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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

Case No. 2019-CP-46-00051

Appellate Case No. 2023-001103

Daniel P. Cedrone and Poly-Tech Industrial, Inc., ... Respondents,

v.

Composite Resources, Inc., ... Appellant.

**RECORD ON APPEAL
VOLUME 1 OF 3**

JOHN B. WHITE, JR., P.A.

John B. White, Jr. (S.C. Bar No. 5996)
Marghretta H. Shisko (S.C. Bar No. 100106)
Griffin L. Lynch (S.C. Bar No. 72518)
Christopher R. Jones (S.C. Bar No. 101265)
291 S. Pine Street
P.O. Box 2465 (29304)
Spartanburg, SC 29302
(864) 594-5988
jwhite@johnbwhitelaw.com
mshisko@johnbwhitelaw.com
glynnch@johnbwhitelaw.com
cjones@johnbwhitelaw.com

BURR & FORMAN, LLP

William Y. Klett, III (S.C. Bar No. 64822)
Paul D. Harrill (S.C. Bar No. 15268)
P.O. Box 11390
Columbia, SC 29211
(803) 799-9800
wklett@burr.com
pharrill@burr.com

KAESKE LAW FIRM

Michael Kaeske
Texas State Bar No. 00794061
200 Crescent Ct. #1040
Dallas, TX 75201
Telephone: (214) 370-3200
mikekaeske@gmail.com

MARTIN APPEALS, PLLC

Jeremy C. Martin
Texas State Bar No. 24033611
2101 Cedar Springs Rd.
Ste. 1540
Dallas, TX 75201
Telephone: 214-488-5021
jmartin@martinappeals.com

Admitted Pro Hac Vice

Index

Volume 1

Orders

Text Order Granting Motion to Remand to State Court (Feb. 13, 2019).....	3
Order Granting Plaintiffs’ Motion to Remand (Sept. 23, 2021)	4
Consent Scheduling Order (Nov. 17, 2021).....	14
Order for Admission Pro Hac Vice of Michael Montecalvo (Mar. 31, 2022).....	18
Order Granting Plaintiffs’ Motion for Partial Summary Judgment (Sept. 29, 2022).....	21
Order Denying Defendant’s Motion to Reconsider, Clarify, Alter, Amend Order Granting Plaintiffs’ Motion for Partial Summary Judgment (June 8, 2023).....	41

Pleadings

Original Summons and Complaint (Jan. 7, 2019).....	44
Amended Answer and Counterclaims (Apr. 1, 2020).....	75

Hearing Transcripts

Transcript of Virtual Hearing on Motion for Partial Summary Judgment (May 4, 2022).....	88
Transcript of Hearing (May 20, 2022)	135
Transcript of Record (Jan. 17, 2023)	214

Volume 2

Hearing Transcripts (cont.)

Transcript of Record (Jan. 20, 2023)	352
Transcript of Record (Mar. 10, 2023)	424

Motions & Other Filings

Notice to State Court of Removal (Feb. 7, 2019)	513
Notice to State Court of Removal (Jan. 29, 2021).....	514
Plaintiffs Dan Cedrone and Poly-Tech Industrial’s Motion for Partial Summary Judgment as to Unambiguous Material Terms (Mar. 18, 2022).....	515
Defendant’s Memorandum in Opposition to Plaintiffs’ Motion for Partial Summary Judgment as to Alleged “Unambiguous” Terms (May 3, 2022)	569

ROA 2

Plaintiffs Dan Cedrone and Poly-Tech Industrial’s Reply in Support of Motion for Partial Summary Judgment as to Unambiguous Material Terms (May 4, 2022)	642
Defendant’s Motion and Memorandum for Contract Construction (May 13, 2022)	653

Volume 3

Motions & Other Filings (cont.)

Plaintiffs’ Supplemental Memorandum in Support of Motion for Partial Summary Judgment as to Unambiguous Material Terms (May 18, 2022)	674
Defendant’s Motion to Reconsider, Clarify, Alter, Amend Order Granting Plaintiffs’ Motion for Partial Summary Judgment (Oct. 10, 2022)	686
Defendant’s Motion for Leave to Amend or Supplement Amended Answer and Counterclaims (Oct. 10, 2022)	741
Plaintiffs Dan Cedrone and Poly-Tech Industrial’s Opposition to Motion for Leave to Amend or Supplement Amended Answer and Counterclaims (Oct. 20, 2022)	759
Plaintiffs’ Response in Opposition to Defendant’s Motion to Reconsider, Clarify, Alter, Amend Order Granting Plaintiffs’ Motion for Partial Summary Judgment (Oct. 26, 2022)	778
Defendant’s Reply in Support of Motion to Reconsider, Clarify, Alter, Amend Order Granting Plaintiffs’ Motion for Partial Summary Judgment (Nov. 2, 2022)	800
Defendant’s Supplement in Support of Motion to Reconsider, Clarify, Alter, Amend Order Granting Plaintiffs’ Motion for Partial Summary Judgment (Nov. 15, 2022)	838
Plaintiffs’ Response in Opposition to Defendant’s Supplement to Motion to Reconsider and Exhibit A (Nov. 22, 2022)	933
Notice of Appeal (July 7, 2023)	975

Other

Certificate of Counsel	1002

ROA 3

Orders on Motions

[0:19-cv-00365-MGL Cedrone et al v. Composite Resources, Inc.](#)

JURY

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 2/13/2019 at 4:40 PM EST and filed on 2/13/2019

Case Name: Cedrone et al v. Composite Resources, Inc.

Case Number: [0:19-cv-00365-MGL](#)

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Document Number: 9(No document attached)



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Docket Text:

TEXT ORDER granting [8] Motion to Remand to State Court. Signed by Honorable Mary Geiger Lewis on 2/13/2019. Clerk's Notice: Attorneys are responsible for supplementing the State Record with all documents filed in Federal Court. (cbru,)

0:19-cv-00365-MGL Notice has been electronically mailed to:

William Y Klett, III wklett@nexsenpruet.com, mchappell@nexsenpruet.com

Keith D Munson keith.munson@wbd-us.com, ashley.couch@wbd-us.com, deborah.lehman-wooten@wbd-us.com, yvonne.fortner@wbd-us.com

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ROA 4



**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION**

DANIEL P. CEDRONE and POLY-TECH
INDUSTRIAL, INC.,
Plaintiffs,

vs.

COMPOSITE RESOURCES, INC.,
Defendant.

§
§
§
§
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§

CIVIL ACTION NO. 0:21-284-MGL

**MEMORANDUM OPINION AND ORDER
GRANTING PLAINTIFFS' MOTION TO REMAND,
DENYING PLAINTIFFS' REQUEST FOR ATTORNEY FEES,
AND DISMISSING WITHOUT PREJUDICE
DEFENDANT'S REQUEST FOR ATTORNEY FEES**

I. INTRODUCTION

Plaintiffs Daniel P. Cedrone and Poly-Tech Industrial, Inc., (collectively, Plaintiffs) filed this lawsuit in the York County Court of Common Pleas against Composite Resources, Inc. (Composite). Plaintiffs bring claims for: breach of contract, breach of contract accompanied by a fraudulent act, failure to pay compensation due, S.C. Code § 39-65-10, et seq., failure to pay compensation due for perpetual commission, *id.*, conversion, unjust enrichment, accounting, and declaratory judgment, S.C. Code § 15-53-10, et seq.

Composite subsequently removed the case to this Court on the basis of diversity of citizenship. But, for reasons not relevant here, the parties consented to a remand.

Thereafter, Composite filed a second notice of removal, contending “this Court has subject matter jurisdiction over Plaintiffs’ claims pursuant to 28 U.S.C. §§ 1331 and 1338 because there is federal question jurisdiction based upon Plaintiffs’ assertion of claim(s), challenging the inventorship and ownership of the patents related to this litigation.” Composite’s Notice of Removal at 2. Composite further maintains “[t]his Court has supplemental jurisdiction over Plaintiffs’ state law claims, pursuant to 28 U.S.C. §1367.” *Id.* Plaintiffs disagree.

Pending before the Court is Plaintiffs’ motion to remand. Having carefully considered the motion, the notice of removal, the response, the reply, the supplement, the sur-reply, the record, and the relevant law, it is the judgment of this Court that Plaintiffs’ motion to remand must be granted.

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs’ complaint concerns disputes about the payment of commissions related to the sale of a patented product called the Combat Application Tourniquet.

As the Court already observed, after Plaintiffs filed this action in the York County Court of Common Pleas, Composite removed the case to this Court. The parties, however, subsequently consented to a remand.

Thereafter, Composite filed a second notice of removal, contending that, in light of Plaintiffs’ answers to some of Composite’s request to admit (RTA), certain deposition statements, and an email between counsel, it had discovered Plaintiffs were also bringing a patent claim in this lawsuit. Plaintiffs then filed a motion to remand in which it asks for attorney fees. Composite responded in opposition, and also requested attorney fees. Plaintiffs thereafter filed a reply.

ROA 6

The Court, having been fully briefed on all of the relevant issues, is prepared to adjudicate Plaintiffs' motion to remand, along with the requests for attorney fees.

III. STANDARD OF REVIEW

A party seeking removal bears the burden of establishing the existence of federal jurisdiction. *Mulachey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). Because removal jurisdiction raises significant federalism concerns, a district court must strictly construe removal jurisdiction. *Id.* (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)). If federal jurisdiction is in doubt, remand to state court is necessary. *Mulachey*, 29 F.3d at 151.

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). To remove to federal court, the defendant or defendants must file "a notice of removal. containing a short and plain statement of grounds for removal." *Id.* § 1446(a).

"The notice of removal of a civil action or proceeding shall be filed within [thirty] days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based[.]" *Id.* § 1446(b)(1).

However, "if the case stated by the initial pleading is not removable, a notice of removal may be filed within [thirty] days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3). This is often known as the "other paper" exception.

IV. DISCUSSION AND ANALYSIS

A. *Whether Composite's second notice of removal is timely*

Plaintiffs argue Composite's second notice of removal is untimely. According to Plaintiffs, "Composite's Notice of Removal focuses on [Plaintiffs'] answers to Composite's [RTA], which [Plaintiffs] served on December 30, 2020, and [other related matters]. This ignores the significant number of interrogatories, [RTA], and [request to produce (RTP)] concerning patents and patent inventorship that Composite and Plaintiffs served months earlier." Plaintiffs' Motion to Remand at 18.

Composite, on the other hand, states that it "was not on notice of the grounds for removal until it was apparent within the four corners of Plaintiffs' express responses to [Composite's RTA] that Plaintiffs were pursuing a federal patent claim." Composite's Response at 13. Plaintiffs have the better argument.

On March 29, 2019, Plaintiff's served requests to produce (RTP) on Composite in which it requested documents "related to Mark Esposito's tourniquet invention, design, license, commission, intellectual property and/or businesses related to combat application tourniquets." Plaintiffs' RTP ¶¶ 21 and 31. Although there are a host of other instances of Plaintiffs raising patent-related questions and requests, this one example is sufficient to establish that Plaintiffs raised patent-related questions as early as March 29, 2019, "from which [Composite should have] . . . ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3).

But, Composite failed to file its notice of removal until January 28, 2021, twenty-two months after it was served with the above-mentioned RTP. Composite had just thirty days after receipt of those RTP to file its notice of removal. But, it failed to do so. And, although 28 U.S.C. § 1454(b)(2) provides that the thirty-day "time limitation[]" contained in section 1446(b) may be

ROA 8

extended at any time for cause shown[.]” Composite neglected to request such an extension. Therefore, the Court concludes Composites second notice of removal is untimely.

But, as the Court will explain below, even if the Court determined Composite’s notice of removal was not tardy, it would still grant Plaintiffs’ motion to remand.

B. Whether there is federal question jurisdiction over this matter

Plaintiffs contend the Court should remand this case to state court because their state claims do not arise under federal patent law. Composite, however, maintains “Plaintiffs’ December 30, 2020[,] responses to the [RTA] serve as the ‘other paper’ under 28 U.S.C. § 1446(b)(3) from which [Composite] could first ascertain that the case was one which is or had become removable.” Composite’s Response at 7.

By statute, all cases “arising under” patent law must be heard exclusively by the federal courts, not state courts. 28 U.S.C. § 1338(a). But not all cases involving patents “arise under” patent law. *See Gunn v. Minton*, 568 U.S. 251, 264 (2013) (“We have no reason to suppose that Congress—in establishing exclusive federal jurisdiction over patent cases—meant to bar from state courts state legal malpractice claims simply because they require resolution of a hypothetical patent issue.”).

Composite argues in its notice of removal and in its response in opposition to remand that Plaintiffs are bringing a patent claim in this lawsuit, thus giving this Court federal question jurisdiction over the matter. But, in Composite’s motion for attorney fees, it maintains it is entitled to such fees because Plaintiffs failed to admit that it was not bringing a patent cause of action; but Composite has now proven it is not bringing such a claim. *See* Composite’s Motion for Attorney Fees at 7 (“request[ing] the Court to enter an order finding [Composite] has proven Plaintiffs’ denials to” Composite’s RTA, in which Composite interpreted Plaintiffs to say they were bringing a patent claim, to be false). According to Composite, while “litigating Plaintiff[s]’ motion to

remand, [Composite] has had to prove that which should have been admitted,]" that there is no patent cause of action in Plaintiffs' lawsuit against Composite. *Id.*

There is also another reason for the Court to conclude there is no patent claim in this lawsuit. According to Composite, "[a]bsent [a] binding admission or dismissal that conclusively demonstrates Plaintiffs are not pursuing patent related claims in the state court action, this Court must retain its exclusive jurisdiction over this action." Composite's Response in Opposition at 9. Here is Plaintiffs' binding admission: "Plaintiffs' state causes of action solely involve the recovery of sales commissions/vendor profits and related damages under South Carolina law." Motion to Remand at 8 (emphasis omitted) (capitalization of letters modified).

Given that these holdings are dispositive of the jurisdictional question before the Court, it need not address the parties' remaining arguments. *See Karsten v. Kaiser Found. Health Plan of Mid-Atl. States, Inc.*, 36 F.3d 8, 11 (4th Cir. 1994) ("If the first reason given is independently sufficient, then all those that follow are surplusage; thus, the strength of the first makes all the rest dicta.").

C. Whether Plaintiffs are entitled to attorney fees

According to Plaintiffs, they are entitled to the attorney fees associated with this motion. Composite, expectantly, disagrees.

As per 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." "[T]he standard for awarding fees should turn on the reasonableness of the removal. Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).

ROA 10

Plaintiffs give three primary reasons why they think attorney fees are appropriate. First, they argue “Composite lacked an objectively reasonable basis to remove this case.” Motion to Remand at 21. Composite states otherwise.

The Court has pored over Plaintiffs’ responses to Composite’s discovery requests, as well as the other materials on which Composite’s argument for federal jurisdiction is based. The Court need not detail all of those materials here. Suffice it to say, from this review, the Court easily concludes Composite had “an objectively reasonable basis to remove this case[,]” *id.*, because it appeared that Plaintiffs were arguably bringing a patent cause of action, which would have made removal appropriate.

Second, Plaintiffs contend attorneys fees are proper because “Composite’s removal was also extremely late and came after the parties have undertaken significant discovery and were heading towards a resolution in state court. That too supports a fee award.” Motion to Remand at 21. Composite’s only response is to stick with its argument that its removal was not late, which the Court rejected above. Nevertheless, the Court thinks it is objectively reasonable for Composite not to have realized this case was removable back on March 29, 2019.

Third, Plaintiffs maintain they are entitled to attorney fees because “two ‘unusual circumstances’ warrant ordering Composite to pay Plaintiffs’ fees, even if Composite had some objective basis to remove.” *Id.* The first is that this is Composite’s second improper removal,

Composite originally removed the case to this Court on diversity of citizenship grounds, although it, as a citizen of South Carolina, was in violation of the forum-defendant rule. According to that rule, “[a] civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a). . . may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b)(2).

Composite’s removal, therefore, as “the removing party[,] lacked an objectively reasonable basis for seeking removal.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Thus, in

the Court's opinion, it was Composite's first removal that might have merited attorneys fees inasmuch as it "lacked an objectively reasonable basis for seeking removal," *id.*

Although this is Composite's second improper removal, as the Court has explained above, it is unable to say it lacked any objective basis for its second removal. Therefore, the Court rejects this argument. Plaintiffs' second "unusual circumstances" contention fares no better.

The second "unusual circumstance" Plaintiffs identify is that "Composite's notice of removal fails to include critical facts concerning the date when Composite first believed this case to be removable[.]" Motion to Remand at 21-22. But, this is nothing more than a repackaged version of their "extremely late" argument above, which the Court has already rejected.

As such, for all of these reasons, the Court will deny Plaintiffs' request for attorney fees.

D. Whether Composite is entitled to attorney fees

Composite contends it is due attorney fees under Fed. R. Civ. P. 37(c)(2) based on its argument that, after Plaintiffs denied several RTA, Defendant has proven the matters to be true.

Rule 37(c)(2) provides as follows:

If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The [C]ourt must so order unless:

- (A) the request was held objectionable under Rule 36(a);
- (B) the admission sought was of no substantial importance;
- (C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
- (D) there was other good reason for the failure to admit.

Id

There are at least three reasons why the Court concludes Composite is unable to entertain Composite's request for attorney fees.

First, the Court begins with the fundamental and uncontroversial point that the Federal Rules of Civil Procedure generally govern all civil actions in federal court. Put another way, the Federal

ROA 12

Rules of Civil Procedure “govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.”

As is applicable here, Rule 81 states that “[t]hese rules apply to a civil action after it is removed from a state court.” Fed. R. Civ. P. 81 (c)(1). It then naturally follows that the rules are inapplicable before the case is removed from state court.

Composite’s served their RTA, and Plaintiffs answered them before, not after, the case was removed to this Court. Thus, the Federal Rules of Civil Procedure were inapplicable when Plaintiffs served its responses to Composite’s RTA.

Consequently, because the lawsuit was in state court before Composite removed it here, the South Carolina Rules of Civil Procedure, not the federal ones, were in effect. Thus, if any court has the ability to properly adjudicate Composite’s claims of discovery abuse, it is for a South Carolina court, not this federal Court, to do.

Second, and relatedly, Composite improperly removed this case to this Court. Accordingly, Composite is unable to enjoy the benefits of the Federal Rules of Civil Procedure in an improperly removed case.

Third, assuming the Federal Rules of Civil Procedure do apply here, then Composite’s RTA were premature. This is so because, except for a few exceptions that are inapplicable here, “[a] party, may not seek discovery from any source before the parties have conferred as required by Rule 26(f)[.]” Fed. R. Civ. P. 26(d)(1). Given this requirement, one district court has gone so far as to say that “[d]iscovery served in state court becomes null and ineffective upon removal.” *Wilson ex rel. Estate of Wilson v. General Tavern Corp.*, No. No. 05-cv-81128, 2006 WL 290490, at *1 (S.D. Fla. Feb.2, 2006).

Consequently, the Court will dismiss Composite’s request for attorney fees without prejudice so it can present the request to the state court if it wishes to do so.

Candidly, given the tenor of the pleadings in this case, it appears counsel have perhaps gotten sideways with one another. Throughout the parties' briefing, both Plaintiffs' counsel and defense counsel have lobbed bad faith accusations at each other. *See e.g.*, Plaintiffs' Reply at 1 (Composite, "in its opposition brief does little to obscure its bald and belated attempt to (again) forum shop this case to federal court."); Composite's Response at 18 (responding to Plaintiffs' request for attorney fees and stating, "This is simply a distortion of the case.").

This is unacceptable. The Court treats all who appear before it with the utmost of respect, and fully expects counsel to treat each other likewise.

Such behavior is a great disservice to all involved: counsel and their reputations, the parties, the Court, and the justice system. Accordingly, assuming the Court is correct, it strongly suggests the parties and counsel confer and determine how to remedy the problem going forward.

V. CONCLUSION

Based on the foregoing discussion and analysis, Plaintiffs' motion to remand is **GRANTED**, Plaintiffs' motion for attorney fees is **DENIED**, Composite's request for attorney fees is **DISMISSED WITHOUT PREJUDICE**, and this matter is **REMANDED** to the York County Court of Common Pleas.

IT IS SO ORDERED.

Signed this 22nd day of September, 2021, in Columbia, South Carolina.

s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE



A TRUE COPY
ATTEST: ROBIN L. BLUME, CLERK

BY: 
DEPUTY CLERK

) SIXTEENTH JUDICIAL CIRCUIT

- a. By **Tuesday, February 15, 2022** witnesses who may be used at trial to present evidence under Rules 702, 703, or 705 of the South Carolina Rules of Evidence (“expert witnesses”) shall be designated by each party on the issues at trial for which that party bears the burden of proof. Said designations shall include a summary of all opinions to be expressed and their underlying basis and reasons therefor. In addition, with respect to an expert witness who is retained or specially employed to provide expert testimony in the case, the designation shall be accompanied by a written statement prepared and signed by the expert witness. The statement shall contain a summary of all opinions to be expressed and their underlying basis and reasons therefor; a summary of the data or other information considered by the witness in forming his/her opinions; the general qualifications of the witness including relevant publications, if any; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years, or the ten most recent if more than 10 in the last 4 years.
- b. By **Tuesday, March 8, 2022**, expert witnesses shall be designated by each party on the issues at trial for which that party does not bear the burden of proof, which would include expert witnesses who will provide expert testimony in opposition or response to the expert witnesses identified in the preceding paragraph. (see the preceding paragraph for the detail of the disclosure).
- c. By **Friday, March 18, 2022**, reply expert witnesses, if any, shall be designated by each party on the issues at trial for which that party bears the burden of proof (see the preceding paragraphs for the detail of the disclosure).

Expert witness depositions shall be taken in the 4 weeks between **March 21, 2022** and **April 15, 2022**. The Parties will alternate weeks, with Defendant having the first week.

2. **Records Custodian Affidavits**: Specific business records intended to be used at trial may be authenticated through affidavits of record custodian witnesses. Such affidavits shall be served on all counsel of record no later than four (4) weeks before the close of discovery (currently that would be March 18, 2022). Objections to such affidavits must be made within fourteen (14) days after the service of the affidavit.

3. **Discovery Deadline**: Discovery shall be completed no later than **Friday, April 15, 2022**. All written discovery requests shall be served in time for the responses thereto to be served by this date. De bene esse depositions must be completed by discovery deadline. However, with the agreement of all parties, fact witness depositions may occur beyond the deadline, provided they do not interfere with the trial date or the necessary preparation for trial.

4. **Contract Ambiguity Motion**: Generally, under South Carolina law, “A court should first consider ‘whether, as a matter of law, the contract is ambiguous or unambiguous on its face.’” *World-Wide Rights Ltd. P'ship v. v. Combe Inc.*, 955 F.2d 242, 245 (4th Cir. 1992). Any party may move the court at any time for any order construing the ambiguity/non-ambiguity of the Contract by identifying terms and phrases in the Contract that should be considered ambiguous or unambiguous by the Court as a matter of law by way of a motion of partial summary judgment as to contract interpretation.

5. **Dispositive Motions**: All dispositive motions, including motions for summary judgment (but not including those to complete discovery, those nonwaivable motions made pursuant to Rule 12 SCRPC, and those relating to the admissibility of evidence at trial) shall be filed on or before **Tuesday, May 10, 2022** and shall include any supporting memoranda. **If a dispositive issue is ripe for resolution, the Parties may file a dispositive motion at that that time.** Opposition memoranda and exhibits shall be filed on or before **two weeks after the dispositive motion is filed and** any reply memoranda in support of a dispositive motion shall be filed by **on or before one week after the opposition memorandum is served.**

6. **Pre-Trial Status Conference**: On or before **Wednesday, June 16, 2022**, the parties will meet with the Court in a status conference pursuant to Rule 16, SC Rules of Civil Procedure, to schedule the hearing of any dispositive motions, and to set the pre-trial deadlines and procedures for all remaining pre-trial matters, including: motions-in-limine; pre-trial briefs; exhibit exchange and marking; witness lists; length and process for trial (including any request for bifurcation); deposition designations and objections; other pre-trial disclosures; jury charges; voir dire; verdict forms; and the resolution of any other pending motions.

7. It is the intention of the Court to seek to have this civil action set for jury trial for one week in the month of **July of 2022**, depending on availability and direction from the South Carolina Supreme Court in setting trial terms generally.

AND IT IS SO ORDERED!

The Honorable J. Mark Hayes, II

November____, 2021
Spartanburg, South Carolina



York Common Pleas

Case Caption: Daniel P Cedrone , plaintiff, et al VS Composite Resources Inc

Case Number: 2019CP4600051

Type: Order/Scheduling Order

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Daniel P. Cedrone and Poly-Tech Industrial,
Inc.

Plaintiffs,

v.

Composite Resources, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS

C.A. NO. 2019-CP-46-00051

**ORDER FOR ADMISSION
PRO HAC VICE OF
MICHAEL MONTECALVO**

This matter comes before this Court upon application of Keith D. Munson, counsel for Daniel P. Cedrone and Poly-Tech Industrial, Inc. (“Plaintiffs”), for the admission of Michael Montecalvo to practice *Pro Hac Vice* before this Court in the above-captioned case as attorney for Plaintiffs. As grounds for this application, counsel would show:

1. Michael Montecalvo is a member in good standing of the State Bar of North Carolina, and is admitted to practice before North Carolina State Courts, United States District Court for the Eastern District of North Carolina, United States District Court for the Middle District of North Carolina, United States District Court for the Western District of North Carolina, and United States District Court for the District of Connecticut.

2. A copy of the Verified Application for Admission *Pro Hac Vice*, along with the required fee, has been filed with the South Carolina Supreme Court Office of Bar Admissions, as required by Rule 404, SCACR;

3. All counsel of record were notified and had no objection to Michael Montecalvo’s admission *Pro Hac Vice*.

The Court having reviewed the Application for Admission *Pro Hac Vice* finds that Michael Montecalvo is qualified to practice before this Court and shall be permitted to appear in this particular matter.

IT IS HEREBY ORDERED, that Michael Montecalvo is hereby admitted *pro hac vice* in this litigation, in association with Keith D. Munson, to practice before this Court and assist in representing Plaintiffs. Failure in the ability of this attorney to appear will not delay the trial for this matter. Keith D. Munson will represent Plaintiffs, under those circumstances.

This the ____ day of _____, 2022.

Presiding Judge, Sixteenth Judicial Circuit



York Common Pleas

Case Caption: Daniel P Cedrone , plaintiff, et al VS Composite Resources Inc

Case Number: 2019CP4600051

Type: Order/Order for Pro Hac Vice

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Daniel P. Cedrone and Poly-Tech Industrial,
Inc.

Plaintiffs,

v.

Composite Resources, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

C.A. NO. 2019-CP-46-00051

**ORDER GRANTING
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

This matter comes before the Court on Plaintiffs Daniel P. Cedrone (“**Cedrone**”) and Poly-Tech Industrial, Inc.’s (“**Poly-Tech**”) (collectively “**Plaintiffs**”) Motion for Partial Summary Judgment as to Unambiguous Material Terms filed on March 18, 2022; Plaintiffs’ Reply in Support of Motion for Partial Summary Judgment as to Unambiguous Material Terms filed on May 4, 2022; and Plaintiffs’ Supplemental Memorandum in Support of Motion for Partial Summary Judgment as to Unambiguous Material Terms filed on May 18, 2022; (collectively, the “**Motion**”). Also before the Court is Defendant Composite Resources, Inc.’s (“**Defendant**” or “**Composite Resources**”) Memorandum in

Opposition to Plaintiffs' Motion for Partial Summary Judgment as to Alleged "Unambiguous" Terms filed on May 3, 2022; and Defendant's Motion and Memorandum for Contract Construction filed on May 13, 2022 (collectively, the "Opposition"). The Court also has before it the several exhibits filed with the Motion and Opposition, along with the Complaint, and Defendant's Amended Answer and Counterclaims. After conducting an initial hearing on May 4, 2022, this Court continued the matter to May 20, 2022 for the purpose of receiving additional briefing and arguments. Both parties expanded their discussion of the present matter by exploring in more detail the terms of the Contract and the terms raised in the Motion.

The Motion seeks entry of Partial Summary Judgment (SCRCP Rule 56). The Motion initially sought to have certain terms in a contract between these parties declared "unambiguous" material terms. Plaintiffs submitted a memorandum in support of their position. The motion and memorandum focused on certain terms related to the payment of a commission rate of \$1.75 per tourniquet sold and a provision in the contract that read "for as long as the project continues." Plaintiffs asserted that partial summary judgment was proper because the contract language establishes, as a matter of law, that the Defendant is liable to the Plaintiffs for payment of \$1.75 per tourniquet beyond the termination date of August 31, 2018.

The Defendant filed its Opposition to the Motion asserting (1) the agreement (Contract) must be construed as a whole and that the plaintiffs are picking and choosing a few terms that misconstrues the terms; (2) other provisions, including the termination

clause, is contrary to Plaintiffs' unreasonable construction which leads to the conclusion of an agreement that is perpetual in nature and never can be terminated; (3) that Plaintiffs' reliance on extrinsic terms establishes that certain terms in the Contract are ambiguous; and (4) if the Contract was not terminable as a matter of law pursuant to the Termination provision, then the Contract is, at best, ambiguous as to the terms for which Plaintiffs seek construction.

Having reviewed the papers submitted by the parties in connection with the Motion, the Opposition, the record evidence presented, and the arguments made by counsel at the two hearings the Court has held on the Motion, this Court finds that Plaintiffs are entitled to partial summary judgment and hereby orders, for the reasons stated herein, that Plaintiffs' Motion is GRANTED.

I. Factual and Procedural Background

From June 2005 through August 2018, the parties had a business relationship related to the manufacturing and sale of a one-handed combat application tourniquet that is standard issue for the United States Armed Forces, other military around the world, police, firefighters, emergency medical technicians and others. According to Defendant, the Combat Tourniquet is a 100% effective and has decreased the mortality rate due to extreme exsanguination by 85%. [See Amended Answer, Para. 2]. In June 2005, Plaintiff Poly-Tech executed the Contract with Composite establishing an independent sales representative/commission relationship for all products manufactured by Composite, including the Phil Durango Combat Application Tourniquets ("**Combat Tourniquet**"),

and establishing a vendor relationship with the respect to certain raw materials. [See Amended Answer, Para. 3 admitting to the Contract, which is attached as **Exhibit A** to the Complaint].

Plaintiffs introduced Composite to Phil Durango L.L.C. (“**Durango**”), the company under which the Combat Tourniquet (sometimes referred to as the “CAT Tourniquet” or “C-A-T Tourniquet”) was developed. [See Amended Answer, Paras. 11-12]. The Combat Tourniquets were subject to “special account” provisions found in Annex C, Section C, Contract, page 11 of 11. On June 26, 2018, Composite notified Poly-Tech of its intent to terminate the Contract pursuant to Section IX’s provision for termination without cause upon sixty (60) days written notice. [See Amended Answer, Para. 23]. Composite stopped making all sales commission payments to Poly-Tech as of August 31, 2018. [See Amended Answer, Para. 24].

The Complaint was filed on January 7, 2019 alleging several causes of action, including causes of action for breach of contract, statutory commissions, and declaratory judgment based on the Contract. Through the Motion, Plaintiffs seek to have this Court interpret the unambiguous terms of the Contract and enter partial summary judgment as to the Composite Resources’ past, present and future obligations to pay Plaintiffs commissions and raw material profit guarantee for as long as Composite Resources or an affiliated company makes the Combat Tourniquets.

Alternatively, the Motion argues that the uncontroverted external evidence filed with the motion papers as to the past, present and future obligation to pay commissions and

raw material profits eliminates the possibility of a genuine issue of material fact as the relief requested in the Motion.

II. Standard of Review

Rule 56(c) of the South Carolina Rules of Civil Procedure requires that summary judgment be granted if “there is no genuine issue of material fact and... the moving party is entitled to judgment as a matter of law.” S.C.R.C.P. 56(c). See *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991). “Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.” *Gauld v. O’Shaughnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008). “When opposing a summary judgment motion, the nonmoving party must do more than ‘simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.’” *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003).

“It is a question of law for the court whether the language of a contract is ambiguous.” *S.C. Dep’t of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). The determination of whether a contract term is ambiguous is a threshold question of law for the court. *World-Wide Rights Ltd. P’ship v. v. Combe Inc.*, 955 F.2d 242, 245 (4th Cir. 1992) (holding that a court should first consider “whether, as a matter of law, the contract is ambiguous or unambiguous on its face.”). In South Carolina

“[c]ontract interpretation begins with the plain language of the agreement.” *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 756 S.E.2d 148, 152 (S.C. 2014), *reh'g denied* (June 25, 2014). In determining this threshold legal issue, the Court should be guided by the principal that “[a] contract is ambiguous only when it may fairly and reasonably be understood in more ways than one.” *Padgett v. S.C. Ins. Reserve Fund*, 531 S.E.2d 305, 307 (S.C. Ct. App. 2000). “If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect.” *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018). Until the nonmoving party establishes a material ambiguity on the issue under consideration for summary judgment, factual disputes dependent on matters outside the contract are neither material nor genuine. *see Russell v. Wachovia Bank, N.A.*, 353 S.C. at 218, 578 S.E.2d at 334 (holding that “the inquiry ... necessarily implicates the substantive evidentiary standard of proof that would apply at a trial on the merits.”) (internal citation omitted).

Even if this Court were to determine the contract was ambiguous, “it may yet examine evidence extrinsic to the contract that is included in the summary judgment materials, and, if that evidence is, as a matter of law, dispositive of the interpretive issue, grant summary judgment on that basis.” *World-Wide Rts. Ltd. P'ship v. Combe Inc.*, 955 F.2d 242, 245 (4th Cir. 1992); *see also Sprint Nextel Corp. v. Wireless Buybacks Holdings, LLC*, 938 F.3d 113 (4th Cir. 2019); *Mears Grp., Inc. v. Kiawah Island Util., Inc.*, 372 F. Supp. 3d 363, 372 (D.S.C. 2019) (“Therefore, summary judgment is appropriate when the

contract in question is unambiguous or when an ambiguity can be definitively resolved by reference to extrinsic evidence”).

III. Findings of Fact

In connection with this order, this Court makes the following findings of fact:

1. The June 1, 2005 Sales Representative Agreement, attached to the Complaint as Exhibit A (herein referred to as the “**Contract**”) is the only operative agreement between the parties relative to the issues in this civil action.
2. The terms within the four corners of the Contract unambiguously establish that the Defendant was and is contractually obligated to pay Plaintiffs a commission of “\$1.75 per tourniquet sold” including after termination of the sales representative relationship on August 31, 2018, including on Combat Tourniquets Defendant produces and sells after the date of this Order, until the Combat Tourniquets stop being produced and sold (“Tourniquet Commissions”).
3. The terms within the four corners of the Contract also unambiguously establish that the Defendant was and is obligated to pay to Plaintiffs “\$1.12 per yard” of “Aplix 500” material, “\$0.51 per yard” of 1 inch wide “Aplix Hook 800” and “\$0.163 per yard” of 1 inch wide “Aplix Loop 800” purchased since August 31, 2018, and which is purchased after the date of this Order, for the manufacturing of Combat Tourniquets, until the tourniquets stop being produced and sold (“Raw Material Profits”).

4. Poly-Tech Industrial, Inc. is the “representative” under the Contract and functions as an independent contractor.
5. The Contract representative relationship terminated on August 31, 2018. This is uncontested and reflected in the June 26, 2018, letter from Jonathan Bennett to Daniel Cedrone, president of Poly-Tech Industrial, Motion, Exhibit B.
6. The obligation to pay Tourniquet Commissions and Raw Material Profits survive the termination of the Contract.
7. The Tourniquet Commissions and Raw Material Profits set forth on page 11 of the Contract are “exceptions” to be paid separately as provided on page 11.
8. The Contract is not indefinite or uncertain.

IV. Conclusion of Law and Legal Analysis

The Court begins by stating certain contract interpretation principles:

1. Whether a contract or contract term is ambiguous is a matter of law is for the Court. *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001) (“[i]t is a question of law for the court whether the language of a contract is ambiguous.”). The construction of a contract is also a question of law for the Court. *Curry v. Carolina Ins. Grp. of SC, Inc.*, 428 S.C. 60, 71, 832 S.E.2d 760, 765 (Ct. App. 2019) (“[g]enerally, the construction of contracts is a question of law for the court.”).

2. The cardinal rule of contract interpretation is to ascertain and give legal effect to the intentions of the parties, as determined by the contract language. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).
3. "Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." *Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958).
4. "When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense." *Schulmeyer*, 353 S.C. at 134, 579 S.E.2d at 495. Generally, from within the "four corners" of the contract. *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945) ("primarily from the contents of the writing itself, or, as otherwise stated, from the four corners").
5. The court must enforce an unambiguous contract according to its terms, "regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully". *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994).
6. "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976).
7. In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered. *Klutts Resort Realty, Inc. v. Down 'Round Development Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25

(1977); *DD Dannar, LLC v. SC LAUNCH!, Inc.*, 431 S.C. 9, 27, 846 S.E.2d 883, 892 (Ct. App. 2020).

8. "Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 94 S.E.2d 485, 493 (Ct. App. 2004).
9. Courts should try to avoid interpreting a contract in a way that makes a material term superfluous. *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 418, 756 S.E.2d 148, 153–54 (2014) (recognizing exclusive nature of the contract in order to give meaning to the termination provision).
10. Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and other construction, which is equally consistent with the language employed, would make it reasonable and fair and just, the latter construction must prevail. *C.A.N. Enters., Inc. v. S.C. Health & Human Serv. Fin. Commn.*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) (citation omitted).
11. "[C]ontract provisions are not vague and indefinite simply because the contracting parties disagree about their meaning. Contract provisions are vague and indefinite if they do not provide an adequate basis or standard for deciding whether the agreement has been kept or broken and there are no extrinsic means by which the terms may be made certain, e.g., trade usage, past practice of the parties." *Dairy King, Inc. v. Kraft, Inc.*, 851 F.2d 356 (4th Cir. 1988).

Applying these contract interpretation principles, Plaintiffs are entitled to the partial summary judgment requested in the Motion. Summary judgment is properly granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRCPP.

To establish a breach of contract, Plaintiffs need only establish the existence of a contract, a breach of the duty imposed upon defendant under the contract, and resulting damages. Defendant has admitted the existence of the Contract, and that it stopped making Tourniquet Commission and Raw Material Profit payments as of August 31, 2018.

As a clear and unambiguous agreement, the Contract’s construction is “a matter of law” for the Court. *Watts v. Monarch Builders Inc.*, 272 S.C. 517, 252 S.E.2d 889 (1979). “When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect, and the court must construe it according to its plain, ordinary, and popular meaning.” *Community Services Associates, Inc. v. Wall*, 808 S.E.2d 831, 835, 421 S.C. 575, 582 (Ct. App. 2017) (internal citation omitted). *Accord Shipyard Property Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 414 S.E.2d 795, 801 (Ct. App. 1992) (“Where an action presents a question as to the construction of a written contract and the language of the contract is clear and unambiguous, the question is not one of fact but one of law.”).

Partial summary judgment as to issues, rather than entire claims, is appropriate, especially when those issues are ultimately issues for the Court to be determined as a matter

of law. *see e.g. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1035, 1066 (D.S.C. 1993) (granting partial summary judgment on contract remedy term). Courts routinely dispose of affirmative defenses on summary judgment even though such disposition does not resolve any claim in the case. *see Fisher v. Stevens*, 355 S.C. 290, 294, 584 S.E.2d 149, 151 (Ct. App. 2003) (granting plaintiff's motion for summary judgment for a finding, as a matter of law, that the defendant's affirmative defense of release did not apply); *Crosby v. Prysmian Commc'ns Cables & Sys. USA, LLC*, 397 S.C. 101, 104, 723 S.E.2d 813, 814 (Ct. App. 2012) (granting partial summary judgment and holding that an affirmative defense "fails as a matter of law"). Similarly, the narrow issue of punitive damages relief is also often determined on summary judgment. *Nash v. Tindall Corp.*, 375 S.C. 36, 38, 650 S.E.2d 81, 82 (Ct. App. 2007).

For the purpose of narrowing the issues via this threshold question, it is appropriate to focus on provisions of a contract that are unambiguous, even if other provision might not reach that level of clarity. *See Atkinson Warehouse & Distribution, Inc. v. Ecolab Inc.*, 15 Fed. Appx. 160, 163 (4th Cir. 2001) (holding that the court must "consider particular provisions in the context of the entire agreement."); *Martin v. Bay*, 400 S.C. 140, 150–51, 732 S.E.2d 667, 673 (Ct. App. 2012) (construing easement document and finding as a matter of law that boundary of easement was unambiguous and not subject to external interpretations, while finding access to easement subject to external interpretation). Because the relief sought in this Motion for Partial Summary Judgment is compelled by the Contract and the plain reading of Defendant's Amended Answer and discovery

responses, as well as the application of South Carolina statutes and common law, this case is particularly appropriate for entry of partial summary judgment.

Although not the basis for granting the relief set forth in this Order, the Court's review of the supplemental material confirms that the Contract's terms set forth in the four corners of the Contract support entry of partial summary judgment establishing that the Contract obligates Defendant to pay Plaintiff's the Tourniquet Commissions and Raw Material Profit payments at the rate set forth on page 11 of the Contract during the term of the Contract, beginning in June 2005, extending beyond the termination of the sales representative relationship on August 31, 2018, and lasting for so long as the Combat Tourniquets are produced and sold. The Plaintiffs' supplemental material included discovery responses and deposition testimony, including the following points.

On June 28, 2019, Composite responded to Requests for Admission, Requests for Production, and Interrogatories, all of which are in the record and were filed with the Court on July 19, 2022. Excerpts of these discovery responses were filed with the Motion as Exhibits E, F & G. As noted in Exhibit E, Composite Resources admitted the following facts relevant to this Order:

- a. ***The June 1, 2005 Sales Representative Agreement attached to the Complaint is the most recent written agreement executed between Poly-Tech Industrial and Composite Resources, Inc. which governs or governed the rights and obligations of Poly-Tech with regard to Combat Application Tourniquets under the special account identified with Phil Durango, LLC. (RTA No.1);***
- b. ***Sales to "special accounts" as defined in subsections C of ANNEX C of the June 1, 2005 Sales Representative Agreement were to be paid "as described below" in subsection C and were exceptions to the commission rates in subsections A and B of ANNEX C (RTA No. 5); and***

- c. *Exhibit A, is a genuine copy of the June 1, 2005 Sales Representative Agreement.* (RTA-Genuineness No. 1).

Composite Resources also provided the following interrogatory answer:

INTERROGATORY NO. 10: Identify and describe the nature and operational terms of any agreements or modifications between Composite and Poly-Tech and/or Cedrone from 2000 forward in time, including the Agreement, dated June 1, 2005, at issue in this case, and state who negotiated and drafted those agreements and state how and why each such term of any such agreement impacts, if at all, the obligations and benefits of the Agreement in this case.

ANSWER: CRI objects to this interrogatory on the basis that it seeks information that is not relevant to the issues in this dispute. **The June 1, 2005 agreement sets forth “the nature and operational terms” between the parties.** Further, CRI objects to this interrogatory on the basis that it seeks information beyond all applicable statutes of limitation. (emphasis added).

Finally, Composite Resources provide the following document requests responses:

REQUEST FOR PRODUCTION NO. 6: Please produce all documents relied on by Composite in answering any interrogatory propounded by Poly-Tech in this case.

RESPONSE: Plaintiffs are already in possession of the June 1, 2005 Sales Representative Agreement.

REQUEST FOR PRODUCTION NO. 24: Please produce any and all ... documents, ... including all attachments to each or documents referenced within each between Poly-Tech/Cedrone and Composite Resources related to Poly-Tech's rights and obligations under the Sales Representative Agreement.

RESPONSE: ... CRI responds that it is this 2005 Sales Representative Agreement that sets forth Poly-Tech's rights and obligations. ...

REQUEST FOR PRODUCTION NO. 34: Please produce any and all ... documents, ... including all attachments to each or documents referenced within each between Poly-Tech/Cedrone and Jonathan Bennett related to Poly-Tech's rights and obligations under the Sales Representative Agreement.

RESPONSE: ... CRI responds that it is this 2005 Sales Representative Agreement that sets forth Poly-Tech's rights and obligations. ...

In further support of the Motion, Plaintiffs submitted the testimony of the Operations Director, who was the Composite Resources' representative in drafting the Contract. In her deposition, Lisa Bennett, testified:

- Q. ... Did you consider it a forever thing?
A. I considered it to be as long as the tourniquets were in production.
Q. Okay. As long as Composite Resources is making tourniquets Poly-Tech would get the commission?
A. Yes.
Q. And negotiating and finalizing the 2005 agreement was that your intent?
A. Yes.
Q. And was that Composite's intent?
...
A. I believe it was Composite's intent.
Q. Okay. And you were the operation director at the time?
A. Yes.
Q. And you had -- did you have authority on behalf of Composite to negotiate that agreement?
A. Yes.
...
Q. And under this agreement there is no way for Composite to sell Poly-Tech's products and not pay Poly-Tech the commission, right?
A. Correct.

See Deposition excerpt of Lisa Bennett, Motion, **Exhibit C**.

Once the party moving for summary judgment meets this initial burden, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. Rule 56(e), SCRCP. Here, Plaintiffs provided specific discovery responses and deposition testimony from Composite Resources' operations director at the time the Contract was executed that directly supports Plaintiffs' Motion. Defendant filed no counter evidence with its filings in opposition to the Motion. "When opposing a summary judgment motion, the nonmoving party must do more than simply show that there is a metaphysical

doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.” *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (internal citations omitted). In addition, Defendant’s discovery responses, noted above, disclaim any evidence of the intent or interpretation of the Contract, other than the Contract itself.

Defendant titled its supplemental filing “Defendant’s Motion and Memorandum for Contract Construction”, but did not cite a rule of civil procedure under which it was seeking “motion” relief. Defendant did argue that “Annex C” contains language that is “indefinite” and thus legally “unenforceable”, and that this Court should not construe a contract where doing so would require ascertaining the intentions of the parties by “mere guess and conjecture.” The Defendant’s argument isolates terms such as “regular contract” and “project” to avoid the parties’ original intent by asserting that these terms are “indefinite” because they are not defined within the written Contract. In making this argument, Defendant is not taking the position that the Contract is ambiguous and therefore subject to external information to derive the intent of the parties at the time the contract was formed. Rather, Defendant advances the position that the last provision of Annex C is, as a matter of law, “indefinite” and thus the Contract is legally unenforceable.

This Court views the Defendant’s assertion that this language in Annex C, p. 11 of the Contract, is indefinite and legally unenforceable as meritless. In *Dairy King, Inc. v. Kraft, Inc.*, , the Fourth Circuit noted that:

“contract provisions are not vague and indefinite simply because the contracting parties disagree about their meaning. Contract provisions are vague and indefinite if they do not

provide an adequate basis or standard for deciding whether the agreement has been kept or broken and there are no extrinsic means by which the terms may be made certain, *e.g.*, trade usage, past practice of the parties.”

851 F.2d 356 (4th Cir. 1988) (finding that the parties intended an exclusive distributorship with a buyout provision and a market reentry mechanism). With regard to sales commission contracts, *Indep. Quality Foods, LLC v. Kansas City Steak Co., LLC*, 585 S.W.3d 855, 858–59 (Mo. Ct. App. 2019) is instructive. Unlike the Contract in the present matter, in *Kansas City Steak*, there was no express provision addressing payment of commissions after termination. Instead, the sales representative’s “right to commissions on post-termination sales depends on what type of commissioned salesperson [plaintiff] was under the parties' contract.” Under Missouri law, a sales representative classified as a “finder” retains the right to commissions on business even after termination, because “a finder has completed all of the work that needs to be completed and the right to payment vests upon the finding of business.” *Id.* at 859. The court further explained that “[t]he principle that a ‘finder’ may be entitled to ongoing commissions despite the termination of a contract is grounded in rudimentary contract law.” *Id.*

This Court’s view of the Defendant’s position as meritless is supported by the testimony of Lisa Bennett to the effect that “as long Composite Resources is making the tourniquets Poly-Tech would get paid;” and other portions of her sworn testimony that it was the Defendant’s intent that the Plaintiffs would be paid as long as the product was produced, even if the Plaintiffs did not sell the product. Even though the term “perpetual” has been used to describe this provision of the Contract, the provision is not perpetual

because it terminates once the product stops being produced and sold. This Court's role is not to determine whether the parties made wise business decisions when the Contract was agreed upon. *See Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) (“[t]he court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly”). Notwithstanding, this provision, as it is written, does not make the Contract unenforceable. *see e.g., Aiken Petroleum Co. v. Nat'l Petroleum Underwriters of W. Millers Mut. Fire Ins. Co. of Kansas City, Mo.*, 207 S.C. 236, 252, 36 S.E.2d 380, 386 (1945) (finding no merit in the contention that the contract was indefinite where “the plaintiffs paid without question any premium rate that the defendant through the Moses Agency saw fit to fix [and t]here was never any question about the identity of the property to be insured or the ownership thereof”).

V. Conclusion

For the reasons stated herein and set forth in the Motion, Plaintiffs' Motion for Partial Summary Judgment is hereby **GRANTED**;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT partial summary judgment is granted in favor Plaintiffs to establish that, as a matter of law, for as long as Composite Resources is associated with the making and selling of C-A-T Tourniquets:

1. Composite Resources was and is obligated to pay Plaintiffs “\$1.75 per [Combat] [T]ourniquet sold,” for which this amount has not already been paid¹, and for all Combat Tourniquets which are sold in the future, and

¹ This Order does not strip Defendant of any viable statute of limitations defense it might be able to prove at trial with regard to sales prior to the termination date of August 31, 2018.

2. Composite Resources is additionally obligated to pay to Plaintiffs “\$1.12 per yard” of “Aplix 500” material, “\$0.51 per yard” of 1 inch wide “Aplix Hook 800” and “\$0.163 per yard” of 1 inch wide “Aplix Loop 800” which Composite Resources has purchased since August 31, 2018, and which it does purchase after the date of this Order, for the manufacturing of Combat Tourniquets.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT the relief sought in Defendant’s Motion and Memorandum for Contract Construction filed on May 13, 2022 is hereby **DENIED;**

IT IS SO ORDERED.

This ___th day of September, 2022.

The Honorable J. Mark Hayes, II



York Common Pleas

Case Caption: Daniel P Cedrone , plaintiff, et al VS Composite Resources Inc

Case Number: 2019CP4600051

Type: Order/Summary Judgment

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

SIXTEENTH JUDICIAL CIRCUIT

Daniel P. Cedrone and Poly-Tech
Industrial, Inc.,

C.A. NO. 2019-CP-46-00051

Plaintiffs,

v.

Composite Resources, Inc.,

Defendant.

**ORDER DENYING DEFENDANTS’
MOTION TO RECONSIDER,
CLARIFY, ALTER, OR AMEND
ORDER GRANTING PLAINTIFFS’
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

This matter came before the Court on Defendant Composite Resources, Inc.’s (“**Defendant**” or “**Composite Resources**”) Motion to Reconsider, Clarify, Alter, or Amend Order Granting Plaintiffs’ Motion for Partial Summary Judgment (the “**Motion to Reconsider**”). Plaintiffs filed their Opposition to the Motion to Reconsider on October 26, 2022, and Defendant filed a Reply on November 2, 2022. On November 15, 2022, Defendant filed a Supplement in Support of Motion to Reconsider, Clarify, Alter, or Amend Order Granting Plaintiffs’ Motion for Partial Summary Judgment (the “**Supplement**”). Plaintiffs filed their Opposition to the Supplement on November 22, 2022, and Defendant filed a Reply on December 5, 2022.

Having reviewed the papers submitted by the parties in connection with the Motion to Reconsider and Supplement, along with the arguments made by counsel at the two hearings the Court held that included consideration of the Motion to Reconsider, this Court hereby denies the Motion for Reconsideration. In denying the Motion to Reconsider, the Court also hereby clarifies the September 29, 2022 Order Granting Plaintiffs’ Motion for Partial Summary Judgment, to reserve to the jury the question of how to calculate

commissions due and raw material payments due. To the extent paragraph 1, at the bottom of page 18, and paragraph 2, at the top of page 19, impose, or can be read as imposing, a mandatory calculation formula, that language and/or conclusion is stricken.¹

For the reasons stated herein, Defendant's Motion to Reconsider, Clarify, Alter, or Amend Order Granting Plaintiffs' Motion for Partial Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED.

This ____th day of June, 2023.

The Honorable J. Mark Hayes, II

¹ Based upon the presentations related to the Plaintiff's conversion claim, and this Court's grant of Summary Judgement in favor of the Defendant, the present ruling is warranted.



York Common Pleas

Case Caption: Daniel P Cedrone , plaintiff, et al VS Composite Resources Inc

Case Number: 2019CP4600051

Type: Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Daniel P. Cedrone and Poly-Tech Industrial,
Inc.

Plaintiffs,

v.

Composite Resources, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS

C.A. NO. 2018-CP-46-_____

SUMMONS

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers at their office at WOMBLE BOND DICKINSON (US) LLP, 550 S. Main Street, Suite 400, P.O. Box 10208, Greenville, SC 29603, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Complaint within the time aforesaid, the plaintiff in this action will apply to the Court for a judgment by default for the relief demanded in the Complaint.

January 7th, 2019
Greenville, South Carolina

s/ Keith D. Munson
Keith D. Munson (S.C. Bar No. 13400)
keith.munson@wbd-us.com
Womble Bond Dickinson (US) LLP
550 South Main Street, Suite 400
Greenville, South Carolina 29601
Telephone: (864) 255-5412
Fax: (864) 255.5480

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

C.A. NO. 2018-CP-46-_____

Daniel P. Cedrone and Poly-Tech Industrial,
Inc.

Plaintiffs,

COMPLAINT

v.

Jury Trial Demanded

Composite Resources, Inc.,

Defendant.

Daniel P. Cedrone and Poly-Tech Industrial, Inc. complaining of the defendant Composite Resources, Inc. would respectfully show unto this Court that:

INTRODUCTION

1. Plaintiff Daniel P. Cedrone (“**Cedrone**”) was instrumental in developing the manufacturing plan and marketing a one-handed combat application tourniquet that is standard issue for the United States armed forces, other military around the world, police, firefighters, emergency medical technicians and others. According to Defendant’s materials, the combat application tourniquet is a 100% effective and has decreased the mortality rate due to extreme exsanguination by 85%.

2. In June 2005, Cedrone, as president of Plaintiff Poly-Tech Industrial, Inc. (“**Poly-Tech**”), executed an agreement with Defendant Composite Resources, Inc. (“**Composite**”) establishing a sales representative relationship for all products manufactured by Composite, including the Phil Durango Combat Application Tourniquets (“**Combat Tourniquet**”); a vendor relationship with the respect to certain raw materials; and a profit sharing program regardless of whether raw materials or component pieces are purchased from Poly-Tech. (the “**Contract**”). A

copy of the executed Contract, with its expressly listed Annexes A-C, is attached hereto as **Exhibit A** and incorporated in this Complaint and each of its causes of action as if expressly set forth verbatim. Poly-Tech was responsible for brokering over \$500,000,000 in sales to Composite throughout the relationship.

3. Composite knowingly and purposefully breached the Contract and wrongfully deprived Plaintiffs of their rights, payments and other benefits of the Contract and have inflicted other injuries on the Plaintiffs giving rise to the causes of action alleged herein.

PARTIES

4. Poly-Tech is a corporation organized and existing under the laws of the state of North Carolina, with its principal place of business in Huntersville, North Carolina. Poly-Tech is a plastic and metal fabrication manufacturer that also offers engineering services and technical design advice to help inventors design, manufacture and improve their products.

5. Cedrone is an individual citizen and resident of the state of North Carolina. Cedrone, individually and as authorized representative of his inchoate estate, is the intended express third party beneficiary of the Contract, described more fully below. Cedrone is the principal and sole shareholder of Poly-Tech.

6. Composite is a corporation organized and existing under the laws of the State of South Carolina with its headquarters and principal place of business in Rock Hill, York County, South Carolina. Upon information and belief, Composite is registered to do business in the State of South Carolina.

JURISDICTION AND VENUE

7. This Court has jurisdiction over Defendant Composite because it is a corporation organized and existing under the laws of the State of South Carolina and because a substantial

part of the events and omissions giving rise to the claims herein occurred in South Carolina and York County South Carolina.

8. Venue is proper in York County because Defendant Composite has its headquarters and principal place of business in Rock Hill, York County, South Carolina.

9. Pursuant to the Contract, described more fully below, the parties agreed that the Contract would be governed by the laws of South Carolina and provides for disputes to be “litigated in courts having a situs within South Carolina.” Contract, Section XIII.

FACTUAL ALLEGATIONS

10. In 2004, Cedrone was approached by an inventor named Mark Esposito (“**Esposito**”) who was looking for assistance in manufacturing and marketing an effective and self-usable tourniquet for combat and similar emergency situations.

11. Esposito managed the development of his tourniquet within a limited liability company called Phil Durango L.L.C. (“**Durango**”) and the Combat Tourniquet sometimes referred to as the “CAT Tourniquet” was developed under that company.

12. Based on Cedrone’s relevant background, he began consulting with Esposito to manufacture and market his invention. This consulting arrangement grew into an agreement whereby Poly-Tech manufactured certain component parts of the Combat Tourniquet for Durango. Durango sought Poly-Tech’s assistance in assembling and mass-producing the entire Combat Tourniquet.

13. Poly-Tech had an existing relationship with Composite whereby Poly-Tech would act as a sales representative for Composite in return for payment of commissions. In this role, Cedrone would meet with distributors and assist with the marketing of the Combat Tourniquet. Poly-Tech served in this capacity until terminated by Composite effective August 31, 2018.

14. Cedrone introduced Composite to Durango. Cedrone and his company, Poly-Tech, convinced Durango to use Composite to assemble and mass-produce the Combat Tourniquet. By doing so, Poly-Tech and Cedrone conferred a valuable right to Composite for the manufacture of the Durango Combat Tourniquet. In return, Composite agreed to a special compensation program to compensate Poly-Tech for all sales of the Combat Tourniquet by Composite and to compensate Poly-Tech for the sale of raw materials for use in the Combat Tourniquet and that this compensation would continue even after the termination of Poly-Tech as a sales representative.

15. By June 2005, the new compensation relationship between Cedrone, Poly-Tech and Composite was confirmed in a new written arrangement reflected in the Contract (including Annexes A-C) attached as Exhibit A.

16. Under the terms of the Contract, Poly-Tech continued to be Sales Representative across the entire United States for all products handled by Composite generally for a 7% commission where Poly-Tech was instrumental in making the sale. Contract, Section I and Annexes A-C (Exhibit A).

17. The Combat Tourniquets were subject to “special account” provisions found in Annex C, Section C of the Contract. Exhibit A, page 11 of 11. These special account provisions modified the general 7% commission rate to a different rate for the GraviGate Products (not at issue in this lawsuit) and the Durango Combat Tourniquet.

18. Within the special account provision for the Durango Combat Tourniquet, Cedrone is expressly identified with intended third-party beneficiary rights and remunerations. Specifically, the special account provisions state that:

- a. Poly-Tech is to receive a commission of \$1.75 per Combat Tourniquet sold by Composite, irrespective of whether Poly-Tech serves as the Sales Representative or not;
- b. Component part “bases” purchased from Poly-Tech would be for a price of \$1.75 each;
- c. Certain raw materials purchased from Poly-Tech would be at cost plus a set profit margin; and
- d. A guarantee that if Composite obtains services or products from other vendors, the commission rate and profit margin on remaining items will be adjusted so that Poly-Tech receives the same “overall profits” payments as it would if it provided all the services and products related to the Combat Tourniquets from Poly-Tech.

See Contract, Annex C, Subsection C; Exhibit A, page 11 of 11.

19. These special account remunerations, perpetual commissions and profit guarantees were “to continue [even] if for any reason the regular contract is discontinued.” In addition, after the death of Cedrone, the special account remunerations, perpetual commissions and profit guarantees are to be paid to his estate for as long as Composites continues to manufacture and sell/distribute Combat Tourniquets.

20. Plaintiffs were responsible for the sales of Combat Tourniquets from Composite to Durango and its network of distributors. One of the major purchasers of Combat Tourniquets was, and is, North American Rescue (“NAR”) headquartered in or near Greenville South Carolina. Beginning around 2008, Composite began selling the Durango Combat Tourniquet wholesale directly to NAR and other distributors. Despite the change in distribution flow, Poly-

Tech received the stated commissions and profits pursuant to Annex C of the Contract for Combat Tourniquets sold to NAR, from 2005 through May 31, 2013.

21. On or about May 31, 2013, Composite, Durango and Poly-Tech agreed to a reduced commission for Poly-Tech on Red Tip Black Combat Tourniquets by \$0.50 per tourniquet, so from \$1.75 to \$1.25 per tourniquet.

22. On or about August 30, 2013, Composite, Durango and Poly-Tech agreed to a reduced commission for Poly-Tech on two discrete categories of Combat Tourniquets: specifically, a \$0.33 reduction for Red Tip Orange tourniquets and a \$0.25 reduction for Red Tip Blue tourniquets.

23. In or around early November 2014 Composite acquired Durango. This event did not change the contractual obligations to, and rights of, Poly-Tech and Cedrone under the Contract. Poly-Tech continued to receive commissions and profits listed in Annex C of the Contract (as modified by the agreed adjustments noted above) for Combat Tourniquets sold after this event for a period of time as noted in detail below.

24. On or about August 11, 2015, Composite formed C-A-T Resources, LLC to manufacture the Combat Tourniquets. This event did not change the contractual obligations to, and rights of, Poly-Tech and Cedrone under the Contract. Poly-Tech continued to receive the stated commissions and profits listed in Annex C of the Contract (as modified by the agreed adjustments noted above) for Combat Tourniquets sold after this event for a period of time as noted in detail below.

25. In the Fall of 2015, Jonathan Bennett on behalf of Composite and C-A-T Resources, LLC met with Cedrone at Poly-Tech's offices in Huntersville, North Carolina. Bennett requested that Plaintiffs consent to a reduction in Plaintiffs' commission rates for

Combat Tourniquets under the Contract. Plaintiffs rejected the request for a reduction in commission and instead offered engineering assistance in manufacturing efficiencies to reduce manufacturing costs instead. Before leaving the meeting, Bennett acknowledged that he understood that the commissions payable pursuant to the Contract for the Combat Tourniquets was a “forever thing”. Composite continued to honor the commission rates and did not take Plaintiffs’ suggestions for other ways to reduce manufacturing costs.

26. Effective beginning in March 2017, Composite unilaterally, and over the objections of Cedrone and Poly-Tech, reduced the commission rate paid to Poly-Tech on sales to NAR by \$0.625.

27. On June 26, 2018, Composite notified Poly-Tech of its intent to terminate the Contract pursuant to Section IX’s provision for termination without cause upon sixty (60) days written notice.

28. Composite stopped making sales commission payments and perpetual commission payments to Poly-Tech as of August 31, 2018. Composite has not adjusted the commission rate or profit margin on remaining items in order to perpetually maintain the overall profits to Poly-Tech and Cedrone.

29. Composite continued and continues to sell/distribute Combat Tourniquets after the termination of the sales representation portions of the Contract. Upon information and belief, Composite is preparing for a substantial increase in its sales of Combat Tourniquets.

CAUSES OF ACTION

FOR A FIRST CAUSE OF ACTION **(For Breach of Contract as to Sales Commissions)**

30. The Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

31. Poly-Tech and Composite entered into a valid and binding Contract upon the terms set forth in Contract, including Annexes A-C, attached hereto as Exhibit A.

32. All conditions precedent to Composite's obligations under the Contract with Poly-Tech were performed, occurred, or were waived at a time and in a manner to make ripe Composites obligations under the Contract without valid defenses.

33. Composite breached the Contract by, among other things, failing to pay the agreed sales commissions set forth in Annex C to the Contract. Exhibit A, page 11 of 11.

34. Effective beginning in March 2017 and through August 30, 2018, Composite unilaterally, and over the objections of Cedrone and Poly-Tech, willfully reduced the commission rate paid to Poly-Tech on sales to NAR by \$0.625. This occurred in breach of the Contract.

35. As a proximate result of Composite's above-referenced breach of the Contract, and the natural and foreseeable consequence of said breach, Poly-Tech was damaged and injured in the amount of the aggregated deficient commission payments. Specifically, Poly-Tech was proximately damaged as follows:

a. March 2017	\$ 46,562.50
b. April 2017	\$ 71,718.75
c. May 2017	\$ 109,843.75
d. June 2017	\$ 69,843.75
e. July 2017	\$ 75,468.75
f. August 2017	\$ 121,412.51
g. September 2017	\$ 89,503.14
h. October 2017	\$ 101,093.75

i. November 2017	\$ 97,410.63
j. December 2017	\$ 62,971.88
k. January 2018	\$ 101,718.75
l. February 2018	\$ 115,087.50
m. March 2018	\$ 109,447.50
n. April 2018	\$ 137,651.88
o. May 2018	\$ 142,500.00
p. June 2018	\$ 174,628.75
q. July 2018	\$ 203,461.25
r. August 2018	\$ 200,740.01

36. As a proximate result of Composite's breach of contract alleged in this cause of action, Poly-Tech has suffered damages in the amount of \$2,031,165.05, plus pre-judgment interest, consequential and incidental damages, plus attorneys' fees and costs it has incurred as a result of the breach.

FOR A SECOND CAUSE OF ACTION
(For Breach of Contract Accompanied by a Fraudulent Act as to Sales Commissions)

37. The Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

38. Composite breached the Contract with Poly-Tech as detailed above.

39. Composite exhibited fraudulent intent relating to the breach as evidenced by the circumstances surrounding the breach. Specifically, on or around October 28, 2015, Cedrone met with Composite's president, Jonathan Bennett ("**Bennett**"), in North Carolina to discuss issues related to the Contract and the NAR account. Bennett was seeking a reduction in the

commission amount because the legal fees for protecting the intellectual property and related rights in the Combat Tourniquets was costing approximately \$800,000.00 per year and Bennett wanted to shift some of the cost to Poly-Tech through a reduced commission. Poly-Tech pointed out that it did not have any ownership rights (and Bennett was not offering any) in the intellectual property. As a result, Poly-Tech expressly refused to consent to a reduction in the commission.

40. Subsequently, Composite, in an act of dishonesty in fact and unfair dealing, unilaterally reduced the commission rate it paid Poly-Tech on NAR sales in the amount of approximately \$2,031,165.05 from March 2017 forward (See preceding cause of action for details of misdirected commissions earned). Poly-Tech objected to the unilateral reduction in commissions to allow Composite to offset its legal costs for protecting its intellectual property rights. In a further act of dishonesty and unfair dealing, Composite ignored Poly-Tech's objections and repeatedly shifted commission money earned by Poly-Tech to Composite for unrelated expenses every month from March 2017 until August 2018.

41. As a direct and proximate cause of Composite's breach of contract accompanied by fraudulent acts, Poly-Tech has suffered significant economic injury and is entitled to actual damages in the amount of \$2,031,165.05, plus applicable pre-judgment interest, incidental and consequential damages, and punitive damages to be determined by a trier of fact.

FOR A THIRD CAUSE OF ACTION
(For Failure to Pay Compensation Due, S.C. Code Ann. § 39-65-10, et seq.)

42. The Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

43. Pursuant to the Contract, Poly-Tech was appointed a sales representative for Composite with regard to all products handled by Composite across the United States, including the Combat Tourniquets. Composite's customers included wholesale customers such as NAR that resell to others who make the products available to ultimate users. Poly-Tech was compensated on a commission basis of a set amount per item (see above) for Combat Tourniquets provided by Composite to NAR.

44. Poly-Tech was the sales representative responsible for the NAR account and other similar distributors for Combat Tourniquets procured by NAR and other distributors for resell to others (e.g., the US Military) to be provided to soldiers in combat, the ultimate users. Poly-Tech did not place orders with Composite for its own account or to resell and Poly-Tech did not take orders from the ultimate consumers.

45. Effective August 31, 2018, Composite terminated the Contract for sales representation by Poly-Tech without cause. As of, and subsequent to, the effective date of the termination, sales commissions had been, or were, earned according to the terms of the Contract. Earned, accrued, and unpaid commissions through August 2018, as defined in S.C. Code Ann. § 39-65-10, et seq., remain unpaid from Composite to Poly-Tech in the amount of \$2,031,165.05.

46. Pursuant to in S.C. Code Ann. § 39-65-30, Poly-Tech is entitled to the earned, unpaid and outstanding \$2,031,165.05 commission compensation plus punitive damages in an amount up to \$6,093,495.15, and applicable pre-judgment interest, attorney's fees and court costs.

FOR A FOURTH CAUSE OF ACTION
(For Failure to Pay Compensation Due for Perpetual Commissions,
S.C. Code Ann. § 39-65-10, et seq.)

47. The Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

48. Pursuant to the Contract, as more fully set forth above, Poly-Tech and Cedrone are entitled to perpetual commissions and profits according to Annex C. Exhibit A, page 11 of 11 for as long as the Combat Tourniquets are manufactured and/or distributed.

49. The Combat Tourniquets continued to be manufactured and distributed after the sales representative provisions of the Contract were terminated. The perpetual commissions and profits provisions of Annex C survive the termination of the sales representative relationship provision.

50. All conditions precedent to Composite's obligations under the Contract with Poly-Tech were performed, occurred, or were waived at a time and in a manner to make ripe Composite's obligations under the Contract without valid defenses.

51. Composite has breached the perpetual commissions provisions of Annex C by not making the required payments to Poly-Tech on sales of the Combat Tourniquet when due from September 1, 2018 through the date of trial. The perpetual commission rate for sales of the Combat Tourniquet was required to be paid as follows:

- a. \$1.25 per tourniquet on Red Tip Black Combat Tourniquets provided to NAR; and
- b. \$1.42 per tourniquet for Red Tip Orange Combat Tourniquets provided to NAR; and

- c. \$1.50 per tourniquet for Red Tip Blue Combat Tourniquets provided to NAR; and
- d. \$1.75 per tourniquet for all other Combat Tourniquets.

52. Composite has breached the perpetual commissions profit provisions of Annex C by not making the required profit payments pursuant to the Contract, Annex C (Exhibit A, page 11 of 11) to Poly-Tech on the purchase of raw materials when due from September 1, 2018 through the date of trial. The perpetual rate for profits on the raw materials was required to be paid at the rate of \$1.12 per yard for Aplix 500 (or similar combined Hook and Loop material).

53. As proximate result of Composite's breach of contract alleged in this cause of action, Poly-Tech has suffered actual damages in the amount to be determined at trial, plus consequential and incidental damages, plus attorneys' fees, and costs it has incurred as a result of the breaches set forth above plus punitive damages of such unpaid commissions pursuant to S.C. Code Ann. § 39-65-10, et seq.

FOR A FIFTH CAUSE OF ACTION
(For Conversion)

54. The Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

55. Poly-Tech had an interest in specific monies converted by Composite. Specifically for each Combat Tourniquet distributed by Composite, a set commission amount, as set forth in Paragraph 51, and a set profit percentage for sales, as set forth in Paragraph 52, were identified to Poly-Tech's account and paid on the 20th of each month. By shifting a set portion of the Poly-Tech's payments on each Combat Tourniquet to Composite's expenses such as the legal costs incurred by Composite to protect its intellectual property rights, Composite committed a wrongful conversion of Poly-Tech's money.

56. The above described conversion occurred without Poly-Tech's permission and in fact over its express objections.

57. As a direct and proximate cause of Composite's conversion, Poly-Tech is entitled to actual damages in the amount in excess of \$2,031,165.05 through August 2018 and in an amount to be determined at trial for unpaid commission and perpetual profit damages from August 2018 through trial, and punitive damages to be determined by a trier of facts.

FOR A SIXTH CAUSE OF ACTION
(For Unjust Enrichment)

58. The Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

59. Composite has been unjustly enriched by the wrongful withholding of sales commissions in the amount of \$2,031,165.05; the amount of unpaid perpetual commissions from September 1, 2018 through the present; and the amount of perpetual profits that have been retained by Composite despite being due and payable to Poly-Tech.

60. By withholding the above listed commissions and profits, Poly-Tech is involuntarily conferring a significant benefit upon Composite, which Composite has realized by taking the money as its own and using it for other expenses such as the legal costs of protecting its intellectual property rights.

61. It would be unjust and inequitable for Composite to retain the benefit of wrongfully withholding a portion of the commissions and profits due and owing to Poly-Tech. As a proximate result of Composites unjust enrichment, Poly-Tech is entitled to an amount equal to the amount of the benefit conferred upon and realized by Composite.

62. Therefore, Poly-Tech is entitled to an accounting from Composite for, imposition of a constructive trust on, and disgorgement of all misdirected commission and profit amounts earned and otherwise owing and unpaid to Poly-Tech, along with pre-judgement interest, costs and attorney's fees.

FOR A SEVENTH CAUSE OF ACTION
(Accounting)

63. The Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

64. Composite has an obligation to disburse commissions to Poly-Tech for each sale of the Combat Tourniquets. Composite has received funds for the sales of Combat Tourniquets without remitting commissions to Poly-Tech as required. The money due Plaintiffs involves long and complicated accounts and calculations over an extended period of time.

65. The money received by Composite on the sale of Combat Tourniquets is information that is exclusively in the control of Composite. Poly-Tech had no access to this information in order to determine the proper amount of commissions due under the Contract, except through Composite. Accordingly, Poly-Tech is solely reliant on Composite to make the proper calculations and render payment pursuant to the terms of the Contract.

66. The Plaintiffs are entitled to, and demand, as an equitable remedy, that Composite provide an accounting of all sales of Combat Tourniquets.

FOR AN EIGHTH CAUSE OF ACTION
(For Declaratory Judgment, S.C. Code Ann. § 15-53-10 et seq.)

67. The Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

68. All parties who have or claim any interest which would be affected by the requested declaration herein are parties to this civil action.

69. Plaintiffs seek a declaration to construe the rights and obligations of the parties and intended beneficiaries to the Contract.

70. Over Plaintiffs' objections, Composite reduced the sales commission rate under the Contract, has not adjusted other commissions and profit margin rates in order to maintain the overall profits for Plaintiffs and has failed to pay the perpetual commissions and profits payments pursuant to the Contract. Composite has failed to provide a promised accounting of the payments made, earned and due under the Contract.

71. An actual controversy exists between the parties with regard to the rights, obligations and remunerations owed under the Contract.

72. Under the Contract, Cedrone, as the current living representative of his future estate is an intended third party of the perpetual commissions and profit margins. Exhibit A, Annex C, page 11 of 11.

73. Under the Contract, after the sales representative provisions terminate, "for any reason", Poly-Tech and Cedrone's future estate are entitled to perpetual commissions and adjusted profit margins to maintain overall profits in perpetuity "for as long as the project continues".

74. Wherefore, Plaintiffs prays that this Court enter a declaratory judgment, declaring as follows:

- a. That Cedrone is an intended third party of the perpetual commissions and profit margins stated in Annex C of the Contract (Exhibit A, page 11 of 11).

- b. That the “project” listed in Annex C, Subsection C.2, of the Contract is the provision of Combat Tourniquets by or through the efforts of Composite.
- c. That the perpetual obligations under Annex C of the Contract survive the termination of the sales representative relationship under Section IX of the Contract.
- d. That the perpetual commission rate applies to every Combat Tourniquet sold or distributed by Composite, including every affiliate, as follows:
 - i. \$1.25 per tourniquet on Red Tip Black Combat Tourniquets provided to NAR; and
 - ii. \$1.42 per tourniquet for Red Tip Orange Combat Tourniquets provided to NAR; and
 - iii. \$1.50 per tourniquet for Red Tip Blue Combat Tourniquets provided to NAR; and
 - iv. \$1.75 per tourniquet for all other Combat Tourniquet.
- e. That Plaintiffs are entitled to the following amounts as the perpetual profit margin to maintain the overall profits pursuant to the Contract, Annex C (Exhibit A, page 11 of 11):
 - i. \$1.12 per yard of Aplix 500 (or similar combined Hook and Loop material); and
 - ii. \$0.51 per yard of Aplix Hook 800; 1”; and
 - iii. \$0.163 per yard of Aplix Loop 800; 1”.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that this Court:

1. Enter judgment against Defendant on all causes of action set forth herein for actual damages, incidental damages, consequential damages, treble damages, punitive damages, as appropriate, and in addition Plaintiff's reasonable attorney's fees, the costs of this action, and pre-judgment interest.
2. Enter a declaratory judgment as set forth above;
3. Order Defendant to account for, impose a constructive trust on, and order Defendant to disgorge to Poly-Tech all the commission money and profits withheld, misdirected and or unpaid;
4. For an accounting of all sales of Combat Tourniquets by Composite; and
5. Enter and order such additional and further relief as the Court deems just and proper.

This the 7th day of January, 2019.

Respectfully submitted,

s/ Keith D. Munson

Keith D. Munson, Esq. (SC # 13400)
WOMBLE BOND DICKINSON (US) LLP
550 South Main Street, Suite 400
Greenville, SC 29601
Telephone: 864-255-5412
Facsimile: 864-420-3426
Keith.Munson@wbd-us.com

Counsel for Plaintiffs Daniel P. Cedrone and Poly-Tech Industrial, Inc.

EXHIBIT “A”

CONFIDENTIAL

ELECTRONICALLY FILED - 2019 Jan 07 3:08 PM - YORK - COMMON PLEAS - CASE#2019CP4600051

Sales Representative Agreement

Representative: Poly-Tech Industrial

COMPOSITE RESOURCES

01 June 2005

An Agreement, effective June 1st, 2005 is made by and between Composite Resources, Inc., a corporation organized and existing under the laws of the state of South Carolina with headquarters in Rock Hill, South Carolina and Poly-Tech Industrial, Inc., a corporation organized and existing under the laws of the state of North Carolina with headquarters in Huntersville, North Carolina (hereinafter call "Representative"), as follows:

I: Appointment of Nonexclusive Sales Representative.

Representative is hereby appointed by the Company as a nonexclusive sales representative within the geographic area defined in Annex A (hereinafter called "The Territory") for the products of the Company defined in Annex B (hereinafter called "The Products") at the commission rates defined in Annex C (hereinafter called "Commissions") on the terms and conditions hereinafter set forth.

II: Acceptance of Appointment.

Representative accepts this appointment and agrees to maintain a sales office in the Territory and to faithfully prosecute the business of selling the Products within the Territory on a nonexclusive basis. Representative shall, as requested by Company, assist the customers within the Territory. By doing so, Representative shall attempt to resolve any financial issues and provide technical assistance with regard to the Products. Representative agrees to refrain from engaging directly or indirectly in any activity or business transaction for itself, or any other person, corporation or subsidiary, directly or indirectly, and regardless of whether remuneration is involved, contingent or otherwise, which in any way competes with any operation of Company, may result in a conflict of interest or would otherwise adversely affect the proper discharge of the duties of the Representative hereunder including, but not limited to the soliciting of orders for, or representing, or dealing in, any goods competing with any core products handled by the Company.

Poly-Tech Industrial

Page 2 of 11

01 June 2005

COMPOSITE RESOURCES

III: Term of Appointment.

The term of appointment shall be for one (1) year, beginning on the date of this Agreement. Upon expiration of the original term, the appointment shall be automatically extended for successive periods of one (1) year each upon the same terms and conditions set forth in this Agreement unless this Agreement is terminated by either party in accordance with its terms and conditions.

IV: Commissions and Expenses.

The Company will pay Representative Commissions to which Representative may be entitled to on all completed sales of product shipped to a purchaser located in the Territory. A sale shall be deemed complete when the Product has been delivered to, accepted by and paid in full by the purchaser, but payment of such Commissions will be made at the time specified in the Agreement. The Company shall not pay any Commissions with respect to charges for insurance, shipping and handling, test reports, postage, sales or use tax, attorney's fees, or Products rejected or returned by the purchaser, or orders canceled or not filled.

Representative will not be paid Commission attributable to any unpaid balance due to the Company from the purchaser. In the event Commissions are paid in error, the Commissions will be repaid by Representative to the Company or deducted by the Company from other Commissions due to Representative by the Company.

Commissions shall be due and payable, by the 20th of each calendar month for all sales completed during the preceding calendar month.

V: Confidentiality.

Representative acknowledges that in the course of its relationship with Company, it will have access to proprietary, confidential and trade secret business information, particularly proprietary information about Company's development, assembly, manufacture and marketing of its Products. Representative will keep confidential and will not disclose, during or subsequent to the term of this Agreement, any information of an unpublished, confidential or proprietary nature for its own benefit after termination of this

Poly-Tech Industrial

Page 3 of 11

COMPOSITE RESOURCES

01 June 2005

Agreement. Representative will not make copies of any portion of such information without prior approval by the Company and any such reproductions or material derived from such information shall be disposed of upon termination in accordance with directions from Company.

VI: Terms of Sale/Acceptance of Orders.

All prices, terms, and discounts shall be established by the Company, and changes shall not be made by Representative without express written permission from the Company. Company shall have and retain the right to establish, modify or amend prices, terms and conditions of sale. When acting as Representative of the Company, all orders solicited by Representative shall be directed to, and subject to acceptance by the Company, and the Company reserves the right to reject any and all orders for any reason whatsoever. The Company shall have complete control of approval or rejection of the customer's application for credit terms.

All orders are to be made out to the Company and will be acknowledged, shipped, and invoiced by the Company only. Representative will receive copies of all pertinent correspondence.

When acting as Representative of the Company, the products sold by Representative will at all times be sold as Products of the Company, and the customer will be clearly informed by Representative that the Products are provided by the Company. The Company assumes no liability and shall not be held responsible for delays in shipping orders due to accidents, strikes, priorities, or for any cause beyond the Company's control.

VII: Expenses

The Representative shall be solely responsible for all expenses incurred by Representative, and Representative shall have no right to incur any expenses on behalf of the Company, nor charge such expenses to it. The Representative shall maintain full liability insurance on automotive and other transportation equipment

Poly-Tech Industrial

Page 4 of 11

COMPOSITERESOURCES

01 June 2005

utilized to protect the Company from liability as a result of accidents.

VIII: Reporting.

The Company and Representative will keep each other informed as to all inquiries and other information leading to the sales of the Products. Representative agrees that periodic sales forecasts will be required by this nonexclusive appointment.

IX: Termination.

At any time either party may terminate this agreement without cause by giving to the other party sixty (60) days written notice of such termination. This agreement may be immediately terminated for cause in the following circumstances:

- (a) by either party if the other fails to cure any material default in the performance of its obligations under this Agreement within twenty (20) days after receipt of written notice detailing said material default; or
- (b) by either party if the other party is sold or becomes controlled by persons other than those now owning a controlling interest of either party.

Any termination notice may be served either personally or by certified mail. Upon termination of this Agreement the Company will pay Commissions to Representative only on orders accepted prior to and during the Notice Period, provided that the completion of such sales takes place no later than the end of the Notice Period. Representative agrees to pack and ship f.o.b. the Representative's office, to the Company, all business records, products, and other property of the Company.

X: Relationship of the Parties.

The relationship between Company and Representative established by this Agreement is that of independent contractor. Representative,

Poly-Tech Industrial

Page 5 of 11

COMPOSITE RESOURCES

01 June 2005

its agents and employees, shall, under no circumstances, be considered as officials or employees of the Company; and, except as the Company may specifically authorize in writing, Representative shall have no right and shall not attempt to enter into contracts or commitments or make any representations or warranties whether verbal or written, concerning the Products, in the name of or on behalf of the Company or accept the return of, or make any allowance for the Products or bind the Company in any respect whatsoever. Representative shall not falsely advertise or contract on behalf of Company, nor dilute any trademark, trade name or service mark of Company of its Products. Representative is responsible for the payment of any taxes, including, without limitation, all federal, state and local personal and business taxes, sales and use taxes, other business taxes and license fees arising out of the activities of Representative. Representative agrees to hold Company harmless from any and all damages resulting from any breach by Representative of this paragraph. Any written, printed, graphic or other recorded information furnished by the Company to the Representative is the sole property of the Company. Upon Company's request or termination of the Agreement, Representative shall return all unused sales and promotional literature and material to the Company.

XI: Waiver.

The Failure of either party to enforce any condition or part of this Agreement at any time shall not be construed as a waiver of that condition, nor shall they forfeit any rights to future enforcement during the term of this Agreement.

XII: Miscellaneous.

This instrument constitutes the entire Agreement between the parties, and supersedes previous oral and written agreements, and except may not be modified, changed or altered by any oral promise or statement and may only be modified, changed or altered by a written agreement signed by both parties. This Agreement shall be binding on the parties hereto, and their respective executors, administrators, successors, and assigns.

Poly-Tech Industrial

Page 6 of 11

COMPOSITERESOURCES

01 June 2005

Representative acknowledges the neither Company nor any of its officers made any representations or guarantees about how much income Representative could earn under this Agreement. If any portion of this Agreement is found to be in conflict with applicable federal, state or local law now in force or hereafter enacted, such provision shall become inoperative, but all other provisions shall remain in full force and effect. Neither this Agreement nor any duties or obligations under this Agreement may be assigned by either party without the prior written consent of the other party.

XIII: Governing Law and Choice of Forum.

This Agreement shall be governed by the laws of the State of South Carolina without regard to applicable conflict of laws provisions. Representative, in order to induce Company to enter into this Agreement and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, agrees that all actions or proceedings arising directly, indirectly or otherwise in connection with, out of, related to or from this Agreement shall be litigated in courts having a situs within South Carolina. For the purpose of the foregoing, Representative hereby consents and submits to the exclusive jurisdiction of any local, state or federal court located within South Carolina and waives any defense with respect to any action upon forum non conveniens or lack of personal or subject matter jurisdiction.

XIV: Indemnification.

Each party hereto shall indemnify, defend, and save the other harmless from and against any liability, loss, cost, expense, or damage caused by reason of such party's default under or breach of this Agreement. In addition, the Company shall indemnify, save harmless, and defend The Representative against all claims, losses, expenses, and damages which The Representative may incur as a result of any defective or negligently manufactured goods or products sold or furnished by the Company through Representative's efforts or assistance.

Poly-Tech Industrial

Page 7 of 11

01 June 2005

COMPOSITE RESOURCES

In Witness Whereof, the Company has caused this Agreement and one counterpart hereof to be executed by its officer thereunto duly authorized, and Representative has caused its hand and seal to be hereunto and to said counterpart affixed.

COMPOSITE RESOURCES, INC.

By: Jonathan P. Bennett

Date: 6/8/05

Printed Name: Jonathan P. Bennett

Title: President

POLY-TECH INDUSTRIAL, INC.

By: Daniel P. Cedrone

Date: 6-8-05

Printed Name: Daniel P. Cedrone

Title: President

485 LAKESHORE PARKWAY
ROCK HILL, SC 29730

803 366-9700
803 366-9710

ROA 71

Poly-Tech Industrial

Page 8 of 11

01 June 2005

COMPOSITE RESOURCES

ANNEX A

TERRITORY

The Territory covered by this Agreement is described as follows:

A. The entire states of: USA

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ROA 72
48 LAKESHORE PARKWAY
ROCK HILL, SC 29730

803 366-9700
803 366-9710

Poly-Tech Industrial

Page 9 of 11

01 June 2005

COMPOSITE RESOURCES

ANNEX B

PRODUCTS

The Products covered by this Agreement are all the Products the Company handles.

The Company reserves the right to change or discontinue any or all of the Products, and this Agreement shall cover the sale of such Products as so modified, altered, or changed.

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Poly-Tech Industrial

Page 10 of 11

01 June 2005

COMPOSITE RESOURCES

ANNEX C

COMMISSIONS

- A. Composite Resources will pay a 7% commission on all Rep account sales where Representative is instrumental in making the sale, per Annex A and B. These amounts are to be paid in accordance with Section IV of this agreement.
- B. Rep accounts are commissioned accounts and are compliant with this agreement. These accounts have been determined prior to the date of this agreement and are listed below. Additional accounts may be added as required.

Ametek Aerospace	(Wilmington, MA)
C.E.M.	(Matthews, NC)
CommScope	(Hickory, NC)
DuPont-Vespel	(Valley View, OH)
Gates Rubber Company	(Jefferson, NC)
Solectron Technology	(Charlotte, NC)
Strongwell	(Bristol, VA)
Timken - excluding spare parts	(Canton, OH; Gaffney, SC)
Tri*Star	(Charlotte, NC)

ROA 74

Poly-Tech Industrial

COMPOSITE RESOURCES

Page 11 of 11

01 June 2005

C. The following special accounts are exceptions to the above stated commission rate and are paid individually as described below.

1. GraviGate Products

17% on All GraviGate, GraviBar & Gravi-T Products sold.

Commission for this product is to continue at 10% if for any reason the regular contract is discontinued and paid to the estate of Daniel P. Cedrone for as long as the product line continues.

2. Phil Durango L.L.C.

A Commission rate of \$1.75 per tourniquet sold.

All Pre-sewn "bases" purchased from Poly-Tech @ \$1.75 ea.

Raw materials to be purchased from Poly-tech:

Aplix 500 @ cost + \$1.12 per yard

Aplix Hook 800 1" PSA @ cost + \$0.51 per yard

Aplix Loop 800 1" No PSA @ cost + \$0.163 per yard

The Company may at any time elect to manufacture in house procured services from Poly-Tech. The Company may elect at any time to procure products from vendors other than Poly-Tech. If the Company chooses to do so with any products or services currently rendered by or purchased from Poly-Tech Industrial, the commission rate or profit margin on remaining items will be adjusted so that overall profits will be maintained.

Commission for this account is to continue if for any reason the regular contract is discontinued and paid to the estate of Daniel P. Cedrone for as long as project continues.

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STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

)

) CASE NO.: 2019-CP-46-00051

Daniel P. Cedrone and Poly-Tech Industrial, Inc.,

Plaintiffs,

v.

Composite Resources, Inc.,

Defendant.

**AMENDED ANSWER
AND COUNTERCLAIMS**

NOW COMES the Defendant, Composite Resources, Inc. ("Composite Resources") in answer to the Complaint and counterclaiming against the Plaintiffs and alleging that:

**FOR A FIRST DEFENSE
(Denial)**

1. Each and every allegation of the Complaint not specifically admitted herein is denied.

2. In response to the allegations of Paragraph 1 of the Complaint, Defendant admits that sales materials state that the Combat Application Tourniquet is 100% effective and has decreased the mortality rate due to extreme exsanguination by 85%. The remaining allegations of Paragraph 1 are denied.

3. In response to Paragraph 2 of the Complaint, Defendant Composite Resources admits that a contract was signed in June of 2005, and that the contract attached to the Complaint appears to be a complete copy of the contract. Composite Resources further alleges that the contract speaks for itself and reserves the right to submit additional contemporaneous documents related to the contract. As for the remaining allegations of Paragraph 2, Defendant Composite Resources lacks sufficient information to form a belief and, therefore, denies the same.

4. Defendant denies the allegations of Paragraph 3 of the Complaint.

5. Upon information and belief, Defendant admits the allegations of Paragraph 4 of the Complaint.

6. In response to Paragraph 5 of the Complaint, Defendant admits so much as alleges Cedrone is an individual citizen and resident of the State of North Carolina but denies the remaining allegations of Paragraph 5.

7. Defendant admits the allegations of Paragraphs 6 – 9 of the Complaint.

8. Defendant denies the allegations of Paragraph 10 of the Complaint.

9. Defendant admits the allegations of Paragraph 11 of the Complaint.

10. Defendant denies the allegations of Paragraph 12 of the Complaint.

11. In response to Paragraph 13 of the Complaint, Defendant admits that there was a pre-existing relationship with Poly-Tech. The remaining allegations of Paragraph 13 are denied.

12. In response to Paragraph 14 of the Complaint, Defendant admits that Cedrone introduced Composite Resources to Durango. Defendant denies the remaining allegations of Paragraph 14 of the Complaint.

13. Defendant admits the allegations of Paragraph 15 of the Complaint.

14. In responses to Paragraphs 16 and 17 of the Complaint, Defendant craves reference to the contract itself for its terms.

15. Defendant denies the allegations of Paragraph 18 of the Complaint.

16. In response to Paragraph 19 of the Complaint, Defendant craves reference to the terms of the contract and to the extent that the allegations of Paragraph 19 are inconsistent, denies them.

17. In response to Paragraph 20 of the Complaint, defendant admits that NAR is a major purchaser of the Combat Application Tourniquets, and denies the remaining allegations of Paragraph 20.

18. Defendant denies the allegations of Paragraphs 21 and 22 of the Complaint.

19. Defendant denies the allegations of Paragraph 23 of the Complaint. Further responding to Paragraph 23, Defendant alleges that it acquired intellectual property rights from Phil Durango, LLC and individual inventors and other assets. Phil Durango, LLC continued to exist for some period of time, but no longer purchased any tourniquets or any other items from Defendant Composite Resources. In further response to Paragraph 23, Defendant alleges that no sales have been made to any entity listed in Annex C, including the special accounts, since November 6, 2014, and, therefore, Poly-Tech has been entitled to no commission payments since that time.

20. In response to Paragraph 24 of the Complaint, Defendant admits that it formed C-A-T Resources, LLC as an operating subsidiary on or about August 11, 2015, and denies the remaining allegations of Paragraph 24.

21. In response to Paragraph 25 of the Complaint, Defendant admits that Jonathan Bennett attended a meeting with Cedrone in North Carolina during 2015, but denies the remaining allegations.

22. Defendant denies the allegations of Paragraph 26 of the Complaint.

23. Defendant admits the allegations of Paragraph 27 of the Complaint.

24. In response to Paragraph 28 of the Complaint, Defendant admits that it stopped making sales commission payments but denies the remaining allegations of Paragraph 28.

25. Defendant admits the allegations of Paragraph 29 of the Complaint.

26. In response to Paragraph 30 of the Complaint, Defendant realleges and incorporates Paragraphs 1 – 25 above.

27. Defendant admits the allegations of Paragraph 31 of the Complaint.

28. Defendant specifically reserves the right to produce other contemporaneous documents forming part of the contract.

29. Defendant denies the allegations of Paragraphs 32 – 36 of the Complaint.

30. In response to Paragraph 37 of the Complaint, Defendant realleges and incorporates the allegations of Paragraphs 1 – 29 above.

31. Defendant denies the allegations of Paragraphs 38 – 41 of the Complaint.

32. In response to Paragraph 42 of the Complaint, Defendant realleges and incorporates the allegations of Paragraphs 1 – 31 above.

33. In response to Paragraph 43 of the Complaint, Defendant admits that Poly-Tech was appointed as a sales representative but craves reference to the contract for the remaining terms and denies any allegations inconsistent with the contract.

34. Defendant denies the allegations of Paragraphs 44 – 46 of the Complaint.

35. In response to Paragraph 47 of the Complaint, defendant realleges and incorporates the allegations of Paragraphs 1 – 34 above.

36. Defendant denies the allegations of Paragraphs 48 – 53 of the Complaint.

37. In response to Paragraph 54 of the Complaint, Defendant realleges and incorporates the allegations of Paragraphs 1 – 36 above.

38. Defendant denies the allegations of Paragraphs 55 – 57 of the Complaint.

39. In response to Paragraph 58 of the Complaint, defendant realleges and incorporates the allegations of Paragraphs 1 – 38 above.

40. Defendant denies the allegations of Paragraphs 59 – 62 of the Complaint.

41. In response to Paragraph 63 of the Complaint, Defendant realleges and incorporates the allegations of Paragraphs 1 - 40 above.

42. Defendant denies the allegations of Paragraphs 64 – 66 of the Complaint.

43. In response to Paragraph 67 of the Complaint, Defendant realleges and incorporates the allegations of Paragraphs 1 – 42 above.

44. Defendant denies the allegations of Paragraphs 68 – 74 of the Complaint.

FOR A SECOND DEFENSE
(Failure to State a Claim)

45. Each and every cause of action alleged by the Plaintiffs in the Complaint fails to allege facts sufficient to state a claim upon which relief can be granted against the Defendant and, as a matter of law, should be dismissed.

FOR A THIRD DEFENSE
(Prior Breach)

46. The existence of the contract, Plaintiffs meeting all conditions precedent, and not having breached the contract are necessary elements of each and every cause of action pled in the Complaint.

47. Plaintiff Poly-Tech breached the contract and extinguished any rights it or its principal, Cedrone, may have had by failing to assist in the marketing and sale and failing to arrange any sales of the Combat Application Tourniquet at least as early as November 6, 2014.

48. Plaintiff Poly-Tech breached the contract and extinguished any rights it or its principal, Cedrone, may have had when Plaintiffs actively competed against Defendant, starting no later than March 7, 2018, by acting with others to design and invent a tourniquet to compete with Defendant's CAT Tourniquet for which Poly-Tech was receiving commission payments.

49. Plaintiffs' prior breach bars all the claims stated in the Complaint.

FOR A FOURTH DEFENSE
(Unclean Hands)

50. Each cause of action stated in the Complaint requires the Plaintiff Poly-Tech to provide marketing assistance, and earn sales to specific accounts by promoting the Combat Application Tourniquet and arranging for its sale.

51. Plaintiff Poly-Tech failed to engage in any active marketing or create any sales of the Combat Application Tourniquet to anyone including the listed accounts on Annex C of the contract since January 1, 2014.

52. Neither Plaintiff has expended any effort to increase sales or sell Combat Application Tourniquets since January 1, 2014.

53. Plaintiffs actively competed against Defendant, starting no later than March 7, 2018, by acting with others to design and invent a tourniquet to compete with Defendant's CAT Tourniquet for which Poly-Tech was receiving commission payments.

54. The Plaintiffs have accepted commission payments they knew they were not due and have distributed and hidden the money in an attempt to defeat any claim Defendant might bring to recover improper payments.

55. Plaintiffs are barred from any recovery in this action due to their unclean hands.

FOR AN FIFTH DEFENSE

56. Plaintiffs request for punitive damages is a violation of the Constitutions of the United States and the State of South Carolina. Therefore, the request for punitive damages is not permissible, should be struck, and any award of punitive damages would be unconstitutional.

FOR A SIXTH DEFENSE

57. Plaintiffs request for punitive damages is subject to the limitations of SC Code § 15-32-530(A). Therefore, punitive damages, if any, awarded against Defendant may not exceed the greater of three times the amount of compensatory damages awarded or the sum of five hundred thousand dollars.

COUNTERCLAIM ALLEGATIONS
FACTS

58. Defendant Composite Resources, Inc. and Plaintiff Poly-Tech Industrial, Inc. entered into a Sales Representative Agreement dated June 1, 2005 (the “Agreement”).

59. Pursuant to the Agreement, Poly-Tech agreed to faithfully prosecute the business of selling the products of Defendant, including the Combat Application Tourniquet (the “CAT Tourniquet”).

60. Pursuant to the Agreement, Poly-Tech agreed to “refrain from engaging directly or indirectly in any activity or business transaction for itself, or any other person, corporation or subsidiary, directly or indirectly, and regardless of whether remuneration is involved, contingent or otherwise, which in any way competes with any operation of Company [Composite Resources].”

61. Plaintiff Poly-Tech ceased to perform its duties of assisting with the marketing and sale of the Combat Application Tourniquet at least by November 6, 2014. Poly-Tech’s owner and principal, Cedrone, participated in this decision and refusal to work.

62. Since November 6, 2014, Poly-Tech and its principal, Cedrone, received over \$17 million in commission payments from Defendant Composite Resources.

63. None of the commission payments after November 6, 2014, were earned or payable, under the terms of the contract to Poly-Tech or Cedrone.

64. Plaintiffs actively competed against Defendant, starting no later than March 7, 2018, by acting with others to design and invent a tourniquet to compete with Defendant's CAT Tourniquet for which Poly-Tech was receiving commission payments.

65. Plaintiff Poly-Tech should not have received any commissions on the sales of CAT Tourniquets after March 7, 2018 (at the latest), when Plaintiffs were competing against Defendant.

66. Pursuant to the Agreement, Poly-Tech agreed that any commissions paid in error would be repaid by Poly-Tech to Composite Resources.

FOR A SEVENTH DEFENSE AND BY WAY OF A FIRST COUNTERCLAIM
(Breach of Contract)

67. The allegations of Paragraphs 58 – 66 are realleged and incorporated by reference.

68. As a direct and proximate cause of and as a result of Poly-Tech's breach of contract, Composite Resources has suffered in the amount of \$17,403,126.12 in damages.

FOR AN EIGHTH DEFENSE AND BY WAY OF A SECOND COUNTERCLAIM
(Unjust Enrichment)

69. The allegations of Paragraphs 58 – 66 are realleged and incorporated by reference.

70. Neither Plaintiff performed any services or labor from November 6, 2014 to the present.

71. Neither Plaintiff had a right to payment absent marketing and selling the Combat Application Tourniquet.

72. Plaintiffs were actively competing against Defendant Composite Resources at some or all times during which the commissions were being paid after November 6, 2014.

73. All commission payments during that time period were improperly made by Defendant Composite Resources and should be refunded to Defendant Composite Resources immediately.

FOR A NINTH DEFENSE AND BY WAY OF A THIRD COUNTERCLAIM
(Frivolous Claim)

74. The allegations of Paragraphs 58 – 66 are realleged and incorporated by reference.

75. Plaintiffs knew they were not entitled to any commission from Composite Resources due to their failure to perform under the contract and the lack of sales to any of the recognized entities in the contract.

76. Plaintiffs knew or should have known that they had retained no earnings and had no gain under the agreement between the parties since November 6, 2014.

77. Plaintiffs' claim against Composite Resources is frivolous as it is objectively baseless.

78. Pursuant to the statute, Defendant is entitled to their attorney's fees and costs of litigation paid by Plaintiffs.

79. Defendant Composite Resources is entitled to a judgment of this Court awarding it of its reasonable attorney's fees and costs of litigation incurred in this action.

80. This Court should enter its judgment awarding Defendant its full attorney's fees and costs in defending this action.

FOR AN TENTH DEFENSE AND BY WAY OF A FOURTH COUNTERCLAIM
(Breach of Contract)

81. The allegations of Paragraphs 58 – 66 are realleged and incorporated by reference.

82. Dan Cedrone ("Cedrone") is the President, Owner, and Founder of Poly-Tech.

83. Prior to March 7, 2018, Cedrone worked with William R. Carson ("Dr. Carson") to design and develop a tourniquet that would directly compete with the CAT Tourniquet.

84. On March 7, 2018, Dr. Carson, William Crossingham Cannon, and Cedrone applied for a United States Patent for a "Tourniquet with Lever Tensioning Mechanism." The application was assigned Application Number 15/914,054.

85. United States Patent Application Number 15/914,054 identified Cedrone as both an applicant and an inventor of the Tourniquet with Lever Tensioning Mechanism.

86. Cedrone was one of the inventors of the Tourniquet with Lever Tensioning Mechanism.

87. United States Patent Application Number 15/914,054 became United States Patent Number US 10,194,917 (“the ‘917 Patent”)

88. Cedrone was an inventor and applicant for the ‘917 Patent.

89. The ‘917 Patent for the Tourniquet with Lever Tensioning Mechanism is designed to be a self-applied tourniquet.

90. The ‘917 Patent expressly states that the Tourniquet with Lever Tensioning Mechanism is designed to address the “problem with existing self-applied tourniquets” that “they require the use of a winding stick (or windlass) . . .”

91. The CAT Tourniquet is a self-applied tourniquet that uses a self-winding stick (or windlass).

92. The ‘917 Patent for the Tourniquet with Lever Tensioning Mechanism was designed and invented to directly compete with the CAT Tourniquet and Composite Resources.

93. Poly-Tech materially breached the express terms of the Agreement with Composite Resources when its President, owner and founder Cedrone worked with Dr. Carson and/or others to design and invent the Tourniquet with Lever Tensioning Mechanism.

94. Poly-Tech also breached the implied covenant of good faith and fair dealing in the Agreement with Composite Resources when its President, owner and founder Cedrone worked with Dr. Carson and/or others to design and invent the Tourniquet with Lever Tensioning Mechanism in competition with Defendant Composite Resources.

95. Composite Resources had the right to immediately terminate the Agreement upon Cedrone's first efforts to compete with Composite Resources.

96. Cedrone's efforts to compete with Composite occurred prior to March 7, 2018.

97. Composite Resources had the right to terminate the Agreement no later than March 7, 2018.

98. Composite Resources has suffered damages in the form of commissions it paid to Poly-Tech while it was competing against Composite Resources starting prior to March 7, 2018.

99. Composite Resources is entitled to all commissions paid to Poly-Tech since at least March 7, 2018.

FOR AN ELEVENTH DEFENSE AND BY WAY OF A FIFTH COUNTERCLAIM
(Conspiracy)

100. The allegations of Paragraphs 58 – 66 are realleged and incorporated by reference.

101. Pursuant to the Agreement, Poly-Tech agreed that it would not disclose to third parties any aspects of the development, assembly, manufacture, and marketing of the products of Composite Resources.

102. Cedrone, as the President, Owner and Founder of Poly-Tech was given direct access to detailed information about the development, assembly, manufacture and marketing of the CAT Tourniquet.

103. Cedrone brought Dr. Carson to the facilities of Composite Resources on more than one occasion to see how the CAT Tourniquet was developed, assembled, manufactured, and marketed.

104. Cedrone stayed in touch with Dr. Carson and conspired with Dr. Carson and/or others to develop and invent a tourniquet that would compete with the CAT Tourniquet.

105. Cedrone used his detailed knowledge of the development, assembly, manufacture and marketing of the CAT Tourniquet to work with Dr. Carson and/or others to develop and invent a competing tourniquet – the Tourniquet with Lever Tensioning Mechanism (the ‘917 Patent).

106. Cedrone conspired with Dr. Carson and/or others in developing a competing tourniquet for the purpose of harming Composite Resources and for the financial gain of Poly-Tech and/or Cedrone.

107. Composite Resources has suffered special damages in the development and invention of a competing tourniquet that has been granted a patent, in part based upon the allegation that the ‘917 Patent addresses an alleged “problem” with the CAT Tourniquet.

108. Composite Resources special damages include possible harm to the reputation of the CAT Tourniquet, any and all sales of tourniquet set forth in the ‘917 Patent, and Composite Resources’ attorneys’ fees and costs in defending this action that was brought frivolously when the Plaintiffs were directly competing against Composite Resources in breach of the Agreement.

109. Plaintiffs are liable to Composite Resources for its actual and special damages and any punitive damages that may be awarded.

WHEREFORE, having fully answered the Complaint and counterclaimed against the Plaintiffs, Defendant Composite Resources respectfully prays this Court enter its judgment.

A. Dismissing Plaintiffs’ claims.

B. Awarding it \$17,403,126.12 for prior breach of contract and compensation for unjust enrichment;

C. Awarding its attorney’s fees and costs of litigation pursuant to S.C. Code Ann. § 39-65-40; and

D. Alternatively, determining that the contract was materially breached by Poly-Tech no later than March 7, 2018 and awarding Composite Resources all commission paid to Poly-Tech since that date or the date it is determined that Poly-Tech began competing with Composite Resources, whichever is earlier.

E. Awarding Composite Resources all its special damages, to include possible harm to the reputation of the CAT Tourniquet, any and all sales of tourniquet set forth in the '917 Patent, and Composite Resources' attorneys' fees and costs in defending this action that was brought frivolously when the Plaintiffs were directly competing against Composite Resources in breach of the Agreement.

F. Awarding Composite Resources punitive damages against Plaintiffs Poly-Tech and Cedrone.

G. Such further relief as this Court may deem just and proper.

Respectfully submitted,

Burr & Forman, LLP
Post Office Box 11390
Columbia, SC 29211
(803) 799-9800

By: s/ Paul D. Harrill
William Y. Klett, III (SC Bar No. 64822)
wklett@burr.com
Paul D. Harrill (SC Bar No. 15268)
pharrill@burr.com

Attorneys for Defendant

April 1, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA: COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT: YORK COUNTY

Daniel P. Cedrone and)
Poly-Tech Industrial, Inc.,) Civil Action Docket No.
Plaintiff) 2019-CP-46-00051
V.)
Composite Resources, Inc.) **VIRTUAL HEARING**
Defendant.) Motion for partial
Summary judgement

May 4, 2022
York, South Carolina

B-E-F-O-R-E:

THE HONORABLE MARK J. HAYES, II

A-P-P-E-A-R-A-N-C-E-S:

Keith Munson, Esq.
Attorney for the Plaintiff

Michael Montecalvo, Esq.
Attorney for the Plaintiff

Paul Harrill, Esq.
Attorney's for the Defendant

William Klett, Esq.
Attorney's for the Defendant

Maria DiScioscia, RPR
Official Court Reporter

1 THE COURT: Thank y'all for getting together.
2 We're here today to address a motion for partial summary
3 judgment filed by Mr. Munson on behalf of the plaintiff.
4 Thank y'all for sending me the documents, which have
5 been a little bit ahead of time, but we got them
6 reviewed, not digested in a sort, but we've got them
7 reviewed. So, Mr. Munson, I will let you have the first
8 bite.

9 MR. HARRILL: I understand there may be two.
10 Is there just one?

11 MR. MUNSON: There's a motion for summary
12 judgement as to ambiguity, which I think was what was
13 put on the calendar. There is a motion for summary
14 judgment as to the fourth and fifth counter claims that,
15 I don't think that was put on this calendar. We also
16 have a motion pending to deem admitted a request to
17 admit and/or compel interrogatories. I think those are
18 the outstanding motions.

19 THE COURT: And I've got a little bit of the
20 partial summary judgement motion as to the unambiguous
21 terms. We received your motion to request for admission
22 just recently and I planned on addressing that, we can,
23 but I thought that the defense might say that it's not
24 -- that's it's not had a chance to respond and did not
25 receive anything, to my knowledge, from the defense in

1 that response. So hopefully, y'all can talk and work it
2 out. So we didn't plan on doing that one.

3 And my understanding, after our last
4 conversation, we weren't going to do the summary
5 judgment motion as to the counterclaim because y'all
6 were contending -- defense was contending they needed to
7 have some discovery done.

8 MR. MUNSON: That's correct, your Honor. And
9 maybe we can talk about scheduling and other things,
10 but, yes.

11 THE COURT: Well, then I will hear from you on
12 the partial -- motion for partial summary judgment.

13 MR. MUNSON: Thank you, your Honor. Keith
14 Munson and Michael Montecalvo is on the line with me
15 with Womble, Bond, Dickinson. As you know, we represent
16 the plaintiff's in this case and it centers around --
17 it's a contract dispute. This is the business court
18 intended to deal with business disputes, such as
19 contract disputes. And one of the initial things that
20 gets T'd up in business cases that are founded on
21 contracts is the interpretation of the terms of the
22 contract. And if some of the terms are ambiguous, then
23 the party's have to muster discovery and evidence at
24 trial as to what the terms mean. If they're unambiguous
25 then, unfortunately, for the Court, it gets assigned the

1 task of having to review the four corners of the
2 contract and decide whether terms are ambiguous or not.
3 To some extent, we brought this motion to bring to the
4 Court's attention some of the terms that we find to be
5 material in this case; that we would like to have
6 interpreted as a matter of law by the Court, so we can
7 know what evidence we need to muster or not muster for
8 trial and prepare for trial in terms of, depositions we
9 need to take and/or documents we need to present,
10 witnesses we need to compel to be at trial. And so we
11 filed a pretty simple partial summary judgment motion to
12 ask the Court to interpret the obligations of the
13 defendant to pay the plaintiff's \$1.75 commission per
14 tourniquet sold and to pay the plaintiff an up-charge on
15 raw materials they purchased through the plaintiff's or
16 purchase through Poly Tech. And if they purchased their
17 raw materials from other than Poly Tech, the raw
18 materials identified in Annex C of the complaint, than
19 the contract obligates them to guarantee us a particular
20 profit margin. So, they stopped buying the material
21 through us and so the profit margin guarantee comes into
22 play and it can be calculated based on the numbers on
23 Page 11 of the contract, Annex C. We cite the case law
24 that makes it appropriate for --

25 THE COURT: You froze for a moment.

1 MR. MUNSON: Oh, sorry.

2 THE COURT: So, back up about 45 seconds.

3 MR. MUNSON: Okay, I'm sorry. We -- in
4 addition to having the Court interpret as a matter of
5 law the requirements for them to pay plaintiff's \$1.75
6 per tourniquet, they're also obligated to pay them a
7 guaranteed profit margin on some raw materials that they
8 were buying through Poly Tech and aren't buying anymore.
9 And the numbers to calculate that, are all laid out on
10 Page 11 of the contract. In the law provision we kind
11 of maybe went further than we needed to because defense
12 counsel doesn't seem to contest that this analysis or
13 request to have the Court interpret terms of the
14 contract is appropriate on summary judgement, but that's
15 laid out in our motion.

16 And we're going to have a disagreement as to
17 what we think it means, but that, as the Court, I'm sure
18 knows, the parties disagreeing on what a contract term
19 means, doesn't make it ambiguous. The -- before I get
20 into detail on the specific terms of the contract, and
21 this is not going to be lengthy, the whole thing's not
22 going to be lengthy. We've also included some factual
23 information and exhibits with our motion for summary
24 judgment, I think that might have been misinterpreted by
25 the defendant's. The reason for that, is not because we

1 think the terms that we want interpreted are ambiguous
2 and therefore, we need this information. It's because
3 under the summary judgment standard at the first tier
4 it's purely a matter of law. So, they're, you know, by
5 definition there's not a material issue of fact. The
6 Court looks at the contract and interprets the term
7 within the four corners of the contract as a matter of
8 law. However, under the summary judgment standard, if
9 there was something about a term that's maybe not
10 completely clear, if the Court can look to evidence
11 outside of the terms of the contract and find that
12 there's no dispute as to some fact. For example, on a
13 contract I'm going to sell you my red mustang. Maybe I
14 had two red mustangs and so the Court might say, that
15 seems a little bit ambiguous. But then I provide an
16 answer to an interrogatory request to admit where the
17 party admits that the red mustang, under the contract,
18 was the one in the driveway, not the one in the garage.
19 In that circumstance, you can still get summary judgment
20 because the facts that the Court relied on to clear up
21 clarification was undisputed. And so, we provided some
22 factual information with our motion in case the Court
23 has to get to a second tier where it's wanting to
24 interpret these terms with a little more clarification
25 then just the four corners of the contact.

1 I'm glad to say, we believe some factual
2 information has been developed to where if the Court
3 thinks there's some kind of ambiguity, those undisputed
4 facts might clear it up and summary judgment still might
5 be appropriate. Looking at the contracts, most of this
6 relates to what's called Annex C, which is the last two
7 pages of the contract. And on the last page, it notes
8 that, "The following special accounts are exceptions to
9 the above stated commission rates." And then in the
10 paragraph under -- the paragraph on Page 3, it begins,
11 "Commissions for this project under the GraviGate,"
12 mentions, if the regular contract is discontinued and
13 then that, if the regular contract is discontinued,
14 language exist under the CAT provision, at the bottom of
15 Page 1. So you have these special provisions related to
16 these items on Page 11 that are different from the
17 regular contract. And in our -- we think under standard
18 contract interpretation, the more recent trumps the
19 older, the more specific trumps the more general. All
20 those kinds of interpreting tools that the Court has as
21 a matter of law to interpret a contract, it helped the
22 Court conclude that in analyzing the four corners of
23 this contract, this page with "special accounts" it's
24 different than a regular contract, makes clear that
25 Composite Resources obligated itself to pay \$1.75

1 commission and guaranteed the profit margin as outlined
2 by the numbers at the bottom of Page 11. Even after the
3 contract was terminated for as long as they make these
4 tourniquets.

5 Our motions just asks the Court to read the
6 contract and find that those term obligations are
7 unambiguous, clear and binding in this case. That
8 Composite Resources are obligated to, as a matter of
9 law, pursuant to the contract, obligated to pay \$1.75
10 per tourniquet sold, which either has been sold or be
11 sold in the future. In addition, to a \$1.12 per yard of
12 the Aplix material, \$1.51 per yard of the inch wide
13 Aplix hook material and \$.16 -- \$.16.3 per yard for the
14 Aplix 800 loop, which it's purchased since August 31,
15 2018 for the Combat tourniquets and that they're in
16 breach of that because it's been admitted, they haven't
17 been paying. That's where we are, your Honor.

18 THE COURT: Okay. Look at page 11 of 11. You
19 now, just said something in your closing, that you also
20 wanted me to find as a matter of law they're in breach
21 of that?

22 MR. MUNSON: Well, there's -- there's no
23 dispute that they're not -- that they're paying it.

24 THE COURT: That's not what you've asked me to
25 do. What you've asked me to do is to clarify -- just to

1 say these terms are unambiguous.

2 MR. MUNSON: Yes. Under the contract they're
3 obligated to pay those amounts for those -- for the CAT
4 tourniquets.

5 THE COURT: Now, when you were speaking, could
6 be I misheard it and you said it correctly. But when
7 you were speaking you referred to the Aplix hooks, you
8 said \$1.51, but what's written on page 11 of mine is
9 just \$.51 a yard.

10 MR. MUNSON: If I said that I was wrong, your
11 Honor. Yes, it's just \$.51 per yard.

12 THE COURT: Could be I misheard something
13 different. Okay.

14 Now, I've circled -- before I hear from
15 defense, I circled the name Phil Durango, LLC. Why did
16 that -- why is this under a section called, "Phil
17 Durango, LLC?"

18 MR. HARRILL: Your Honor, perhaps I can --
19 unless, of course --

20 THE COURT: I'm asking him first, as he gets
21 the chance to talk, okay?

22 MR. MUNSON: Yes, your Honor. It's a shortcut
23 name for the production of the CAT tourniquets. If you
24 look up above on GraviGate products. It doesn't include
25 just GarviGate, it also includes GraviBar and Gravi-T

1 products. It's just a -- it's just a shortcut name for
2 the products covered under that paragraph and products
3 covered under that paragraph are the CAT tourniquets.

4 THE COURT: So, that's not important to
5 anything.

6 MR. MUNSON: It's not important to us, your
7 Honor.

8 THE COURT: Okay. All right. And I'm just
9 looking and I want to turn to defense. I'm not looking
10 at determining or saying that the defendant's are
11 conceding that they've reached the agreement.

12 Just looking at Page 11 of 11, which -- do
13 y'all contest that those terms don't say those things
14 that Mr. Munson just said that they said?

15 MR. HARRILL: Yes, your Honor. There are
16 certain things that -- certainly, they say what they
17 said. It's how they want them construed and
18 interpreted, is the issue, your Honor. And we can't
19 just look at Page 11. We have to look at the whole
20 document in order to contrude the document.

21 I do want to address a couple of things real
22 quickly that Mr. Munson said. Especially, the one he
23 just said where you asked about, "Phil Durango, is that
24 important." It's very important. And maybe you circled
25 it because you found it that way or we addressed it in

1 our brief, I'm not sure.

2 But for Mr. Munson to sit here and say, that
3 is a shortcut name for the CAT tourniquet. That's
4 something he pulled from whole cloth, 30 seconds ago,
5 your Honor. That has never ever been the case. No one
6 has ever referred to CAT tourniquet, as Phil Durango,
7 LLC. Phil Durango was a former customer of my client
8 Composite Resources. And the initial introduction,
9 which is what Mr. Munson's client did, made an
10 introduction to our client with Phil Durango, LLC.
11 Which, Phil Durango, LLC is owned by a gentleman by the
12 name of Mark Esposito. This information is in a lot of
13 the pleadings and so forth. Phil Durango, LLC owned the
14 pattens for these tourniquets that are the subject of
15 this lawsuit or at least the commissions for the sale of
16 these tourniquets is the subject of this lawsuit. And
17 so an introduction was made --

18 THE COURT: Let me ask you to do this.
19 Mr. Munson has a history with me of giving great
20 narratives. We have to get past narratives. We're
21 dealing with summary judgment motion on these files on
22 these terms. Get on with your narrative, but make your
23 narrative short because my question to you is which one
24 of these terms are you going to dispute that don't say
25 what they -- as written. Okay. I do want to hear the

1 narrative, but we've got to get moving on because this
2 case is scheduled for trial in July.

3 MR. HARRILL: I understand. A little leeway
4 would be appreciated, your Honor.

5 THE COURT: I've given you a lot of leeway.
6 I've given both sides a lot of leeway. I have sat and
7 gone through in-camera review of volumes of documents
8 for the defense. I have heard the defense saying, you
9 are being unfair. I reviewed every one of those
10 documents and gave the defense the right to have every
11 one of those documents. I will give you leeway, but
12 we've got to address the issue that's before this Court.

13 Now, if you want to tell me a narrative, tell
14 me a narrative, but let's make it very concise. Okay.
15 And Mr. Munson is held to that same standard.

16 MR. HARRILL: Your Honor, you asked about Phil
17 Durango, so I'm trying to explain what Phil Durango is,
18 that's all I'm try together do.

19 THE COURT: Sir. Sir. Sir. I did ask
20 Mr. Munson about Phil Durango and you did say you
21 disagree with him. I asked you a question about which
22 of these terms you say do not -- that you're going to
23 contend do not say what they are written to say. I
24 understand you want me to know about Phil Durango. I'm
25 fixing -- what I'm hearing from you is, I'm fixing to

1 get into along dissertation about Phil Durango.

2 MR. HARRILL: Your Honor, my reply. I will
3 say you cannot construe this contract by looking at only
4 Page 11.

5 THE COURT: Okay.

6 MR. HARRILL: I have cited to the case of
7 North America Rescue products in our brief and it is at
8 769 S.E.2nd 237 and our Supreme Court in 2015 has
9 instructed us that, "A contract must be read as a whole
10 so that one party may not create ambiguity by pointing
11 out a single sentence or clause." So, our contention
12 is, your Honor, that similarly Mr. Munson can't go to
13 page 11 and point to a couple of clauses and say look
14 here your Honor, these aren't ambiguous or these are
15 clear as can be. The Court ultimately has to construe
16 this contract prior to trial. Because it is as a matter
17 of law that must be -- the Court has to construe. If
18 your Honor, then finds that there are ambiguities, like
19 Mr. Munson said, then extrinsic evidence would come in
20 at trial. If your Honor, finds that it's clear and
21 convincing or clear an unambiguous then, heck, we may
22 not need a trial ultimately. But the contract has to be
23 looked at as a whole.

24 The issues as far as what the plaintiff was
25 entitled to prior to his breach of the agreement, prior

1 to the termination of the agreement by our client and
2 prior to the termination of the Phil Durango, LLC
3 account, which I was going to explain, but I'll leave it
4 at that unless your Honor has a question. That account
5 no longer exist. That's explained in the affidavit of
6 affidavit of Mr. Thompson, that is attached to our
7 response. That is an affidavit that's been submitted in
8 this case previously. The Phil Durango account no
9 longer exist and Mr. Munson and his client want to jump
10 straight to a verdict here. He's saying he wants you to
11 construe the document. He's pointing to a couple and
12 picking and choosing a couple provisions that he wants
13 you to construe and then he's saying, and just go ahead
14 and enter us a judgement that we're entitled to
15 commissions on these things at these rates for in
16 perpetuity and that's ultimately what they want in this
17 case. So, he's essentially saying, he wants a partial
18 summary judgement for everything that they're asking for
19 in this case. Clearly, that's premature. Clearly,
20 that's not appropriate at this stage.

21 THE COURT: Tell me what's premature. Again,
22 I go back to, what is going to be y'all's position in
23 regards to these terms if these terms do not say what
24 they're written to say. What is the defenses position?

25 MR. HARRILL: Well, your Honor, first of all,

1 the contract maybe terminated. The plaintiff doesn't
2 like to point out there's a termination provision in
3 this contract. The plaintiff's do not like to point out
4 that at the top of this page that you just read with
5 Mr. Munson. It says, "The following special accounts
6 are exceptions to the above stated commission rate."
7 And the the word "rate" is important. So, the two
8 "special accounts" on which they are entitled to
9 commissions are GraviGate products, number one and then
10 number two, Phil Durango, LLC which was a client and
11 customer of Composite Resources.

12 THE COURT: Let me ask you what you just told
13 me, cause I think for me understand that, I might have
14 misstated it.

15 You're saying they are entitled to the
16 GraviGate and the Phil Durango accounts?

17 MR. HARRILL: They were.

18 THE COURT: They were.

19 MR. HARRILL: When these accounts existed.
20 Yes, your Honor.

21 THE COURT: But they were terminated under the
22 termination clause of the contract?

23 MR. HARRILL: No. So there were multiple ways
24 that they're not entitled to commissions going forward.
25 The first that we will address because we're on this

1 particular clause on page 11. Is that these two
2 "special accounts" no longer exist at Composite
3 Resources. The first one is not relevant to this
4 lawsuit. Mr. Munson agrees they're not pursuing
5 GraviGate commissions. They're suing for commissions
6 under Number 2, that "special account" for Phil Durango,
7 LLC. They may contest this, I'm not sure what basis
8 they have to contest it. I don't think they can, but
9 there is no longer a "special account" for Phil Durango,
10 LLC. That was a customer of ours. It is no longer a
11 customer of ours. Our client after nine years of paying
12 commissions, mind you, to Mr. Munson's client, maybe
13 ten, was offered an opportunity from Phil Durango to
14 purchase the patten that Phil Durango had on these
15 tourniquets. So our client did that and became the
16 owner of the patten and Phil Durango went off into the
17 sunset and is no longer a customer. He's no longer an
18 account of ours. They're bound by this language that
19 says these commissions apply to these accounts. These
20 two special accounts. That account is gone. And it
21 disappeared when we bought the pattens from Phil
22 Durango, LLC in late 2014.

23 If for the purposes of the construction, your
24 Honor, has to read all that together. And I don't think
25 there's any question that is a fact. The commissions

1 are due or in this case, were only due, on the account
2 for Phil Durango, LLC. So that's Number 1, your Honor.

3 THE COURT: You say, were only due... Let me
4 see if I understand your position.

5 MR. HARRILL: Yes.

6 THE COURT: In the event that there is money
7 owned for some account, it wouldn't be under the Phil
8 Durango, LLC account, if there were monies owned.

9 MR. HARRILL: That is correct.

10 THE COURT: Their position is, there's no money
11 owned because there was a separate transaction between
12 the defendant's and Phil Durango that transferred the
13 patters.

14 MR. HARRILL: That's correct.

15 THE COURT: And that plaintiff way over there
16 has nothing to do with that.

17 MR. HARRILL: That's right. Because Phil
18 Durango is no long a client. He's no longer an account
19 of ours. It was for -- it was for ten years while
20 Mr. Cedrone and his company were reaping the large
21 commissions. But it is not and has not been since 2014.

22 The next issue, your Honor, is pursuant to
23 Article 9 of the agreement, the sales representative
24 agreement. The parties both have a right to terminate
25 the agreement. And it gives either party the right to

1 terminate the agreement on 60 days notice without cause
2 for no reason to raise.

3 THE COURT: Page 4 of 11?

4 MR. HARRILL: Yes, sir. I'm sorry. I should
5 have said that. It's section, Roman numeral IX,
6 entitled Termination. That provision and that clause
7 gives either party the express right to terminate this
8 provision or this agreement. It also provides in the
9 section -- well, it also provides for a, for clause
10 termination of the agreement. If either party fails to
11 cure a material default after being given notice of 20
12 days. The agreement in Section IX on Termination also
13 says, that after termination that my client, the
14 defendant, Composite Resources; if that were the case,
15 if they're the ones terminating, would continue to pay
16 commissions for 60 days, which is the notice period. So
17 at best, for the plaintiff's that is contradictory to
18 what they're claiming, at absolute best.

19 THE COURT: May I ask a question?

20 MR. HARRILL: Yes, sir.

21 THE COURT: In that 60 day period. In that 60
22 day window once notice is given, the calculation for
23 what's owed, is it still what's on page 11 of 11?

24 MR. HARRILL: For the 60 days, that would be
25 correct.

1 THE COURT: Right. Right, just for the 60
2 days.

3 MR. HARRILL: Yes, sir.

4 THE COURT: Okay.

5 MR. HARRILL: And we paid them that, your
6 Honor. It's uncontested. And in fact, I think the
7 later of termination is attached to plaintiff's motion,
8 that's Exhibit B perhaps, that this contract was
9 terminated in June of 2018 by a written letter from my
10 client to Mr. Munson's client and giving them 60 days so
11 that it was terminated effective August of 2018. So in
12 August 2018, after paying 60 days of continuing
13 commissions, when the termination became effective that
14 is when we stopped paying Mr. Munson's client
15 commissions. We've paid -- we've paid them everything
16 they're due.

17 THE COURT: Let me ask you one question before
18 you move on to more. The June 26, 2018 letter from
19 Composite from Jonathan Bennett, that's the termination
20 letter?

21 MR. HARRILL: Yes, sir.

22 THE COURT: Okay. Okay, thank you.

23 MR. HARRILL: Your Honor, there's another way
24 that they don't get to keep getting commissions. If you
25 will refer to the first page of the document. This is

1 one of our counter claims, this is the basis of one.

2 There's a -- in Roman numeral II, "Acceptance
3 of Performance," about 40 percent or so down in that
4 paragraph. The line starts, "Representative agrees to
5 refrain from engaging directly or indirectly in any
6 activity" and I will skip past all that language and go
7 on where it says, "Which in anyway competes with any
8 operation of company, which is Composite Resources, may
9 result in a conflict of interest or other wise adversely
10 effect the proper discharge of the duties of the
11 representative hereunder." Again, this is a sales
12 representative agreement. "Including but not limited to
13 the soliciting of orders for or representing or dealing
14 in any goods competing with any core products handled by
15 the company." Again, our core product is this
16 tourniquet. And it's also uncontested, your Honor, if
17 you will look at the requests for admission, which we've
18 attached to our response at Exhibit 2. Mr. Cedrone, the
19 plaintiff, has admitted that prior to March 7, 2018 he
20 collaborated with two other individuals to develop,
21 invent, improve or design a tourniquet that is the
22 subject of a patten that was subsequently issued.

23 Through other discovery, we've learned that he
24 was collaborating with these gentlemen at least as early
25 as August 2017. He was still drawing commissions from

1 Composite Resources at that time. And that is clearly a
2 breach to collaborate with and design a competing
3 tourniquet. And if there's any question whether it
4 competes, your Honor. The testimony of Mr. Cedrone is
5 attached to our response at page 171 and 172. He admits
6 that the tourniquet that he has helped design and
7 produce is a competitive product to the CAT tourniquet.
8 And all of these began unbeknownst to our client while
9 he was still accepting commission payments from
10 Composite Resources.

11 So, your Honor, back to the last page of the
12 agreement. That first section says, "The following
13 special accounts," which again we're just looking at
14 Phil Durango, "are exceptions to the above-stated
15 commission rate." The rate is set forth on the previous
16 page as 7 percent. It does not say anything about these
17 special accounts create exception to this agreement or
18 these will be treated completely differently than all
19 other transactions under this agreement. It is an
20 exception to the rate of 7 percent. So, when you go
21 down and look at the last sentence of the agreement,
22 that's the one that they really like and they like to
23 point to. Your Honor, I think first of all, as I've
24 said, you've got to read the entire contract as a whole.
25 But if you read that sentence there, it is clearly -- I

1 shouldn't say it's clear. I should say, it was clearly
2 not clear. But it is not clear what it means when it
3 says, "commission for this account." I think I know
4 what that means. It's referring to Phil Durango, LCC
5 and we know that that account no longer exist. Then it
6 goes on to say, "is to continue if for any reason the
7 regular contract." I don't know what that's means. I
8 don't know how we can know what that means. I think --
9 and I'm not trying to testify here, but I think Mr.
10 Cendrone even was unclear exactly what the regular
11 contract means. But I mean their contention is, this
12 entire agreement. Somehow they're except from every
13 other provision in this agreement because of this, under
14 the Phil Durango, LLC account. If that's the case, they
15 need to say that or need to say that clearly it does not
16 -- everywhere else in this agreement -- excuse me, your
17 Honor. Everywhere else in the agreement, the agreement
18 is referred to as capital A agreement. So, if this was
19 intended to be some exception to the agreement, they
20 needed to say so, not the "regular contract" and not
21 tell us what that means. What provision does it mean,
22 does it mean agreement? Does it mean some provision in
23 the agreement? What does it mean. It then says, "Is
24 discontinued." I think I know what the word
25 discontinued means in a vacuum. It doesn't say, is

1 terminated pursuant to Article 9. So I'm not sure what
2 "discontinued" means. I don't think the Court can know
3 without trying to construe this as a whole and either
4 finding somehow that it means something or that this
5 clause is ambiguous ultimately. And then it says, "Paid
6 to the estate of Dan Cedrone." Well, there is no estate
7 of Dan Cedrone, that's been established through discovery.
8 It is only payable if Mr. Cedrone passes away. Is it
9 payable only if he files bankruptcy. I don't know what
10 the, "Estate of Mr. Cedrone" means and no one else does.
11 They want it to mean he gets to get -- he gets paid
12 whether he's dead or alive. Somehow it goes to him and
13 no longer to the contracting party. It doesn't make any
14 sense to me.

15 And then finally, your Honor, it says, "As
16 long as the project continues" and they love that
17 because they think, well, that means as long as any
18 tourniquet is made. Well, project has to relate back to
19 the account or Phil Durango. "Project" isn't defined,
20 it's not clear. But whatever it is, it's got to relate
21 back to this account because this says, "Commissions of
22 this account," in that section.

23 So your Honor, clearly, we're getting the cart
24 before the horse here. Ultimately, your Honor is going
25 to have interpret this contract and construe it and I

1 think there's a time before trial that's appropriate and
2 we go through the entire contract. The party's can
3 setout the terms in their interpretation of the contract
4 as a whole. It maybe that once, your Honor's done that,
5 the case will settle perhaps or it may resolve the case
6 completely depending on your construction. On the other
7 hand, if you find that the terms are ambiguous, then we
8 will have to go get these witnesses and extrinsic
9 evidence to demonstrate what the intent of the parties
10 is. I don't agree with Mr. Munson's characterizations
11 that he was just putting in some extrinsic evidence to
12 show you what the next step would look like. I mean,
13 the next step is, either this is ambiguis or you find
14 it, somehow, unambiguous and we move forward, which I
15 don't see how that can be done but... Or we submit
16 extrinsic evidence. We don't do both and we can't do
17 both now. And we've submitted some extrinsic evidence
18 as well, just in the event that your Honor -- if for
19 some reason you consider that. It's also to show that
20 they're stuff that they're trying to put out there
21 saying that, even if the documents a little confusing,
22 we're going to show you that everyone agrees to the
23 facts. Well, we've put in information to show that
24 those facts aren't solid and locked down like Mr. Munson
25 suggests.

1 So, ultimately, your Honor, I think you're
2 going to have to construe this. I think that's the way
3 these contract construction and contract breach cases go
4 if the parties don't agree to interpretation, but it's
5 too early. And for the reasons I've stated, the
6 provision that they're asking you to construe, that
7 somehow they were entitled to continue getting payments,
8 is at best, ambiguous. And certainly, it's contested and
9 it's certainly not the basis for some summary judgement,
10 which as I said, Mr. Munson is essentially asking you to
11 award him a verdict in this case. All he wants to do is
12 say they are entitled to commissions for the rest of
13 time. That's not -- that's what he's asked you to do in
14 the motion, at least technically and it's not
15 appropriate certainly, at this stage.

16 We think the motion should be denied because
17 the provisions they're asking you to construe are at
18 best, ambiguous, and they're certainly, contested. And
19 by looking at the document as a whole, it's clear that
20 they either require extrinsic evidence or they are the
21 unreasonable interpretation, what the plaintiff's
22 romancing. And the position that the defendant is
23 romancing will be found to be a reasonable
24 interpretation. It could have been terminated on
25 multiple occasions and actually, was terminated properly

1 pursuant to the agreement. Thank you, your Honor.

2 THE COURT: Thank you. And thank's for that.

3 I've viewed the -- I know Mr. Munson has walked in here
4 and stated the end part of his argument, which is he
5 wanted me to find a breach. I never saw that's what the
6 purpose of this is. On the issue -- therefore, I did
7 not view this argument today to be one that would lead
8 to liability or no liability or breach or no breach.

9 And like wise with this, I know that both sides
10 presented additional evidence that go outside of the
11 four corners of the document. I appreciate that,
12 because I know this is not going to be the end of the
13 end today. And that gave me some idea as to what I'm
14 looking at. If I went to extraneous evidence to
15 interpret a contract, I couldn't do that today. But I
16 do appreciate the extra information, because I feel like
17 that understanding what y'all still have left to do of
18 my understanding of what you haven't done yet, I think
19 it would be premature for me to come to those
20 conclusions. I'm simply looking at what's presented in
21 front of me as far as the document itself and stating
22 where there might be disagreement with that. Now,
23 Mr. Munson, I know you haven't replied yet, I'm just --
24 gonna let you do that, I just thought I'd throw that in
25 there.

1 Okay. Yes, Mr. Munson, would you like to
2 reply?

3 MR. MUNSON: I will and I'll try and be brief,
4 your Honor.

5 First, on the nature of Phil Durango on page
6 11, I would say, Mr. Harrill doesn't get to be the one
7 to interpret that either. He also said that Phil
8 Durango is the owner of the intellectual property, which
9 is all these products. So, Phil Durango here, is not
10 quote unquote just an account in a document, in a ledger
11 that Composite has somewhere. And if they were, they
12 would have attached it to their response this motion
13 some financial documents or accounting ledger that shows
14 that they carried them as a quote unquote account, which
15 they didn't do. They're here because they're the owner
16 of the intellectual property that is the product at
17 issue. And when you interpret the contract as a whole
18 meaning, looking at the GraviGate portion of this as
19 well. It is clear that these two special accounts
20 relate to products and that the commissions are intended
21 to be paid for as long as the projects are made. That's
22 why the terms "products" and "products" again, below,
23 the project continues that the profit margin on the
24 remaining items will have to be maintained. It's all
25 about the products, not about what some account might be

1 named on some ledger or some shortcut that might be used
2 in a title in this contract. We're all very familiar
3 with lots and lots of contracts that say, the captions
4 of this contract don't mean anything. That's a very
5 common -- we shouldn't get caught up on what people
6 caption things. Anyway, it's pretty obvious from the
7 last page that the "regular contract" is the rest of
8 this contract. It's the regular -- it's this contract.
9 And by "regular," if you look at this contract you see,
10 it is a relatively buy in large standard sales
11 representative agreement whereby, I agree to go into
12 grocery stores and sell your toilet paper to Winn-Dixie
13 or whoever and get paid commission on it. This, page
14 11, is different. And it begins with, that it's
15 special, that it's exceptions to what is above. And
16 then in the provisions both for GraviGate and for the
17 CAT tourniquet it says, "If, for any reason, the
18 regular contract is terminated." So it ends because --
19 because it expired. There's a provision in here to
20 where it's a yearly thing and it just continues as long
21 as nobody -- as long as that continues -- as long as
22 nobody says other wise. And then there's the 60 day
23 notice and the notice for the opportunity to cure, which
24 although mentioned is completely irrelevant. Nobody
25 ever sent us a cure notice with regards to anything.

1 But I would draw the Court's particular attention to the
2 Reyes, R-E-Y-E-S case that we attached to our reply,
3 which we filed today. It is exactly this case, where
4 somebody had an obligation to pay commissions for 7
5 years in that case, after the normal employment in that
6 case, agreement, ended. And the employer -- the person
7 responsible for those commissions made all the same
8 arguments that Mr. Harrill made. There's a termination
9 clause and therefore the termination clause trumps the
10 provision that says, this continues beyond the
11 termination. And that case points out that that's
12 nonsensical. To say that I agree to do something beyond
13 the terms of something and that therefore, ending the
14 term of something eliminates that, it's nonsensical
15 here. If that were the case then as soon as this
16 contract was written in 2005, Composite would have
17 terminated it. As soon as they got -- if they were not
18 required -- if they had no posttermination obligations,
19 as soon as they got my client to bring them this great
20 big fish that they were going to eat off for the next 20
21 years to the tune of \$500 million dollars, as soon as
22 they captured that for my client, they would have
23 terminated the contract and given him 60 days notice and
24 that would have been the end of it. With regard to --
25 as long as the project continues, these same tourniquets

1 are still being made by the same people under this
2 contract, under the same intellectual property, the only
3 difference is, they bought the intellectual property.
4 Now, they're the owners of the name. If GraviGate
5 changed its name, if it were -- if we had a contact with
6 FaceBook and then it changed it's name to Meta, then
7 Meta or whatever they're called now, it's something like
8 that -- that they changed their name, that the ownership
9 has changed, doesn't change the fact that these products
10 are being made from the same intellectual property as
11 when this was created and this project continues.

12 With regards to the noncompete. First of all,
13 lots and lots and lots of people patten things that are
14 similar to other products to protect the product, not to
15 compete with it. My client did not compete with them by
16 getting a patten on a similar -- on another tourniquet.
17 If anything, at the time they were protecting the CAT
18 tourniquet from competition by getting the patten.
19 Pharmaceutical companies, medical device companies do it
20 every day. I don't think they contested that my client
21 never sold a competing product before they terminated
22 the contract. And didn't even start to patten the
23 tourniquet until they imposed the unauthorized haircut.
24 And so, that's kind of factual thing with the
25 noncompete. I think you would recognize from looking at

1 that noncompete that is wholly unenforceable in South
2 Carolina. So, I mean, if you wanted to, go ahead and
3 interpret that. But I don't think that really -- really
4 comes into play. I think, if you look at the language
5 of the four corners. I'm not afraid of the four corners
6 of the contract. Look at the whole thing. Look at the
7 final page. Use the interpretive tools that South
8 Carolina provides to judges on specificity versus
9 generality, new versus old, expressed versus implied and
10 I think you'll find that what we're asking to be
11 declared as a matter of law is what should be a
12 appropriately done here. Thank you, your Honor.

13 THE COURT: Thank you. Let me ask --
14 Mr. Munson, the way that I interpret your motion is far
15 more limited than what you're asking me to do.

16 MR. MUNSON: So, on that point. When I said,
17 they breached it. I wasn't meaning to carry that to
18 judgement. They may have defenses or excuses for
19 breach, but the obligations is there. Which is
20 technically what I asked for and what I'm asking for.
21 And I just think it's recognized fact that they haven't
22 paid, which would constitute the breach if the
23 obligation is recognized.

24 THE COURT: Well, thank you for that clarity.
25 Let me ask you a question -- another question.

1 You just made an argument that indicates that
2 the monetary value of what's at issue here is about half
3 a billion dollars?

4 MR. MUNSON: It could be more than that, your
5 Honor. Half a billion is the amount of tourniquets
6 they've sold since this began.

7 THE COURT: If that is the financial issue at
8 stake, I want to make -- I want to give this, as I would
9 any case, but when I'm looking at half a million
10 dollars, I'm going to give it the half a million dollars
11 look. And what I'm seeing right now is, both of your
12 arguments have indicated to me the significance now of
13 this motion. I did not, based upon what traditionally I
14 hear in the development of these types of cases, I would
15 hear this one after a lot of discovery had been done. I
16 will be hearing -- I would be receive a lot more of what
17 I would consider broad arguments. Because I think this
18 motion is going to be pretty significant to the outcome
19 of this case.

20 MR. MUNSON: And to be fair, your Honor, we're
21 only getting \$1.75 on that. In the the past we've only
22 gotten \$1.75 on that half a billion dollars.

23 THE COURT: Okay. That's still a substantial
24 amount of money.

25 MR. MUNSON: It is, your Honor.

1 THE COURT: Right now this document says what
2 this document says. I cannot go beyond that to say that
3 entitles your client to really anything other than this
4 document's going to say what this document says. What
5 y'all have argued to me today, both sides want me to
6 consider other outside extrinsic evidence, conduct of
7 the parties, whether or not they've breach other
8 provisions or not, that somehow either do relate or
9 don't relate to this. So I see this partial motion for
10 summary judgment as being maybe premature at best. But
11 this document -- I mean, it's going to say what's
12 written on the paper here. Does Phil Durango -- does
13 this paragraph that talks about commissions for this
14 account is to be continued if for any reason the regular
15 contract is discontinued and paid to the estate for Dan
16 P. Cedrone for as long as the project continues?

17 MR. MUNSON: I mean --

18 THE COURT: Does that apply to this case?
19 Defendant says, no. Their position, if I understand
20 them correctly is, no, it doesn't apply because this
21 thing was terminated.

22 MR. MUNSON: But your Honor, he also attempted
23 to suggest that because the word "discontinued" is used
24 here, it's unrelated or is related to the termination
25 provision. And somehow, we don't know if that means,

1 termination -- that their termination under the terms of
2 the contract for which they could stop my client from
3 being a sales representative for them, stops them from
4 being obligated to pay commissions on the contract,
5 that's their position. And were trying to get the Court
6 to say, that's not what the contract says. The contract
7 says, that regardless of any discontinuation of the
8 regular contract, this obligations continues.

9 I mean it seems like that's a pretty narrow
10 thing that the Court could interpret for us here.

11 THE COURT: That might be -- that is a pretty
12 narrow thing, but I'm not sure I can go that far right
13 now.

14 MR. MUNSON: Does the Court recognize that at
15 some point that, unfortunately the --

16 THE COURT: Yeah. I'm not saying I'm not going
17 to, but I think right now, I can't.

18 MR. MUNSON: Do you have -- what do you think
19 you need to be able to be in that position?

20 THE COURT: I would need -- I would need a
21 better record to know what these arguments that have
22 been presented to me today. As to what are the
23 positions of the parties. I mean, I did not see your
24 motion as being one that would have a conclusive effect
25 to the outcome of this litigation, and I think that this

1 might. I can see the defendant's argument as to what
2 they want that paragraph to be viewed. I can see -- I
3 think their position is -- I can consider. I can also
4 understand your client's position and wanting me to read
5 that particular provision the way that you want it to be
6 read.

7 MR. MUNSON: Your Honor, would you find it and
8 maybe this is more of a rhetorical question and you
9 would need to study briefing on this. But would you
10 find the implication or the -- the implication of the 60
11 day termination of the sales representation relationship
12 to mean that, this obligation was also terminated
13 because that's -- that's one thing that it would help us
14 to, for the Court to say, "No, those two things don't
15 relate to each other." Like the Reyes case shows in the
16 reply that I filed this morning.

17 THE COURT: Yeah, I think so. As well as,
18 you've made assertions and arguments that some of the
19 positions asserted by the defendant are not -- I'm going
20 to put words in your mouth, are untrue or not
21 believable. Probably some more information as to why
22 you view that that way. Because if conduct of a party
23 indicates that they've acted in a way that's contrary to
24 what a particular -- particular what now the defendant's
25 lawyer wants me to say, this contract provision must

1 admit A, but yet he acted as if it was C. When you've
2 establish that he acted like it was C. And obviously
3 that's an argument that I'm not going to -- argument
4 presented by counsel that I'm not going to accept in the
5 interpretation of the agreement.

6 MR. MUNSON: Sir, can I ask that you take it
7 under advisement and allow us to provide supplemental
8 briefs?

9 THE COURT: Well, I don't want to take it under
10 advisement, because if I take it under advisement I
11 don't want to limit myself to ask y'all to come back and
12 give me more information and give me more arguments. Or
13 to say, okay, you've had your time at bat, you don't get
14 another swing at it. And reason I'm hesitant to say,
15 take it under advisement and hopefully this does not
16 happen, because that means something's happened to me.
17 If I do something like that, then it could be that,
18 let's say something tragic happens to me I could be I'm
19 binding another judge that comes later to take a look at
20 it. I'd rather -- I'd rather just either continue this
21 hearing, consider it premature or ask for additional
22 briefing and ask for additional evidence. I don't want
23 us to say that today, what we did is not important, it
24 is. It's going to be taken into account. But I don't
25 want this to be seen as some type of, we're closing the

1 door now or limiting in the event that I decide you need
2 to go out and get another deposition or need to get
3 another affidavit or need to get further clarity. They
4 need to present to me additional briefing.

5 I'd like the chance to be able to actually
6 take a look at the four corners of the document to be
7 sure that I have everything.

8 MR. MUNSON: Do you want to continue it to
9 when we do the other summary judgment motions?

10 THE COURT: We'll get to that. I mean, I'd
11 like to do it as soon as possible.

12 MR. MUNSON: Okay. Okay.

13 THE COURT: Let me tell you I just walked
14 back. I didn't walk back, I drove back from the circuit
15 court judge's conference that we had for the last 3 days
16 to get here to this thing. The focus -- the things that
17 we're being asked to do in regards to the general
18 session docket is so -- the pressure is intense that I'm
19 gonna try to do what I can to give y'all as much time as
20 I can for something that is considered common pleas. So
21 I'm going to do as much as I can to get as much time for
22 y'all as is needed since we've all, at least I have, put
23 the ball in motion for this thing to go to a jury trial
24 towards the second or third week of July. Second or
25 third or forth week of July. So I guess what I'm

1 saying, don't wait until then and in receiving things
2 sooner than later.

3 MR. MUNSON: Okay, your Honor. Thank you.

4 THE COURT: Now, the reason I also want to do
5 that is I've viewed that interpret of this contract is
6 something a jury is not going to do. It's going to be
7 something I'm going to have to do at the initial stage
8 and my interpretations may very well as, defense counsel
9 has argued, might lead to some resolution or maybe an
10 appeal, of something I ruled, and that never offends me.
11 So, at least we maybe try to get this scheduled as --
12 sooner than later. That's about the best I can do for
13 y'all today.

14 MR. HARRILL: Your Honor, can I ask -- I'm not
15 sure what you're telling us today. It seems to me the
16 best thing to do is, deny without prejudice and let us
17 come back. We're going to want you to interpret it our
18 way as well. So I don't know if we're going to need to
19 be battling motions. But at some point, there has to be
20 a hearing on interpretation of the contract, I guess, as
21 a whole. And unfortunately, that falls to you so... Or
22 you may find it ambiguous.

23 THE COURT: That's fine. I'm definitely
24 willing to do that and want to do that. Because even if
25 my ruling on the interpretation do not conclude the case

1 or doesn't result in some settlement. At least I feel
2 like it would be assistance to this jury that we're
3 going to bring in to make decisions in this case and as
4 many issues as I can narrow down for them as possible,
5 I think would be helpful. We're going to ask 12 people
6 to sit and hear some very significant issues between
7 these parties. Okay.

8 So, I'd rather not say I'm denying it without
9 prejudice. I'd rather just stop right now and we can
10 continue it on. If defense wants to file some motion
11 themselves at to some issue y'all want that relates to
12 interpret this contract, let's go ahead and get those
13 done and filed. That way, Mr. Munson then won't have to
14 argue, I've got to go take a deposition or I got to go
15 do something else. Let's get those done.

16 With that in mind, I'm going to reach for my
17 calendar so that we can try to take a look at y'all's
18 calendar and maybe. And again, y'all have no idea --
19 I'm dealing with a lot -- I'm juggling a lot of balls
20 with court administration trying to get the general
21 sessions docket done and then doing anything else.
22 Okay. I'm getting my law clerk to check to see if I have
23 a date certain for trial already set for a particular
24 week. I think I do.

25 MR. HARRILL: Your Honor, you may want to

1 schedule this particular hearing sooner, but I still
2 have on my calendar that we have the 27th of June is
3 potential hearings in this case, the 27th and 28th.

4 THE COURT: Yeah, I want to do this hearing
5 sooner than that. The 27th and 28th is getting -- still
6 it's less than a month, but not the next week.

7 Y'all think on contract interpretation, these
8 issues and any issues that maybe defense would want me
9 to take a look at, for contract interpretation, y'all
10 could be ready sometime the week of the...

11 MR. MUNSON: 16th.

12 THE COURT: 16th, yeah. I do have a day
13 certain for trial the week of the 16th, but I feel -- I
14 feel confident the end of the week, Thursday afternoon
15 or Friday morning.

16 MR. MUNSON: I can do those.

17 THE COURT: What does defense look like?

18 MR. HARRILL: I have depositions scheduled on
19 Thursday, I shouldn't go late. I would prefer Friday
20 morning if we were going to do one of those two days to
21 be certain I have time to prep.

22 THE COURT: Mr. Munson, Friday morning?

23 MR. MUNSON: Fine by me, your Honor.

24 THE COURT: I guess cocounsel's, Mr. K. and
25 Mr. M. will follow y'all's lead. Let's pencil that in.

1 MR. MUNSON: Can we include the motion to deem
2 admitted or compel interrogatory answers for that
3 morning as well?

4 THE COURT: If you want to and you don't work
5 it out, maybe.

6 MR. MUNSON: Thank you, your Honor.

7 THE COURT: All right. Motion for summary
8 judge. Anything -- let me ask y'all to do me a favor.
9 If you've done any more briefings, any more of the case
10 law. Mr. Munson, you know, again, morning, drove back
11 from the judicial conference, I read your submission. I
12 read the case. I did not digest the things for -- to be
13 absorbs and say I understood all your points. I've got
14 everything already that both sides have given me. I've
15 taken a look at it. I still have those things. But
16 anything else that y'all want me to have, it would be
17 beneficial if maybe I could have it, at least maybe 48
18 hours ahead of time.

19 MR. MUNSON: Yes, sir.

20 THE COURT: That would be a great benefit.

21 MR. HARRILL: Would this be virtual, your
22 Honor?

23 THE COURT: Yes, sir. As we were instructed.
24 Common pleas nonjury is supposed to be, as much as we
25 can, virtual. It helps with the scheduling with court

1 administration. Now, if we get to the point that, at
2 any time even with this case or anything else, we go
3 nonjury matter with me and you want in to be person,
4 just let me know and the reason and I'll try to
5 accommodate and do it in person. Unless we hear other
6 wise, this thing would be virtual.

7 MR. MUNSON: Your Honor, did you ask about how
8 discovery was going?

9 THE COURT: I did.

10 MR. MUNSON: We are still not getting what you
11 ordered to be produced. We got -- I was complaining at
12 our hearing on the 22nd, and then on the 28th we got
13 some additional production from the defendant's, but I
14 still don't think I've gotten any of the deposition
15 transcripts that we asked for. I attached to our --

16 MR. HARRILL: I can give a status of this,
17 your Honor. I can give a status, I think, rather than
18 have Mr. Munson say what he --

19 MR. MUNSON: Thank you. Thank you.

20 MR. HARRILL: Your Honor, we've sent Mr.
21 Munson about 35,000 pages of documents, which came from
22 those federal court patten cases that we argued were not
23 relevant, but he wanted, so we have done that. The
24 transcripts from depositions, I don't know that he has
25 any of those. I don't think he does. But we have gone

1 through those and he should have them in the next day or
2 so. But we had to go through those your Honor, to make
3 sure and Mr. Munson's been copied on some of these
4 letters, so it's not a mystery. Attached to a number of
5 those depositions are confidential documents from third
6 parties. So we've written letters to these third
7 parties pursuant to those agreements to say, we've been
8 asked and ordered to produce this stuff and "We have an
9 obligation to give you a notice of that." So if they
10 want to come in and move to quash or move to something
11 before your Honor. I think everyone has consented to
12 this point, as long as we keep it highly confidential.
13 So Mr. Munson should see a bunch of transcripts coming
14 his way this week I think.

15 Also on the emails, Mr. Munson asked for
16 extremely broad production and that's resulted in
17 thousands and thousands of emails. And we can't just
18 turn them over without at least making sure they're not
19 attorney/client and things like that. So we're going
20 through those and we're gonna try to get those to him
21 ASAP. But it is gonna take a little bit of time to go
22 through because of sheer volume breath of his request, b
23 ut anyway that's where we are. And he has all the
24 documents from those federal court case, the patten
25 cases except the transcripts at this point.

1 THE COURT: Now, Mr. Munson, you had wanted me
2 to get you this stuff sooner than later because you
3 wanted to take somebody's deposition.

4 MR. MUNSON: That's correct, your Honor. It's
5 impingement on your July 18th trial week. I mean, this
6 is stuff that was ordered in October of 2020.

7 THE COURT: And I know -- it's not my July
8 18th week. Y'all wanted me to get it for that.

9 MR. MUNSON I appreciate --

10 THE COURT: I was going to get that. I went
11 and got that. I moved Mount Everest to get that day.

12 MR. MUNSON: And I've looked at the tri terms
13 and see that you did do that and I want to have trial
14 that week, but I shouldn't have to get stuff the week
15 before, that I need for trial.

16 THE COURT: Well, I'm trying to get you the
17 stuff to take your depositions, so you don't come and
18 say I haven't taken depositions yet.

19 MR. MUNSON: Thank you, your Honor.

20 THE COURT: Who do you intend to depose with
21 all this massive amount of information?

22 MR. MUNSON: Jonathan Bennett, he's the CEO of
23 the company. A corporate rep for the company. Morgan
24 Brady who is the current president of the company, I
25 think. A few other former employees the North America

1 Rescue, a corporate representative and a couple of
2 particular individuals over there, Mark Esposito, the
3 person who invented this product.

4 THE COURT: Have you already scheduled with
5 Mr. Harrill and get those dates worked out for
6 depositions.

7 MR. MUNSON: We have not because I don't
8 have -- I keep getting promised these deposition
9 transcripts as early as March 31st when we had our
10 original hearing and here we are May the 5th or May the
11 4th be with you and I don't have the documentation to
12 prepare.

13 THE COURT: Well I mean you could go ahead and
14 try to scheduled it and then you can come to me. Judge,
15 I've got this deposition coming up. They're not giving
16 the stuff. Then you can complain like that and I can
17 help you get the stuff.

18 MR. MUNSON: That's fair, your Honor. I will
19 jump in that lane.

20 THE COURT: Yeah, jump in that lane. Try to
21 get things scheduled, that way I feel good, I feel
22 better that somehow we're moving this along so when I --
23 that way court administration and the parties and judges
24 that I said, I got to be there the 18th and I might have
25 to be there the week after that, they don't look at me

1 like I'm an ostrich or something or worse.

2 MR. MUNSON: Thank you, your Honor.

3 THE COURT: Okay. I will see y'all again on
4 the Friday the 20th at -- sorry, my law clerk was
5 speaking to me in one ear. So, we've got the 20th, say
6 9:30?

7 MR. MUNSON: Sure, your Honor.

8 THE COURT: And we also have the 27th and
9 potentially the 28th for any other motions. If between
10 now and say, after at 20th or between now and the 20th,
11 y'all develop other motions you think I need to address
12 and might need to work it in earlier, let me know. Make
13 me aware of them and I will try to maneuver some things
14 around. After what I've heard about general sessions,
15 it's -- I will try to do that.

16 Anything else I can do for y'all today.

17 MR. MUNSON: Nothing from the plaintiff's,
18 your Honor.

19 MR. HARRILL: That's it. Thank you, your
20 Honor.

21 THE COURT: Thank y'all very much. See y'all
22 soon. Let me know if I can help. Thank you.

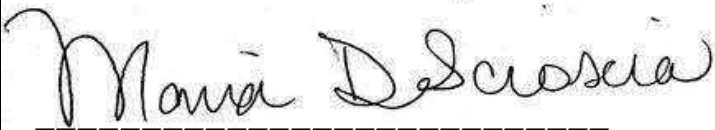
23 (Whereupon, the virtual hearing in the
24 above-caption matter was adjourned.)

25

C E R T I F I C A T E

I, the undersigned Maria DiScioscia, Official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the record of all the proceedings in the captioned case, in the Circuit Court for York, South Carolina, on the 4th day of May, 2022.

I do further certify that I am not related, either by blood or marriage, to any of the parties in this action; and that I am in no way interested in the outcome of this matter.



Maria DiScioscia
Official Court Reporter

State of South Carolina	)	
	)	
County of York	)	
	)	
Daniel Cedrone, et al.,	)	2019-CP-46-00051
	)	
Plaintiffs,	)	
	)	
v.	)	Transcript
	)	
Composite Resources,	)	of
Inc.,	)	
	)	Hearing
Defendant.	)	
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Date: May 20, 2022

Time: 9:38 a.m.

Location: This hearing was held via
Webex for all parties.

Reported by
Amber Payne, CVR

APPEARANCES

Presiding: The Honorable J. Mark Hayes, II

For the Plaintiffs: Keith D. Munson, Esq.
Rimon Law
220 North Main Street
Ste. 500
Greenville, SC 29601

Michael Montecalvo, Esq.
Womble Bond Dickinson
One West 4th St.
Winston-Salem, NC 27101

For the Defendant: William Klett, III, Esq.
Burr & Forman, LLP
P.O. Box 11390
Columbia, SC 29211

Paul D. Harrill, Esq.
Burr & Forman, LLP
P.O. Box 11390
Columbia, SC 29211

Also Present: Law Clerk: Zachary Turner, Esq.

INDEX

	Page No.
Hearing:	4
Court Reporter's Certificate:	79

EXHIBITS

There were no exhibits marked during this hearing.

1 PROCEEDINGS

2 THE COURT: Okay. The court reporter has got
3 all of her information she needs?

4 THE COURT REPORTER: Yes, Your Honor.

5 THE COURT: Okay. Good.

6 (To the attorneys) All right. Thank
7 y'all for getting back together on -- on this
8 -- on the motion. I've had a -- since our
9 last time together, I've had a better chance
10 to digest the information that y'all have put
11 together. So I think I'm in a better position
12 to understand the arguments, but I look
13 forward to receiving them.

14 Mr. Munson, anything in addition to what
15 you argued last time or you want me to
16 consider more strongly from last time. You --
17 it's your opportunity to go.

18 MR. MUNSON: Yes, Your Honor. Yeah. Based on
19 your potentially -- invitation to provide
20 additional information on specific terms that
21 we would like to have the Court construe, we
22 submitted a filing this week with -- it begins
23 kind of with Black Letter Law of the various
24 construction tools available to the Court when
25 looking at the four corners of a contract to

1 try and determine as a matter of law
2 unambiguous terms.

3 And then we went in kind of a -- a chart
4 formation, identifying particular terms that
5 we think are unambiguous and can be
6 interpreted by the Court as a matter of law.

7 And we went term-by-term with them,
8 identifying the term, sometimes saying where
9 the context comes from within the four corners
10 of the complaint -- or within the contract,
11 what we think the definition is, and then an
12 analysis of mostly what it means for that
13 definition to be in the contract. And then at
14 the end, we kind of repeated our request for
15 relief to have these -- one, to have these
16 terms interpreted in a way that we set them
17 forth, and -- and then, two, after doing that,
18 finding that the contract requires Composite
19 to be obligated to pay Plaintiffs the profit
20 margin on the -- on the raw materials and the
21 commission on the tourniquets.

22 And the -- in addition to the -- the
23 construction that we laid out in the original
24 memorandum, the supplement goes to the terms
25 of who the drafter is of the complaint, which

1 we think is clearly Composite. It's on their
2 stationery. They signed it. The wording
3 suggests -- I mean, they signed it first. The
4 wording in terms of how things are defined
5 makes it pretty clear that -- that Composite
6 was the one who put this -- these words to
7 paper, so to speak.

8 The second term that we put in our chart
9 is "independent contractor." And -- we agree
10 that Poly-Tech as the sales rep is -- the
11 relationship between the parties is that of an
12 independent contractor, and we lay out from
13 case law what the definition of an independent
14 contractor is in South Carolina at that root
15 analysis standpoint that impacts the
16 obligations of the parties with regard to the
17 contract. You -- you can't, at the same time,
18 say somebody is an independent contractor and
19 then say the contract allows you to put your
20 boot on their neck and control absolutely
21 everything they do.

22 And I -- I'm not particularly sure that
23 that's an issue, having seen their response
24 because, now, really, I think it comes into
25 play on the issue of being instrumental in

1 causing a sale to occur from their reaping --
2 I understand that they agree that -- even to
3 the extent that that applies to an independent
4 contractor, it only applies to the commissions
5 under Block A of Annex C, and this case is
6 about Block C of Annex C.

7 But, anyway, to the extent that is an
8 issue, this is what it means to be an
9 independent contractor in South Carolina and
10 how that relates to the terms of the contract.

11 The next term that we think is worth
12 defining, and -- and it's clear from the
13 contract, is who the representative is; and
14 that is Poly-Tech Industrial. And to the
15 extent that there are concerns or allegations
16 about Dan Cedrone, he is not the
17 representative under the contract. That's
18 generally the significance of that term.

19 The next term, and this one's -- I mean,
20 the definition isn't all that complicated, but
21 it's what compete means -- the word "compete"
22 means. And the context here is that the
23 representative -- and that would be Poly-Tech
24 -- agrees to refrain from activities which
25 compete with Composite during the term of the

1 agreement.

2 And Black's Law defines "compete" to be
3 the struggle between rivals for the same trade
4 at the same time.

5 Now, where that comes into play is that
6 it would be limited -- actions that compete in
7 this case, would be limited unambiguously to
8 active activities to try and obtain the same
9 trade at the same time. And, I mean, we just
10 want that as the definition. It -- it's
11 significance here is the allegations of
12 whether or not Poly-Tech -- and, again, that
13 would be Poly-Tech not Dan Cedrone -- actively
14 competed in violation of the terms here, would
15 be limited to active attempts to steal away a
16 customer at the same time that Composite was
17 after a customer during the term of the
18 agreement.

19 And -- and, frankly, I think our analysis
20 goes further into pointing out that any
21 broader of a definition would -- would, as a
22 matter of law, make the compete provision
23 unenforceable in South Carolina under the --
24 the -- I'm sure the Court knows the very well-
25 developed, No Blue Pencil construction against

8 So, anyway, that's -- that's what we
9 believe the unambiguous definition of compete
10 is, and our knowledge just kind of lays out
11 what we think the effect of that unambiguous
12 definition causes in this case. And, in fact,
13 there is a specific provision in the contract
14 that says, "Should a term in this contract be
15 found to be unenforceable, that the -- that
16 term falls out of the contract and the
17 contract is enforced as if that term were not
18 in the contract." So that's the significance
19 of defining compete.

25 We -- the definition that -- that we

1 think is clear from the four corners of the
2 contract is that Phil Durango, LLC is a short-
3 term reference to the product rights holder
4 for the combat tourniquets. That the owner of
5 the intellectual property rights of the combat
6 tourniquet -- essentially that the
7 entity/person/owner who has the power to allow
8 somebody to manufacture the tourniquets.

9 And we lay out the -- we lay out the
10 analysis for that within the four corners of
11 the contract. We make reference to the
12 filings with the United States Patent and
13 Trademark Office regarding these tourniquets.
14 And, significantly, when you look at Page 11
15 of the contract, there are two kind of
16 connected special exceptions to the rest of
17 the contract. One is the GraviGate, and one
18 is Phil Durango combat tourniquet provisions.
19 And when you see them both together in the
20 greater context of the entire agreement, it's
21 clear that what's being talked about in that
22 provision is the combat tourniquets, not just
23 some ledger accounting term.

24 And I won't belabor the -- the analysis
25 there, but we went for several pages, because

1 that seemed to be a significant issue with the
2 hearing on -- on the -- I guess, the -- I
3 forget when it was we were together -- the
4 10th, I think, maybe.

5 The next term we want to define, and this
6 is -- I mean, well, it's the word "and." It
7 seems unimportant, but it actually is
8 extremely important in this case.

9 On Page 11 of the contract, at the very
10 beginning of it, it talks about the special
11 accounts that are laid out on Page 11 "being
12 exceptions to the above commission conditions
13 and rights," and then "and are paid
14 individually as described below." So there's
15 this demarcation between what's above and
16 what's below.

17 And you'll see in Composite's filing on
18 these issues today that they only want to talk
19 about what's above. They only want to talk
20 about the stated exceptions to the commission
21 rate. They completely ignore the fact that --
22 that Page 11 expressly also accepts what comes
23 below to be ruled by the information that
24 comes below.

25 So to the extent that anything described

1 below conflicts with what's above, the
2 information below would expressly supersede
3 it, both by specificity and temporally comes
4 after and by the expressed terms of -- of
5 that.

6 They're out there -- one of my major
7 criticisms of their entire suggestive
8 interpretation is that they ignore what comes
9 below here. For example, they say there's a
10 termination provision that allows for the
11 parties to terminate the contract without
12 cause, and, therefore, since they terminated
13 it -- terminated the sales representative
14 relationship, everything disappears. It
15 completely ignores what comes below on Page 11
16 where it expressly states, "Should the --
17 should this contract be terminated, for any
18 reason whatsoever, these commissions
19 continue." That's just one example where the
20 -- the failure to acknowledge that the word
21 "and" on Page 11 requires analysis beyond just
22 a different commission rate. It also requires
23 that these products be controlled, first and
24 foremost, by the terms that appear below on
25 Page 11. Anyway, that's the -- that's the

1 significance of defining "and."

2 The -- in Paragraph 7, this -- I won't
3 belabor it, but it -- it falls with the same
4 analysis with regard to the -- what is -- what
5 is entailed in the commission rate above for
6 which these tourniquets are exempted from both
7 -- from the statement that they're exempted
8 from those commission rates and conditions.
9 And then, again, they're controlled by the
10 terms that follow on Page 11.

11 And -- and so they are the -- I break
12 that down and provide sources for -- for
13 definitions of various related terms that go
14 into the concept expressed there, and that
15 would be what "commission" means, what "rate"
16 means, and -- and what we believe "above
17 commission rate" means. And, again, that one
18 may not be -- we may not have a dispute about
19 that because in their writing they seem to
20 acknowledge that the idea of being
21 instrumental in making a sale applies to only
22 the Block A commissions, which are not at
23 issue in this case and fall on Page 10, not
24 Page 11.

25 The -- so the -- the -- in Block 8 of my

1 chart, we ask the Court to construe regular
2 contract and exception. We -- we believe it's
3 pretty clear and obvious from the four corners
4 of the complaint that -- of the contract that
5 the regular contract is a part of the contract
6 that's not subject to the exceptions, so that
7 would be Pages 1 through 10. Then, Page 11
8 provides the exceptions. What are the
9 exceptions from? They're exceptions for the
10 rest of the agreement, making the obvious
11 definition of the regular contract being the
12 part of the agreement that's not set forth in
13 this page of exceptions.

14 And I provide a dictionary definition of
15 "regular" and a dictionary definition of
16 "exception." I think that might help to see
17 the clear intent of the parties from review of
18 the four corners and that -- and what you --
19 and what can be discerned as the general
20 purpose between the parties from the terms
21 that they used.

22 Then on -- on Block 9, we discuss the
23 definition of commission for this product to
24 continue as long as the product line continues
25 and commission for this account to continue as

1 long as the project continues. From reading
2 of that entire four corners and the purpose of
3 the contract that can be discerned from the
4 four corners, those are synonymous. And,
5 frankly, to the extent that they're not,
6 Composite's the one to -- that the words don't
7 exactly match. Composite's the one who put
8 this on their stationery and drafted these, so
9 the -- the rules of construction for a
10 contract, which can be used by the Court in --
11 in evaluating whether a language within the
12 four corners is unambiguous or not, should --
13 the tiebreaker should be in our favor,
14 although I -- you really don't need a
15 tiebreaker.

16 The -- the context in which both of those
17 phrases are put into Page 11, makes clear that
18 the focus is the product and that the
19 commissions are as stated in each of the
20 paragraphs and that as long as Composite is
21 handling those products, the commissions
22 continue.

23 The -- I also provide a definition of the
24 word "account" from Black's Law Dictionary. I
25 mean, this came up before, but they wanted to

1 narrow it to some kind of accounting ledger
2 reference, but account has a -- a broader
3 meaning than that within the context of this
4 contract; it's clear that they're talking
5 about CAT tourniquets. In fact, elsewhere in
6 the contract, Composite notes that the
7 contract is intended to cover all products --
8 all products that Composite handles.

9 And whether you change the accounting
10 ledger reference from Phil Durango to
11 Composite itself, doesn't change the fact that
12 this is a product that Composite is still
13 handling, and that this contract expressly
14 covers all products handled by Composite.
15 Now, if the -- if the project line
16 discontinued, they stopped making them, there
17 wouldn't be a product to handle anymore, but
18 they -- they haven't stopped making them.
19 They haven't stopped manufacturing them. It
20 is still one of all the products they handle,
21 and it's still a project that continues, which
22 from the four corners, is clearly the intent
23 of the provision on Page 11 regarding that
24 issue.

25 Okay. I think I'm -- I think I'm down to

1 the last couple, maybe even the last one,
2 which -- which is now on to a different topic,
3 and that is the confidentiality provision.

4 In that writing, they -- they suggest
5 that the confidentiality provision is a
6 relatively standard confidentiality provision.
7 I -- I would disagree with that. The term
8 that we think should be construed is quote,
9 "any information of an unpublished
10 confidential or -- or proprietary nature."
11 Which that is -- it might be somewhat standard
12 if it said, "Of a designated confidential or
13 proprietary nature."

14 But the definition of "unpublished" would
15 essentially be all the information that --
16 that wasn't, quote/unquote, "published by
17 them." Some article that they wrote, a -- I
18 don't know if they would even say stuff filed
19 with the patent office would be,
20 quote/unquote, "published." It's certainly
21 public, but I don't know that they would agree
22 that it was published.

23 The result of that, though, is that the
24 confidentiality agreement -- which when a
25 confidentiality agreement is broad like this,

1 is a restrain on trade and does get evaluated
2 under the South Carolina law on
3 anticompetitive provisions. One is so broad
4 that -- that it -- it's got to fail, and
5 suffer the same fate as a noncompete
6 agreement. It initiates -- without kind of a
7 better definition of -- of what these areas
8 are, they're left to decide -- well, you know,
9 I guess you don't need to get into that here.

10 Regardless of what the definition is,
11 there's still going to be an issue of whether
12 some piece of information falls within it,
13 which, fair enough, is beyond the scope of
14 what we're doing here today. But I will say
15 proprietary -- the definition of "proprietary"
16 in Black's Law Dictionary is information that
17 due to -- information that acquires property
18 rights for the owner. And I think they want
19 to interpret it as any information that --
20 that came to them within their business. But
21 Black's Law definition would require that a
22 proprietary piece of information would have
23 protectable interests for the owner. And you
24 can't -- you can't get those protectable
25 interests just by using the word in a

1 confidentiality provision.

2 So, for example, if Aplix -- one of their
3 suppliers told them information about Aplix's
4 product, for example, there are a hundred
5 little hooks and a hundred little loops per
6 square inch on their product; let's say they
7 told them that. That they have that
8 information, doesn't make it proprietary
9 information to them, because they don't own
10 that information, and they don't have any
11 protectable rights in that information.

12 And so when you -- if you use Black's Law
13 Dictionary, which, again, here we're just
14 trying to define what proprietary rights are,
15 that -- that may be appropriate, the analysis,
16 I think, will be -- ultimately we'll find that
17 they -- they don't have information to
18 complain about in their -- in their claims on
19 that point.

20 But going back, though, I think you can
21 see, as a matter of law from the Court, that
22 the confidentiality agreement, which has no --
23 again, has no temporal and has no definition
24 of these vague terms -- look -- if you look --
25 if you said noncompete instead of

1 confidentialities, you would look at that and
2 say, "That is so vague that it is a restrain
3 on trade and would violate the noncompete
4 stuff." And we cite the case law that -- that
5 says, "A confidentiality agreement that is so
6 broad that it impacts competition needs to be
7 evaluated under the competition standards in
8 South Carolina."

9 As a subset of that, one of the terms in
10 the confidentiality agreement is subsequent to
11 the terms of this agreement. That's the --
12 that's the temporal structure that the
13 confidentiality employs during that -- during
14 the agreement and subsequent to the term of
15 the agreement and after termination of the
16 agreement.

17 So those terms clearly show that there's
18 no temporal limitation on these
19 anticompetitive provisions, and we suggest
20 that they should be -- that subsequent to the
21 terms of the agreement and after the terms of
22 the agreement, should be defined to mean the
23 termination date August 31, 2018 through
24 infinity. And with that definition, those
25 provisions violate South Carolina

1 Anticompetitive Law.

2 Another issue that I think came up at the
3 -- and so it's worth defining, that came up
4 earlier at the hearing -- and this is the last
5 one -- is what "cause for termination" is.

6 In this contract, cause for termination
7 requires a -- a group of things. One would be
8 to do some activity that would support cause
9 for termination. So, for example, taking --
10 I'm sorry. I'm just moving my mouth and not
11 saying anything.

12 Cause for termination might be taking a
13 pallet of these tourniquets and going to a
14 fair somewhere and trying to sell them. That
15 may be an act that would.

16 But in this contract, for there to be
17 cause for termination, they have to give us
18 written notice of it, and they have to give us
19 a time to cure. And so the opportunity or the
20 -- the rightness in them to terminate the
21 contract for cause doesn't exist unless 20
22 days have expired after a written notice has
23 been provided.

24 And so we -- we just ask that that term
25 be defined as a condition existing only upon

1 the expiration of 20 days after written notice
2 of a material default of performance has been
3 provided and not cured, which from that
4 revision in Section 9 of the contract is
5 clearly that unambiguous, meaning of cause for
6 termination.

7 So to conclude, we think this in
8 conjunction with our original motion, allows
9 the Court -- almost compels the Court to
10 define these terms in this way, as a matter of
11 law, unambiguously, and -- and the result of
12 that is an unambiguous recognition that
13 Composite was and is obligated to pay
14 Plaintiffs \$1.75 per combat tourniquet sold
15 and for which is sold in the future. And, in
16 addition, they're obligated to pay the profit
17 margin on the Aplix material, whether or not
18 they ordered it through us or ordered it
19 elsewhere as set forth in the contract.

20 So that's my presentation, Your Honor.
21 Thank you.

22 THE COURT: Okay. Thank you very much for
23 that. Give me -- I'm gonna take about five
24 minutes break. I'm gonna come right back to
25 you. I've got to take care of one other quick

1 matter. I'll come right back, so let's take a
2 -- a restroom break. I'll come right back and
3 look forward to talking with the other side.
4 Give me five minutes.

5 (Off the record from 10:09 a.m.
6 until 10:27 a.m.)

7 THE COURT: I apologize. It took more than
8 five minutes. I've been taking my schooling
9 on how to estimate time from the trials I've
10 been doing this week. Ask how long a witness
11 is gonna take. "Judge, we can get it done in
12 30 minutes." Two hours later, you know,
13 "Okay. You ready for cross-examination." So
14 I apologize for taking so long.

15 Okay. Okay. Mr. Harrill, you gonna
16 carry -- carry the water for the Defense?

17 MR. HARRILL: No. Mr. Klett is going to argue
18 today, Your Honor.

19 THE COURT: Okay. All right. Mr. Klett, I'll
20 be more than happy to hear from you. I can't
21 hear you. Wait a minute. There might
22 something wrong. (To the law clerk) Is he
23 muted? Try one more time, Mr. Klett.

24 MR. KLETT: Can you hear me now?

25 THE COURT: Yeah. There you go. I can hear

1 you. Madam Court Reporter, I'm going to
2 assume you can or otherwise you'd tell us.
3 Okay. Yes, sir.

4 THE COURT REPORTER: Yes, Your Honor.

5 MR. KLETT: Good morning, Your Honor. Corky
6 Klett appearing on behalf of the Defendant,
7 Composite Resources, Inc.

8 It's the Defendant's understanding that
9 the purpose of today's proceeding is to argue
10 contract construction and help the Court, if
11 it can, construe the terms of the agreement.

12 We have submitted a contract construction
13 brief that sets forth all of the standard
14 Black Letter Law allowing the Court to
15 construe a contract. And -- and the important
16 thing is if a contract is unambiguous, it is a
17 question of law for the Court to construe. If
18 the Court, however, finds that there is
19 ambiguity in that language, and that
20 determination is also a question of law, then
21 it's a fact issue that goes to the jury for
22 determination of what that ambiguous language
23 means.

24 So what I would like to do is to go
25 through Defendant's proposed contract

1 construction and what we believe to be
2 unambiguous and -- and what we believe the
3 Court should find. And then I'd like to also
4 touch on the arguments made by Mr. Munson
5 earlier this morning.

6 So, first of all, as the Court is aware,
7 contract construction requires that all four
8 corners of the document be examined. And so
9 the Defendant, Composite Resources, starts off
10 with, obviously, Section 1 of the agreement at
11 issue; and this is the appointment of a
12 nonexclusive sales representative. And this
13 provision of the contract plainly and
14 expressly states that this agreement has three
15 Annexes. Annex A, which is intended to define
16 the geographic territory of the sales
17 representative relationship, Annex B, which
18 identifies the products covered by the sales
19 rep agreement, and Annex C, which identifies
20 the commission rates for that sales
21 represented -- representation.

22 So we would urge that Section A be
23 construed to reflect that each of Annex A, B,
24 and C identifies territory, products, and
25 commission rates, respectively. Apparently,

1 there is no disagreement with that, because we
2 -- we didn't see the Plaintiffs raise any
3 issue with that.

4 The next section, Acceptance of
5 Appointment, again, is fairly straightforward,
6 and Poly-Tech, Inc. -- or LLC, expressly
7 accepts its appointment as a nonexclusive
8 sales representative. But, importantly, this
9 section of the agreement contains a
10 noncompetition provision. And it states
11 plainly that Poly-Tech, while acting as a
12 sales representative, should not engage in any
13 activity related to any business of CRI, which
14 of course includes tourniquets, for itself or
15 any other person, which obviously would
16 include the -- Dan Cedrone or any other
17 company.

18 So this noncompetition provision is
19 effective during the term of the agreement.
20 Again, plain, straightforward, unambiguous,
21 and there doesn't seem to be any dispute.

22 The next section is Section 3, which is
23 entitled "Term of Appointment," and it should
24 come as no surprise that this Section 3
25 expressly sets forth the duration of this

1 agreement; and it should be for a period of
2 one year and automatically extended for one-
3 year intervals unless terminated by either
4 party in accordance with the terms and
5 conditions set forth later on in the agreement
6 of -- of Section 9. We'll get to that.

7 So, again -- and this appears to be
8 undisputed -- Section 3 of the Sales
9 Representative Agreement has a definite term
10 of one year with successive, automatic
11 renewals of one year, and may be terminated by
12 either party consistent with the provisions of
13 the Sales Representative Agreement. Again,
14 there appears to be no disagreement with this,
15 and so we know that this is not a perpetual
16 agreement and has a finite term of one year
17 with automatic renewals unless terminated.

18 The next Section 4 is entitled
19 "Commissions and Expenses," and -- and it --
20 it states that if there are any commissions
21 that are paid in error, the commissions will
22 be repaid. Plain, straightforward,
23 unambiguous, and apparently no disagreement
24 from the Plaintiffs.

25 So this section we heard should be

1 construed to mean that Annex C sets forth the
2 commission rates to be paid, and any
3 commissions that Composite Resources
4 erroneously or mistakenly pays to Poly-Tech
5 must be returned. I don't think that there's
6 any disagreement with that construction.

7 The next Section 5 deals with
8 confidentiality. Again, straightforward, and
9 it's not only directed to trade secrets, but
10 extends to all confidential or proprietary
11 information, and it should be construed to
12 mean that Poly-Tech, including its agents,
13 employees, and representatives -- and that
14 would include its president and sole owner,
15 Dan Cedrone -- must not disclose any of
16 Composite Resources' proprietary information.
17 And this term -- this term survives
18 termination of the agreement. Again,
19 unambiguous and straightforward.

20 Now, as I mentioned earlier, Section 9 is
21 the termination provision of this agreement,
22 and it expressly states that at any time
23 either party may terminate this agreement
24 without cause upon giving 60 days' notice.

25 Importantly, it also goes on to state

1 that upon termination of this agreement, the
2 company will pay commissions to representative
3 only on orders accepted prior to rendering the
4 notice period. So this was intended,
5 unambiguously and expressly, to protect the
6 sales rep for commissions earned, yet not
7 paid, prior to termination. And so, again,
8 under the clear and unambiguous language of
9 this Sales Representative Agreement, it should
10 be construed to mean that this has a
11 termination provision and after termination of
12 the agreement, no further commissions are
13 payable at the end of the 60-day-notice
14 period.

15 I think that we've discussed earlier
16 today the relationship of the parties. There
17 is no dispute that these parties are to be
18 treated as independent contractors, and that
19 means they're not partners, they're not joint
20 venturers, they don't share in profits, and
21 there's no other relationship between them
22 other than independent parties.

23 Section 11 discusses waiver, and it
24 expressly states that failure of any -- of
25 either party to enforce any condition or part

1 of this agreement at any time, shall not be
2 construed as a waiver of that condition.
3 Again, plain, express, unambiguous, no
4 controversy. And Plaintiff apparently does
5 not have any problem with that.

6 Now, we get to the three annexes to the
7 agreement. And as we know from construction
8 of Section 1, Annex A deals with the
9 territory, the geographic territory within
10 which this Sales Representative Agreement is
11 to operate. Annex A basically says, "The
12 United States of America." There's no
13 ambiguity, and it provides and informs a -- a
14 limitation on the sales rep agreement.

15 Likewise, Annex B should be construed as
16 defining the products covered by the
17 agreement. And, specifically, the products
18 covered are all the products the company
19 handles. No ambiguity, no disagreement, clear
20 and straightforward.

21 Annex C, likewise, deals with
22 commissions. Annex C should be construed as
23 setting the commission rates to be paid under
24 this Sales Representative Agreement.

25 Subsection A of this says that, you know,

1 Poly-Tech is to receive a commission rate of 7
2 percent. That's the rate provided by Annex C,
3 for all sales of products in the United States
4 where Poly-Tech was instrumental in making the
5 sale. Plain, unambiguous, and
6 straightforward.

7 Section -- Subsection B states that, you
8 know, lists some specific accounts for which
9 Poly-Tech would not be entitled to the same 7
10 percent commission rate, and these are
11 exceptions to the agreement.

12 Subsection C, again, in the rate setting
13 Annex C, provides for two, quote, "special
14 accounts," which are exceptions to the above
15 stated commission rate of 7 percent. The
16 first of these are for GraviGate products, and
17 the exception to the 7 percent rate is 17
18 percent. Plain, clear, unambiguous. If it's
19 a GraviGate product, you get 17 rather than 7.

20 Likewise, the second special account is
21 the Phil Durango, LLC, account. And this is
22 going to become important later on, but it's
23 not the tourniquet account, it's not anything
24 other than Phil Durango, LLC. And this
25 special account is an exception to the

1 commission rate of 7 percent, and it provides
2 a commission rate of \$1.75 per tourniquet
3 sold. And then it also goes on to -- to
4 provide some rates for raw materials.

5 The plain language of the agreement
6 provides that this is a different commission
7 rate for the Phil Durango, LLC, special
8 account, and there's no ambiguity associated
9 with that.

10 None of Annex A, B, or C can stand alone;
11 they are not their own specific, separate
12 contract. They are merely annexes to the
13 Sales Representative Agreement setting forth
14 territory, products, and rate. As we know
15 from Section 1, that's all Annex A, B, and C
16 do, respectively.

17 Now, there is a sentence at the end of
18 Annex C, and our position is that this is
19 indefinite and unenforceable. There is the
20 following sentence: "Commission for this
21 account is to continue if for any reason the
22 regular contract is discontinued and paid to
23 the estate of Daniel P. Cedrone for as long as
24 the project continues." This is indefinite
25 because we don't know what regular contract

1 means, we don't know what the estate of Daniel
2 P. Cedrone is, and we don't know what the word
3 "project" means.

4 And under South Carolina law, when a
5 contract provision is indefinite and
6 uncertain, it is unenforceable. Extrinsic
7 evidence cannot supplement the description.

8 We know that regular contract does not
9 mean the Sales Representative Agreement,
10 because the capitalized term "Agreement" is
11 used throughout the entire Sales
12 Representative Agreement. Capital "A"
13 Agreement is used within the four corners of
14 the document, throughout. If regular
15 contract, lowercase "r," lowercase "c" meant
16 the Sales Representative Agreement, they would
17 have, could have, should have used capital "A"
18 Agreement like they did throughout the rest of
19 the contract.

20 Likewise, there's no defined term
21 "project." We don't know what the term
22 project means, it's lowercase "p" project.
23 Does it relate to tourniquets? Does it relate
24 to the relationship with Phil Durango, LLC?
25 We don't know. There is no definition, and no

1 amount of extrinsic evidence can be used to
2 supplement and define these terms. And under
3 the law, therefore, they should be deemed
4 indefinite and unenforceable.

5 Defendant, Composite Resources'
6 construction is plain, straightforward,
7 unambiguous, and -- and doesn't require any
8 extrinsic evidence. That's the legal
9 requirement.

10 Now, going to Plaintiffs' proposed
11 constructions, and quickly going through the
12 blocks that Mr. Munson addressed earlier this
13 morning, straight out of the block, we have
14 the term "drafter." Drafter is not a term
15 contained within this contract.

16 Under South Carolina law, the only time
17 you get to the concept of drafter is if
18 there's an ambiguity. If something, because
19 it is unambiguous needs to be construed
20 against the drafter, that's the only time
21 drafter even matters. That's number one.

22 Number two, we don't think we need to get
23 there, and if we do, we have evidence that the
24 Plaintiff, Dan Cedrone and his company, Poly-
25 Tech are the drafters of this Sales

1 Representative Agreement. And we can provide
2 that if the Court needs it, but we don't need
3 to get there because it only arises when
4 there's an ambiguity. And if there's an
5 ambiguity it becomes a question of fact for
6 the jury.

7 Secondly, we've already discussed
8 independent contractor. There doesn't seem to
9 be a lot of agreement -- or disagreement --
10 excuse me -- on that term.

11 Third, Plaintiff urges the Court to
12 construe the term "representative." And the
13 Plaintiff wants Poly-Tech Industrial, Inc., to
14 be the capitalized "R" representative. And
15 the reason for that, Your Honor, is because
16 Dan Cedrone, the Defendant -- or excuse me --
17 the Plaintiff -- Co-Plaintiff, the president
18 of and sole owner of Poly-Tech Industrial,
19 Inc., wants to argue that he's bound by the
20 terms of the Sales Representative Agreement
21 when he is wearing his Poly-Tech Industrial
22 hat, but if he decides to take that off, he
23 can do whatever he wants because he's not
24 Poly-Tech Industrial, Inc., he's Dan Cedrone,
25 individual.

1 That's not proper. He's the only person
2 -- we've got deposition testimony, again,
3 extrinsic -- so representative -- I don't know
4 whether to agree or disagree with the
5 construction, but I understand why the
6 Plaintiffs want to separate Dan Cedrone from
7 his company, and, factually, that can't be
8 done. It's curious that Dan Cedrone is a
9 Plaintiff if he's not bound by the terms of
10 the Sales Representative Agreement at issue.

11 The next term is "compete," and, again,
12 this is a legal question of -- or perhaps a
13 factual question of -- of when and where and
14 how a party competes. But in Plaintiffs'
15 papers, they say, "Preparation simply is not
16 within the definition of compete." That's a
17 factual issue.

18 The Court is here to construe whether you
19 can or cannot compete under the agreement, and
20 if you can't, it's a factual issue to
21 determine whether someone has or not.

22 The next important proposed construction
23 from the Plaintiffs is Phil Durango, LLC.
24 Phil Durango, LLC, is or was a third-party
25 legal entity. That requires no construction

1 whatsoever. It is a company, an entity with
2 which Composite Resources did business. It's
3 not a product rights holder for Combat
4 Application Tourniquets.

5 The Court is bound to look within the
6 four corners of the document, the Sales
7 Representative Agreement, and no one could
8 come up with a product rights holder for
9 Combat Application Tourniquets. In fact, the
10 Plaintiff has to cobble together its argument
11 by pointing the Court to extrinsic evidence.
12 Well, gee, if you go to the U.S. Patent and
13 Trademark Office trademark index, and take
14 judicial notice of that, somehow you can
15 figure out what Phil Durango, LLC, means.
16 Well, we already know what it means. It means
17 what it unambiguously states. It's the name
18 of a third-party entity that had an account
19 with Composite Resources.

20 The Plaintiffs would like the Court to
21 construe the word "and." I think it's
22 unambiguous, plain, and clear, and I think
23 everyone knows what the word "and" means.

24 Likewise, commission rate. We've got
25 some dictionary definitions. As we know,

1 Annex C sets forth the commission rate for the
2 Sales Representative Agreement. It states
3 that it's 7 percent, unless it's an exception
4 of 17 percent or \$1.75 per tourniquet. Those
5 are the rates. Those are the clear and
6 unambiguous rates set forth in the contract.

7 Importantly, Number 8, Plaintiffs would
8 like the Court to construe the term "regular
9 contract." And it's fairly clever because
10 the Plaintiffs, for the first time, all of a
11 sudden, capitalize regular and capitalize
12 contract as if that's a defined term within
13 the Sales Representative Agreement.

14 In their definition, they say, "Capital
15 regular, capital contract. The sales
16 representative relationship created by Pages 1
17 -- 1 through 10 of the capitalized contract."
18 All of a sudden, we're starting to see more
19 capital letters in an attempt to create the
20 illusion that these are somehow defined terms
21 under the agreement. That is simply not the
22 case. The Sales Representative Agreement is
23 the capitalize "A" agreement.

24 Regular contract, lowercase "r,"
25 lowercase "c," is indefinite. There is no

1 definition to be found within with capital
2 Sales, capital Representation, capitalized "A"
3 Agreement.

4 If the parties had meant agreement, they
5 would have used capital "A" agreement, as they
6 did throughout the entire contract.

7 The next box that Plaintiffs urge for
8 construction is commissions. Commissions for
9 this product, commission for this account.
10 And something caught my ear earlier with Mr.
11 Munson's presentation when he said, "Well,
12 clearly the commission is for this product."
13 And that's simply not the case, because if you
14 look at the bottom of Annex C, it says, "The
15 commission for this account," the Phil
16 Durango, LLC account, not the product, not the
17 tourniquet product, but the account. And we
18 know the account is the Phil Durango, LLC,
19 account. Phil Durango, LLC, specifically,
20 unambiguously, clearly referring to a third-
21 party legal entity.

22 And, again, in their proposed
23 construction, which they say is unambiguous,
24 yet they have to point to extrinsic evidence,
25 such as going to the U.S. PTO links and

1 looking at products and this tortured
2 construction of, "Well, we have to look at
3 what this means because, it must mean product
4 and not mean this and not mean that." Again,
5 the clear, unambiguous language of the
6 contract means what it says.

7 Next, we go to the -- relating to the
8 proprietary confidential information, they say
9 that it's a -- it's an unlawful restrain on
10 trade. Again, it means what it says. We're
11 not here to determine whether it's enforceable
12 or not under law unless that's an issue that
13 they're going to raise. But, you know, the --
14 the confidentiality provision, it's pretty
15 clear.

16 And, by the way, all of the cases,
17 including the Muckenfuss case raised by the
18 Plaintiff, deal in the context of
19 employer/employee relationships, and tying up
20 employees from future employment. That's not
21 the factual scenario that we have here, Your
22 Honor, because we have a company, Poly-Tech
23 Industrial, contractually agreeing to do
24 something and, in this case, not do something
25 in the future. They can continue to be sales

1 representatives, engineers, designers,
2 whatever Poly-Tech chooses to do in the
3 future. They just can't use our proprietary
4 and confidential information. Much different
5 than the concerns addressed by Muckenfuss and
6 the other cases mentioned in dealing with
7 former employees and continued employment
8 opportunities in the future.

9 Lastly, the Plaintiffs address cause for
10 termination. And they say, "Well, you know,
11 you have to have given us notice under the
12 provisions of the contract."

13 Both in South Carolina and just about
14 every other jurisdiction that we've found
15 across this county, the law does not require
16 one to do something that is futile. And in
17 this case -- getting into the facts -- we
18 found that Poly-Tech breached its
19 noncompetition provision. They competed --
20 had already competed when we found out about
21 it. The contract had already been terminated
22 when we found out about it in discovery, so
23 there was no need to send notice under the
24 agreement. It's something that could not been
25 -- have been cured by Poly-Tech; they had

1 already done it.

2 So, you know, again, I understand where
3 Mr. Munson is coming from, but at the end of
4 the day, it's not a contract construction
5 issue for the Court today.

6 So, again, it's Defendant's position and
7 understanding that the proceeding today was
8 intended to address contract construction
9 issues. The Plaintiffs continue to argue this
10 as a partial motion for summary judgment.
11 They want the Court to construe the contract
12 as if it is unambiguous, rely upon extrinsic
13 evidence, which we now know is a no-no if it
14 is unambiguous, and then have the Court find
15 as a matter of law some dispositive issues.

16 Now, it's our understanding from our last
17 hearing that the Court found that perhaps that
18 was premature. We still think it's premature,
19 and that's why we are here on the contract --
20 THE COURT: Let me stop you at that point.
21 Let me stop you at that point. I thought I
22 wouldn't need to make that point clear. The
23 fact that I said the last argument was
24 premature has no prejudice or bias towards
25 either side, okay?

1 MR. KLETT: Yes, Your Honor.

2 THE COURT: It was premature, because I needed
3 to get more information. I did not -- as --
4 as the Defense requested at the end of the
5 last hearing, I did not deny the motion and
6 say it's without prejudice. I said it's going
7 to be -- we're gonna do it later. We're gonna
8 continue it.

9 So do not read into this Court's wording
10 that it is -- that it had any implication to
11 either side of the fact that I wanted to
12 conduct this second hearing, okay?

13 MR. KLETT: Understood, Your Honor.

14 THE COURT: All right. I wanted to make that
15 clear for the record. Go ahead, sir.

16 MR. KLETT: Yes, Your Honor. And -- and,
17 also, for the record, based upon the
18 Plaintiffs' clear and unambiguous proposed
19 construction of the contract, Plaintiffs'
20 motion for partial summary judgment on these
21 material terms should be denied.

22 THE COURT: Anything in reply, Mr. Munson?

23 MR. MUNSON: Yes, Your Honor. And I -- I'm
24 going to attempt to only reply to their point.
25 His -- his criticism of our points, I will

1 just let those leave, or we'll just end up in
2 a thing that goes forever.

3 So I'm going to try and be very brief.

4 THE COURT: Well, let me -- I mean, you
5 need -- you reply however you want to reply.

6 MR. MUNSON: Okay. The --

7 THE COURT: This is y'all's moment. This case
8 is coming up on a trial docket. This case has
9 age to it. I am doing everything I can to try
10 to get this case to move forward, getting
11 ready for that trial, including my
12 understanding of the purpose of the motions
13 prior to a trial that are not related to the
14 evidentiary issues is to somehow define and
15 narrow the issues that will be heard if it's
16 gonna happen to the trier of fact.

17 So summary judgment motions, as I view
18 it, is an effort by the Court to act
19 efficiently, expeditiously in a way that
20 serves the interest of both parties, and also
21 serve the interest of the Court, okay? So you
22 take whatever time you want, because I want to
23 understand. I'm making that little soapbox
24 speech, because I want y'all to let me know
25 what this is about. Let me know what your

1 arguments are.

2 But do not read into something that I
3 have said before that I have an opinion about
4 what I'm going to today, or that that should
5 somehow sway me to look at the other side
6 adverse or positive. I thought it was very
7 clear what the purpose of today's hearing was,
8 and it was simply a continuation of the last
9 hearing. There was no decision made by this
10 Court at the -- in the last hearing as was
11 suggested by the Defense that I make a ruling
12 to deny the motion and say that it was -- can
13 simply be brought again because it was without
14 prejudice. I made no rulings. So don't
15 suggest or read into anything that I have done
16 that somehow that sways the burden of
17 persuasion or lifts the burden of defending
18 any issue in this case.

19 So, Mr. Munson, you go ahead.

20 MR. MUNSON: Thank you, Your Honor. I'll
21 begin with the issue of this suggestion that
22 regular contract cannot be understood from the
23 language used in -- first, let me point out,
24 it's clear on Page 11 that there's a
25 demarcation between things that are special

1 and things that are regular. And the use of
2 regular contracts here is merely to say the
3 parts of this agreement that are not, quote,
4 "special." And it's easy to make that
5 demarcation from the language used on Page 11,
6 because Page 11 creates special exceptions to
7 the regular contract.

8 Now, the idea that because a -- a word --
9 because there's not a definition for a word in
10 a contract makes it indefinite and therefore
11 unenforceable, one, that's not the law. And,
12 two, if you go back to the very first
13 paragraph of this contract, throughout the
14 contract the word "company" is used. And it's
15 used, I believe, to refer to Composite
16 Resources. But Composite Resources is never
17 defined as the company in this contract.

18 So by their argument, Composite Resources
19 is -- is essentially not a party to this
20 contract because it's not defined here.

21 In -- in the first paragraph, it does
22 say, "Poly-Tech is hereinafter the
23 representative." But it does not say,
24 "Composite Resources is hereinafter the,
25 quote, 'company.'" Yet, it is not hard to

1 understand from the four corners of this
2 contract that Composite is the company. And
3 it is also not hard to understand that the
4 regular contract is the things that are not
5 special in this agreement and the special
6 things are on Page 11. I will leave it at
7 that.

8 The -- there's a -- they make a point
9 about what "in error" means in that it's clear
10 and unambiguous that anything paid not
11 required under this contract would be in error
12 and they would be able to recover it. I
13 disagree that that's what this contract says.

14 Factually, I don't think anything was
15 paid in error, but this contract has two
16 provisions that need to be read together.
17 That provision about what something paid in
18 error is and then the waiver provision. Under
19 the waiver provision, they can temporarily pay
20 things that are beyond what's required by this
21 contract and that not be in error.

22 So in error does not mean something that
23 was paid not forcibly by the terms of this
24 contract. If they deliberately and
25 intentionally paid something, that is not in

1 error under this contract.

2 So I -- their very narrow view of in
3 error -- one, I think just is -- is
4 inconsistent with the deliberate payments that
5 were made in this case. And, two, it cannot
6 be reconciled with the waiver provision that
7 allows them to -- it allows them to waive
8 things. It just says, "If we waive it this
9 month, that doesn't mean we're waiving it
10 forever." So, clearly, they can waive things,
11 and that wouldn't make it in error.

12 The -- I mean, they -- they note this in
13 their briefing under the terms of the
14 appointment where they -- where termination is
15 allowed for, and it says, quote, "Consisting
16 with the provisions of this agreement." Well,
17 when it's consistent with the provisions of
18 this agreement, that has to include the
19 material after the word "and" on Page 11,
20 which creates an -- an exception to the
21 termination -- the other termination
22 provisions of this contract.

23 So the fact that that provision includes
24 -- consistent with this agreement -- brings
25 into the exceptions on Page 11, and their

1 analysis of that is just incorrect.

2 One thing that Mr. Klett said at the very
3 end of his presentation, was that regardless
4 of whether it's Dan Cedrone or Poly-Tech,
5 others are not allowed to use their
6 information. That's not what the
7 confidentiality provision says. The
8 confidentiality provision does not restrict
9 the use of their information. It only
10 restricts the disclosure of their information.
11 And Mr. Klett's representation that it
12 includes the use of it, is inconsistent with
13 the express terms of their confidentiality
14 provision.

15 The -- on a similar point that -- that
16 the futility of providing notice of a breach,
17 I -- to some extent we're ships sailing in the
18 ocean. I'm not saying that their degree or
19 counterclaims, they needed to do that. I'm
20 saying they never did it during the term of
21 the agreement. And -- and it -- and so there
22 was never any termination for cause under the
23 agreement because that had to happen during
24 the term of the agreement. Let me put it
25 another way.

1 By the time you get to their
2 counterclaims, this contract's already been
3 terminated. It was terminated in 2018. My
4 point is, prior to that, there was no cause
5 for termination. And we know there was no
6 cause for termination, because they never
7 wrote us a letter. That they think things
8 happened afterwards, I don't think it's an
9 issue.

10 Another very significant disagreement we
11 have is the idea that these territorial
12 limitations -- let's just go with the
13 territorial limitation. That the territorial
14 limitation applies to the special product in
15 Block C of Annex C, it -- it just doesn't.
16 First, the clear language of -- of Page 11 is
17 that the combat tourniquets are not governed
18 by what comes above that but only what comes
19 below that. In addition, it is only Block A
20 on Page 10 of the agreement that references
21 the territorial limitation.

22 Block A, Composite instrumental in making
23 sales per Annex A and B. So Annex A is
24 limited in application to the Block A
25 commissions which are not an issue in this

1 case. It's only the Block C commissions on
2 Page 11.

3 And, again, in that same provision being
4 paid in accordance with Section 4, which is
5 where you get the erroneous you-have-to-pay-
6 back provision, that also expressly only
7 relates to the Block A commission in Annex C,
8 which are not an issue in this case. Only the
9 Block C commissions on Page -- Page 11 are --
10 are involved.

11 And, Your Honor, I will leave it there.

12 THE COURT: All right. Mr. Klett, you want to
13 -- anything you want to -- did he raise
14 anything new on you that you need to respond
15 to?

16 MR. KLETT: Yes, Your Honor. Thank you.

17 From what I just learned, apparently
18 Annex C has no territorial limitation,
19 whatsoever, and the Annex A doesn't apply. In
20 that case, Annex C is -- is entirely
21 unenforceable and void for lack of
22 definiteness, because there is no territorial
23 limitation or definition that goes along with
24 that.

25 So if that's the approach that the

1 Plaintiffs would like to take and remove that
2 defining term, then the entire thing is
3 unenforceable with respect to Annex C.

4 Nothing further, Your Honor.

5 MR. MUNSON: There's no requirement that there
6 be a territorial limitation to get a
7 commission on something. The commissions are
8 paid because they're getting -- they're
9 selling tourniquets. That's -- if you sell a
10 tourniquet, we get paid a commission. It's
11 like a royalty. You can have a royalty for
12 all over the world.

13 MR. KLETT: It's not a royalty, but thank you,
14 Your Honor.

15 THE COURT: All right. A couple questions.
16 Is there another contract that's going to be
17 presented as part of this case besides the one
18 that's -- that y'all have talked about during
19 this motion hearing or any other times we've
20 been together?

21 MR. MUNSON: So I think I can answer that for
22 both of us, Your Honor. If something becomes
23 ambiguous and external information needs to be
24 provided, that -- there were Sales
25 Representative Agreements between these two

1 parties prior to this date.

2 So, for example -- and so you can tell me
3 if this overstates it, but I believe the Sales
4 Representative Agreement that existed the day
5 before this contract went into effect was the
6 exact same contract minus Page 11.

7 THE COURT: All right. And is that a dispute
8 between these parties, that this is the
9 contract that a jury or this Court is supposed
10 to take a look at?

11 MR. MUNSON: That is not an issue, Your Honor.
12 We -- they've admitted in their answer that
13 this is the contract.

14 THE COURT: I mean, I have not -- I mean, I
15 asked my law clerk to go pull the answer
16 because I have assumed that this case had been
17 developed over the last however long y'all
18 been in discovery, that somehow the parties
19 would have agreed which document would be the
20 "contract," quote/unquote, that a Court or a
21 jury would look at. That's why I asked the
22 question.

23 MR. MUNSON: Yes, Your Honor.

24 THE COURT: Okay. Do you disagree with that,
25 Mr. Klett?

1 MR. KLETT: No, Your Honor. This is the
2 agreement.

3 THE COURT: Okay. Okay. I'm probably asking
4 a question that -- that maybe is not going to
5 be very clear, because I'm trying to see if
6 y'all are, for lack of a better word, how I'm
7 supposed to slice the bread here with the
8 standard of review.

9 That relates to issues -- both of you
10 have mentioned extrinsic evidence. And -- and
11 if I have to resort to extrinsic evidence,
12 what that means, okay?

13 Take a look, if y'all would, I'm looking
14 at Page 11 of 11, last paragraph. Now, if I
15 understood the Defense's argument, it was that
16 this provision is unenforceable if I have to
17 resort to extrinsic evidence to interpret it.
18 Do I understand that correctly? Because I
19 understand the Plaintiffs' argument is that
20 this paragraph is unambiguous, therefore it is
21 enforceable.

22 So help me -- help me understand y'all's
23 two positions on that last paragraph.

24 MR. KLETT: Yes, Your Honor. Thank you. As
25 you note from our submission, if it is

1 indefinite, you cannot resort to extrinsic
2 evidence to fill in the blanks to somehow
3 construe it. If it is indefinite, it is
4 unenforceable and you may not look to
5 extrinsic evidence to fill in the holes, gaps,
6 blanks, or try to construe it.

7 THE COURT: Are you -- as -- you're using the
8 word "indifferent" and I did not use the word
9 "indifferent." Is indifferent the same as
10 ambiguous to you with that -- with your
11 argument?

12 MR. KLETT: I think you're -- I think you are
13 talking about indefinite.

14 THE COURT: I think -- yeah. I think you just
15 used the term "indefinite." Yeah. I'm sorry.

16 MR. KLETT: That's right, indefinite. Yes.

17 Indefinite is different than ambiguous.

18 Legally, ambiguous means, one, it may be
19 construed, you know, in one of a couple of
20 ways -- one of two ways. If it is indefinite,
21 it is beyond ambiguous, there is no meaning to
22 it, and it may not be construed because it is
23 unenforceable.

24 THE COURT: Okay. Thank you for that
25 clarification.

1 MR. KLETT: Yes, Your Honor.

2 THE COURT: So let me see if I understand your
3 position. So your position is that that
4 paragraph should be viewed as me (as spoken),
5 at this point, as a matter of law to be
6 unenforceable because it is indefinite?

7 MR. KLETT: Yes, Your Honor.

8 THE COURT: Did I say that correctly?

9 MR. KLETT: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. MUNSON: And, Your Honor, just briefly,
12 our position is --

13 THE COURT: Yeah. You get to argue and -- and
14 state how he's not wrong. But now, clarify me
15 on what your position is about that paragraph,
16 so that I understand -- pretend that I'm a
17 little child in the first grade. Feed me the
18 stuff so I understand it, and I'm going to
19 write it down, so I don't forget it.

20 MR. MUNSON: Yes, Your Honor.

21 THE COURT: What is your position?

22 MR. MUNSON: Our position is it is
23 unambiguous --

24 THE COURT: Unambiguous.

25 MR. MUNSON: -- and can be enforced as a

1 matter of law. And I'll take that in three
2 parts. One, the conclusory suggestion that
3 it's indefinite and unenforceable is just
4 finding a word that support hypothetically
5 something being unenforceable. They could
6 have said it was illegal and it's
7 unenforceable. They could have said it was
8 illicit and unenforceable. They could have
9 said it was obscene and unenforceable. They
10 just picked indefinite. They -- they don't
11 support how it is indefinite.

12 But let me support how it is unambiguous.
13 As we -- as we noted, the regular contract,
14 which is what they pen, quote/unquote,
15 "indefinite" on, it clearly means Pages 1
16 through 10 of this contract, because it's the
17 opposite of special, and Page 11 deals with
18 special. The very first words, "The following
19 special accounts are exceptions and paid as
20 below described."

21 So it's clear what regular contract is.
22 Now, let's say, even if it were ambiguous as
23 we just discussed, the external evidence would
24 show that the day before this they had a
25 contract, which -- which maybe they considered

1 the regular contract, which was Pages 1
2 through 10, and in this contract adds Page 11.

3 So I don't think -- if you look at
4 extrinsic evidence, it's easily going to be
5 definite.

6 The -- I mean, they -- the effort to be
7 unambiguous here is clear. They wipe away any
8 conceivable reason why the relationship might
9 terminate, has no impact on the obligation
10 that's here. And -- and so the -- the first
11 part of this -- the commission is to continue
12 if for any reason the regular contract is
13 discontinued and still has to be paid. That
14 was -- that is unambiguous and is an effort to
15 be unambiguous about how these are different
16 from everything else in this contract.

17 It's one thing that the parties
18 apparently didn't anticipate, which frankly I
19 think is a confirmation of how permanent they
20 were thinking when they wrote this, was that
21 they thought -- it appears clearly -- that
22 this thing was only going to terminate if Dan
23 Cedrone died, because they say that then
24 they'll be paid to Dan Cedrone's estate. And
25 that creates a little bit of a problem. We

1 had a declaratory-judgment action to clear
2 that up here. But I would just say, that is a
3 -- that is an issue that does not concern
4 Composite. There are still obligations --
5 still obligated to pay their commission on the
6 sale of the product.

7 It's like them being an insurance company
8 for George Foreman, got a life insurance
9 policy that he left to his son, George. We
10 may not know exactly which George is gonna get
11 that money, but we know the insurance company
12 is not going to get to keep it. And so that
13 is an issue that needs some clarification, but
14 it doesn't impact the obligations that
15 Composite has.

16 Anyway, sorry to be longwinded.

17 THE COURT: On that point, Mr. Klett, do you
18 need to say anything?

19 MR. KLETT: Well, I mean, I think -- I think
20 the Plaintiffs have gone from presenting
21 something as unambiguous to pointing to
22 extrinsic evidence and now they're getting
23 into speculation.

24 I would state for the record, however,
25 that it appears that the Plaintiff is trying

1 to craft a perpetual commission. Legally
2 under South Carolina law, perpetual anythings,
3 including commissions under contract, are
4 disfavored, and for them to be enforceable,
5 they must be very carefully and clearly
6 defined. And here, not only do we not have a
7 perpetual commission, we don't have anything
8 approaching what is necessary under
9 appropriate law to be enforceable.

10 And, again, the parties could have used
11 any words that they wished; they did not.
12 They used undefined terms, and because they
13 are undefined, this last paragraph is
14 indefinite; and we may not look to extrinsic
15 evidence or anywhere else to try to figure out
16 what they mean; and legally, it is
17 unenforceable.

18 THE COURT: Okay. But -- I think I got that
19 point. What if I disagree with you and
20 disagree with Mr. Munson and feel like this
21 paragraph needs the -- in that the trier of
22 fact needs to receive extrinsic evidence?

23 And I -- I forgot what my question is,
24 now. Oh. Then would -- would the Defendant
25 still say that the -- that if I rule, that

1 it's -- that it is ambiguous and needs
2 extrinsic evidence to interpret it, that that
3 would be wrong?

4 MR. KLETT: Yes, Your Honor. Because it's not
5 ambiguous; it is indefinite. And we can't
6 look to extrinsic evidence to try to fill in
7 those blanks.

8 THE COURT: Okay.

9 MR. KLETT: That would be improper.

10 THE COURT: Okay. And the reason I ask is
11 because I know that previously one of you, and
12 I think it's probably Plaintiff, presented the
13 deposition of -- of one of your vice
14 presidents or somebody who was married to a
15 vice president or something, and I believe her
16 interpretation was consistent with what the
17 Plaintiff wants it to be read as far as -- it
18 seemed to be more consistent with how the
19 Plaintiff wanted it to be read.

20 So if I rule that it's -- that if I rule
21 that it's ambiguous and needs and should
22 extrinsic evidence be considered, then your
23 position would be that those types of factual
24 information that's been presented to me could
25 not be considered, because it is at a matter

1 of law unenforceable, because it is
2 indefinite?

3 MR. KLETT: That is correct, Your Honor.

4 THE COURT: Did I say that correctly? Okay.

5 MR. KLETT: Yes, sir.

6 THE COURT: All right.

7 MR. MUNSON: Your Honor, just to flesh it
8 completely out.

9 THE COURT: Sure. Go ahead.

10 MR. MUNSON: Our position would be that it
11 makes it a matter of fact, and whether it goes
12 to the jury would depend upon whether there
13 are controversial facts on the issue.

14 So, for example, you could find it to be
15 ambiguous, and then you could find the
16 extrinsic evidence, which colors it to be
17 uncontested. At which point, it would be,
18 again, a matter that you can resolve as the
19 Court in the matter of law, because the
20 factual issue that has to be looked at is
21 uncontested.

22 So just -- just to give it an example.
23 Let's say you can't -- you say -- let's say
24 you say regular contract is ambiguous, and we
25 both agreed that there was a contract that

1 proceeded this that was identical to Page 1
2 through 10, and that there was no other
3 factual information. You could say that
4 that's an uncontroverted fact, and so you can
5 take that fact and then make this decision as
6 a matter of law like any summary judgment
7 could be made without having to actually send
8 it to the jury just because the term was
9 ambiguous.

10 THE COURT: Thank you for that. I think -- I
11 think I understand that. That's what --
12 that's one of the reasons I asked about the
13 contract, because I -- because y'all have
14 never -- through this entire -- the times
15 we've been together, I've not heard that there
16 was some issue or that this particular
17 contract was not gonna be the contract that
18 was at issue at in the litigation.

19 MR. MUNSON: Yes, Your Honor.

20 THE COURT: Do I hear that -- do I say that --
21 I mean, so this -- I think we're beyond that.
22 Okay. All right. Let me look at -- let me
23 look at my notes. Give me just a second. All
24 right.

25 Well, before I run off, let me go back to

1 that. Mr. Klett, what -- give me an idea --
2 you can use a third-party example or maybe
3 another case you've worked on or read about.
4 What makes that particular paragraph
5 indefinite?

6 MR. KLETT: It -- because -- because we don't
7 know --

8 THE COURT: Let me ask it --

9 MR. KLETT: -- what --

10 THE COURT: -- this way. Let me see if I can
11 help you give me an answer. That was the
12 question I wanted you -- what does it not
13 contain that it should contain? Or what does
14 it contain that it should not contain? How
15 about that?

16 MR. KLETT: It -- it contains no temporal
17 limitation. We don't know what the term
18 "lowercase 'p' project" means, because that's
19 not a defined term. We don't know what
20 regular contract means and when it's
21 discontinued versus termination, which is what
22 is clearly used throughout the rest of the
23 capitalized agreement.

24 And, you know, and it says, "To be paid
25 to the estate of Dan Cedrone." We don't know

1 what that means. I don't know whether it
2 means he's dead or has claimed bankruptcy and
3 has a bankruptcy estate.

4 Again, these are terms that are
5 undefined, that are indefinite, and
6 unenforceable. In -- in fact, it's curious
7 that the Plaintiff would argue that the
8 noncompetition provision has no definite term
9 and should be deemed unenforceable, but a
10 commission provision that they would urge
11 isn't -- it goes on forever, should be
12 enforceable. And it doesn't work that way.
13 And we all know, legally, that a perpetual
14 anything under contract must be set forth very
15 carefully, very clearly, very specifically.
16 And, in this case, we're arguing whether this
17 is indefinite or not. That's the opposite of
18 being clear, careful, and precise.

19 THE COURT: Thank you for that.

20 MR. KLETT: Thank you, Your Honor.

21 THE COURT: Now, Mr. Munson, you've made the
22 assertion that this contract -- I think I
23 understand the general proposition of rule
24 that contract interpretation is to be
25 construed against the drafter. I think you've

1 used the -- you've used the analogy if it's a
2 tie, it goes to the non-drafter of the
3 contract. And Defense says, "We don't know
4 who drafted this contract."

5 Now, why do you make that assertion?
6 What -- what is it that gave you the
7 confidence that you could argue that to me and
8 I accept it? What was it?

9 MR. MUNSON: So Your Honor, so it -- it may be
10 that the application of the drafter rule has
11 to await something being ambiguous, but the
12 decision of who the drafter is, we think is --
13 it is unambiguous from the four corners of the
14 contract, and -- and mostly it's because it's
15 been produced on Composite's stationery. We
16 don't have their stationery, all right? Poly-
17 Tech's typist couldn't have typed it on
18 Composite's stationery. They typed it on
19 their stationery.

20 THE COURT: I mean, thank you for that. Let
21 me ask it in another way.

22 There's been no -- in all of this
23 discovery y'all have done, request for
24 admissions and for document, interrogatories,
25 you know, all the stuff that's gone on, that

1 question has never been asked?

2 MR. MUNSON: So, Your Honor, and this may
3 be -- yesterday, I filed a request to be
4 allowed to ask additional interrogatories and
5 request to admit to clean up some of the mess
6 that we had previously. I asked that question
7 in -- in those interrogatories. We also asked
8 that the deadline be shortened to June the
9 3rd, so that question is out there, but I need
10 -- I need to be allowed, beyond the scheduling
11 order, to propose those questions.

12 THE COURT: When did you file that?

13 MR. MUNSON: Yesterday, Your Honor.

14 THE COURT: What time?

15 MR. MUNSON: Oh, it was last night.

16 THE COURT: Last night?

17 MR. MUNSON: Yes, Your Honor.

18 THE COURT: And you expect me to know about it
19 by now?

20 MR. MUNSON: Your Honor, that's why I brought
21 it up.

22 THE COURT: Okay. Well, I do know about it,
23 because my law clerk told me about it, okay?
24 All right. I wasn't gonna bring it up,
25 because I hadn't read it. Okay.

1 You're filing new discovery requests --
2 you're filing more to go outside the discovery
3 order. All right. Well, anyway, it's --
4 right now, it's not a settled -- I cannot --
5 right now, it's not a settled issue as to who
6 the drafter is, or it's not an uncontested
7 issue, then.

8 MR. MUNSON: It -- that's correct.
9 Apparently, it's -- it's contested.

10 THE COURT: One second. Two things is --
11 maybe this is more procedural, but to me it
12 helps me the way that I compartmentalize
13 things in my -- in when I look at motions.
14 Well, I forgot the first one.

15 Oh, Mr. Munson, your first motion for
16 partial summary judgment and then from that
17 point to your supplemental response for
18 today's -- and I think it was in response to
19 once the Defense had filed a document -- you
20 seem to broaden what you want me to look at
21 for purposes of this motion to declare it
22 being unambiguous. That's one thing. Am I --
23 am I correct with that?

24 And then the second thing is that you
25 mentioned in one of your filings that you're

1 the only party that's filed a motion for what
2 this Court's being asked to do something as to
3 what we're -- for here today. I understand
4 and took a look at the Defendant's information
5 that they filed, and they did title it
6 "Motion." So do you -- is there something
7 about all of that thing -- those things I
8 noticed that needs -- that you're trying to
9 send a message to me or to the Defense,
10 because the way I view it, I'm here today and
11 we've received arguments on two separate days,
12 based on what you first filed. And, you know,
13 I do want to be -- both sides, I want to use
14 our time together to be productive and
15 efficient, but I also don't want to overstep
16 my bounds as to what the parties are asking me
17 to do --

18 MR. MUNSON: Okay, Your Honor --

19 THE COURT: So --

20 MR. MUNSON: I think I can clear all that up.

21 THE COURT: Okay.

22 MR. MUNSON: My -- when we originally set to
23 have the hearing on May the 10th -- I think it
24 was, like, from our March 31 hearing -- I
25 think the invitation was for both parties to

1 file motions and they didn't at that point,
2 and I think that's what that reference is to.
3 I take no issue with the fact that they
4 have -- the latest thing they said was a
5 motion and that they're asking the Court to do
6 something, so that's -- that's not an issue.

7 On the other point, I took your
8 invitation to supply subsequent stuff as an
9 invitation to broaden it, so, yes, I
10 purposefully broadened it to ask for a
11 definition of those --

12 THE COURT: Okay.

13 MR. MUNSON: -- those other terms.

14 THE COURT: I may not go there, but thank you
15 for that clarification. All right.

16 Mr. Klett, is what he just said, are you
17 okay with that? Do you understand that to be
18 the -- to be where we are, I guess,
19 procedurally or whatever?

20 MR. KLETT: I agree to the extent that we
21 should not be precluded from filing additional
22 motions for summary judgment moving forward.

23 THE COURT: Okay. All right.

24 MR. MUNSON: Although, we are past that date
25 on the scheduling order, but . . .

1 MR. KLETT: And we've also past the discovery
2 date, as well, and yet --

3 MR. MUNSON: That's fair. That's fair.
4 That's fair.

5 THE COURT: Well, I'll tell you what Mr.
6 Klett, while -- while you mentioned that, are
7 you willing to let him do more discovery if
8 I'm -- I'm gonna hear more motions from y'all,
9 from everybody else? That way I don't have to
10 look at it, that's the only reason I'm asking.
11 I'm not saying --

12 MR. KLETT: Well --

13 THE COURT: -- you have to consent to this. I
14 won't have to read his submissions if you
15 consent to it.

16 MR. KLETT: Well, you know, Mr. Harrill and I
17 discussed that this morning, Your Honor, and,
18 I guess, the question is: Does this work both
19 ways? What happens to the Court's orders? I
20 mean, we -- in addition to this motion, we
21 also received an email last night at 5:15 from
22 Mr. Munson, wherein, he requests to take
23 depositions, basically, up through the Friday
24 before trial for some unknown reason. He's
25 known about these people presumably and has

1 not bothered to even begin scheduling and,
2 yet, I find myself in the position of having
3 to travel to Colorado throughout the latter
4 part of June and have additional people
5 deposed, you know, July 12, 13, 14, 16. And,
6 I guess, my question to the Court is: When
7 does this end? What -- what is the status of
8 the Court's order, and has discovery closed or
9 not?

10 THE COURT: Okay. Then the short answer is,
11 no, you're not going to consent. So y'all
12 talk about it, and if y'all can't get it
13 worked out, come back to me and I'll share the
14 answer to that question with you. You know,
15 y'all talk about it, then, if y'all can't get
16 it worked out, come and ask me. I don't feel
17 that it would be appropriate for me to -- to
18 say yay, nay, or whatever at this juncture. I
19 have not even read what it is that was filed
20 at seven-godly hour last night, you know, so I
21 don't want to make any comment about that.

22 Okay. Well, listen, thank y'all very --
23 very much. I will take this. I've looked at
24 it. I've read it. I've read it. I've read
25 it. I'll read it again and take a look at it

1 and I'll be back in touch with y'all as soon I
2 can.

3 The -- gosh, while I have y'all, we
4 probably need to go ahead -- I don't know what
5 we would be penciling in. There seems to be a
6 growing amount of things that you're asking me
7 to do, but we probably need to go ahead and
8 maybe try to reserve some dates.

9 (To the law clerk) Do you want to get
10 the calendar?

11 Just if y'all are going to continue on,
12 which I'm not saying don't continue on, but,
13 you know, you probably need to try to as best
14 we can make some planning. I've got other
15 people -- I've got other people wanting my
16 time, as well.

17 Let's see. (To the law clerk) Thank
18 you.

19 MR. MUNSON: (To the Court) I believe we
20 already have June 27 and 28 kind of earmarked.

21 THE COURT: To the dismay of the Spartanburg
22 Clerk of Court's Office, we do. They -- yeah.
23 They didn't like that I gave y'all that,
24 but . . . I've got to ask my law clerk
25 something.

1 All right. What about -- well, let me
2 ask y'all this: If -- and, again, we're gonna
3 pencil it in. We're not gonna say these are
4 definite dates, because I'll need y'all to be
5 in touch with me, and I'll be in touch with
6 y'all. Y'all be in touch with me as to what
7 priority y'all -- y'all feel I need to address
8 things. I'll be in touch with y'all as to
9 times available, but if we've got the 27th and
10 the 28th, especially if you are together in
11 Colorado or someplace nice and y'all wanted to
12 actually send a judge to y'all, you know, how
13 about the 23rd and 24th, you know, of -- that
14 would be of June. The reason I mention the
15 23rd and 24th, I've got a term of general
16 sessions, but I'm in a county that's -- that's
17 one of the smaller counties, so it could be
18 that I might have some free time the 23rd or
19 the 24th; that's Thursday and Friday. I can't
20 make that a guarantee, but I -- but if -- if
21 it comes up that we need to do something, I
22 might can do it that Thursday. So we'd have
23 Thursday, Friday, Monday, and Tuesday of the
24 following week.

25 Y'all see what I'm talking about?

1 MR. MUNSON: I could do that, Your Honor, but
2 I think Mr. Harrill may have a conflict with
3 that because he did on our deposition, yeah.

4 THE COURT: Okay. Okay.

5 MR. HARRILL: Yeah, Your Honor. I have a
6 preplanned vacation starting --

7 THE COURT: Okay.

8 MR. HARRILL: -- I guess, Thursday afternoon
9 and Friday through that weekend.

10 THE COURT: Okay. That's all right.

11 MR. HARRILL: I'm sorry about that.

12 THE COURT: No. I -- don't be sorry for
13 vacations. Take them; enjoy them. Okay.

14 MR. KLETT: Your Honor, if I may, part of this
15 may be contingent upon -- as you know, the
16 Defendant now has pending its motion for
17 contract construction, which you heard today.
18 And, you know, the timing of when we get back
19 together may be dependent upon whatever the
20 Court decides with respect to that contract
21 construction, because I think, obviously,
22 whatever those decisions are, both parties may
23 have some additional briefing and motions that
24 -- that may come as a result of that.

25 And so that's -- that's not to complicate

1 or put pressure on the Court's schedule,
2 but -- but it -- you know, it is kind of a
3 contingent situation, Your Honor.

4 THE COURT: Thank you for pointing that out.
5 No pressure at all felt by that. Okay. Okay.
6 Then just, how about -- I understand, so I'm
7 gonna work as hard as I can and as fast as I
8 can to get y'all an answer to what we did
9 today.

10 What about the 7th and 8th of July, are
11 those any -- are those open for y'all at all?

12 MR. MUNSON: They're okay with me. I think
13 the 8th might have been bad for you, Mike.
14 But -- but one of us -- the 7th and 8th, we
15 can -- we can cover the 7th and 8th, Your
16 Honor.

17 THE COURT: All right. Again, I'm not setting
18 anything in stone. If y'all come up with
19 something, that's fine too. But I'm going to
20 just on my calendar, put y'all down as -
21 on -- as a pencil write-in, so that if it
22 comes to it and we need it, I know that I've
23 already -- and other people come to me and
24 say, "Judge, can you do something?"

25 I'm gonna tell them, "Well, I got to

1 check with" -- so I got to check with y'all
2 first. That's what I'm trying to, in my mind,
3 set this up compartmentally that I -- y'all
4 get the high priority. Okay. All right.

5 Listen, thank y'all very much. I've --
6 I've been told that I have people already
7 waiting for my next hearing. So thank y'all.
8 I will get back in touch with y'all as soon as
9 I can on this, and I appreciate your patience
10 today.

11 MR. MUNSON: Your Honor, on behalf of all of
12 us, I just want to say thank you for taking
13 the effort here. We don't -- I'm sure all of
14 us don't see this very often, and we
15 appreciate it.

16 THE COURT: What don't you see?

17 MR. MUNSON: The -- the effort --

18 THE COURT: A judge who loses his temper and
19 yells at people.

20 MR. MUNSON: No. The effort to construe a
21 contract. I mean, the thing you invited and
22 what we put on you -- it was a gracious thing
23 for you to invite, and I just want -- I think
24 all of us agree with that.

25 THE COURT: Well, I appreciate you saying

1 that, but I have to tell you I -- that --
2 those 12 or 13 people that are gonna have to
3 sit for two weeks in this trial probably will
4 be the ones who will be more thankful for what
5 we've done today, you know. Okay. Listen,
6 thank y'all very much. I'll be in touch. Let
7 me know if y'all need me before you hear from
8 me.

9 MR. HARRILL: Thank you, Your Honor.

10 MR. KLETT: Thank you, Your Honor.

11 THE COURT: Yes, sir. Bye.

12 (Whereupon the within hearing was
13 concluded at 11:39 a.m.)

14 (*This transcript may contain quoted material.
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16 by the speaker.)

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG) CERTIFICATE

I, Amber Payne, Official Court Reporter for the
Seventh Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a
true, accurate, and complete Transcript of Record of
the proceedings had and the evidence introduced in
the trial of the captioned case, relative to appeal,
in the Court of General Sessions for York County,
South Carolina on May 20th, 2022.

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

Amber J. Payne, CVR

Date: 8/9/2022

Notary public for South Carolina

My commission expires August 12, 2029

STATE OF SOUTH CAROLINA)
COUNTY OF YORK) COURT OF COMMON PLEAS NONJURY

DANIEL P. CEDRONE AND POLY-TECH)
INDUSTRIAL, INC.,)
PLAINTIFFS,)
VS.)
COMPOSITE RESOURCES, INC.,)
DEFENDANT.)

TRANSCRIPT
OF
RECORD
2019-CP-46-51

January 17th, 2023

B E F O R E:

THE HONORABLE J. MARK HAYES, II, Judge.

A P P E A R A N C E S:

KEITH MUNSON
ESQ.
Attorney for the Plaintiffs

JOHN B. WHITE, JR., JEREMY C. MARTIN, and MICHAEL L.
KAESKE, JR.
ESQ.
Attorneys for the Defendant

Pamela E. Green
Circuit Court Reporter

I N D E X

(WHEREUPON, there were no exhibits marked or testimony
taken during this hearing.)

P R O C E E D I N G S

THE COURT: Thank y'all for the submissions.

I was a -- I do not in -- well, what the, the game plan is, I was -- the Clerk of Court in Spartanburg was kind enough to give me about an hour and 45 minutes for this morning. That was several months ago when we were trying to plan the case.

I do not anticipate that we will finish in an hour and 45 minutes with everything we've got to do. I have been told that one of the cases for this afternoon, one of the big cases for this afternoon, has asked for a continuance.

Now, I have not seen the order for continuance nor have I seen the request. So I don't know what the basis is and it is a case that, that -- that's got some age on it. But I would anticipate I might be very favorably granting that continuance.

And so, if that happens, then we might have some time this afternoon if we don't finish this morning as well as, if we don't finish today, I would like to get these motions done. I can probably do some time on Friday. I understand that people are not from Spartanburg. This would be unexpected but this is an in person hearing today.

But if we did it on Friday, we could do it virtually so that no one has to actually leave their office. That's one

1 of the benefits we get from COVID and the pandemic is that
2 we now have a little bit more flexibility when it comes to
3 operating virtually.

4 Don't like virtual hearings. I prefer in person. But
5 just keep those in mind because I do want to try to get
6 through with as much of these motions either today or this
7 week or as soon as possible. But I do not want you to feel
8 like that simply because we had only -- I only have an hour
9 and 45 minutes that we're bound to that hour and 45 minutes.
10 But, again, thank y'all very much for your patience while we
11 got everything set up this morning.

12 Okay. Pam's got everything.

13 THE COURT REPORTER: Yes, sir.

14 THE COURT: The court -- you've got all their names?

15 THE COURT REPORTER: Yes, sir.

16 THE COURT: All right. What I would like to do is I
17 try, and contemplating on how to approach today, I usually
18 try to take motions in the way that they were filed
19 chronologically.

20 Prior to the issuance of the summary judgment order to
21 which I know we're here on a motion to reconsider, we had
22 the motions for -- plaintiff's motions as to the defendant's
23 counterclaims and we also had the defendant's motions as to
24 the plaintiff's claims as well that were pending prior to
25 the summary judgment motions.

1 Am I right on that with the filing of those?

2 MR. MUNSON: That's correct, Your Honor, although in
3 your previous email you only mentioned the, the -- our
4 summary judgment motions being on the agenda for today.

5 So---

6 THE COURT: Only your---

7 MR. MUNSON: So, so---

8 THE COURT: I, I didn't mention the defendant's
9 motions?

10 MR. MUNSON: No, Your Honor, and to some extent---

11 THE COURT: That was my mistake.

12 MR. MUNSON: I mean they may have a position on this.
13 But, to some extent, the resolution of mine could impact --.

14 THE COURT: The rest---

15 MR. MUNSON: -- theirs.

16 THE COURT: The resolution of your summary judgment?

17 MR. MUNSON: The non-compete---

18 THE COURT: So your motion as to their counterclaims?

19 MR. MUNSON: If the non-compete doesn't exist, then
20 the -- their summary judgment on the non-compete seems to
21 evaporate. So, it might make sense -- I, I took that as, as
22 the Court recognizing the sentencing stage in those.

23 THE COURT: well, you're very kind and generous in what
24 you think I assume but thank you.

25 okay. well, let's do the plaintiff's motions for

1 summary judgment. Give me one second. Let me find the
2 summaries.

3 (Pause.)

4 THE COURT: And then I would like to take up, after
5 that, the motion for sum -- the motion for reconsiderations
6 on the motion for partial summary judgment and then I
7 believe we then have the defendant's motions to -- related
8 to the -- to amend the complaint and I believe there's a
9 motion to strike an errata sheet.

10 Yes, sir.

11 MR. WHITE: May it---

12 MR. KAESKE: Your Honor, may I---

13 MR. WHITE: May it please the Court?

14 For the record, John White and Michael Kaeske,
15 Kaeske -- Kaeske's here along with Jeremy Martin. And the
16 order in which these are addressed, I think the Court's
17 intuitive in, in, in looking at that. The objection that we
18 filed on the errata sheet is, is kind of a -- critical in
19 terms of teeing that up before some of the motions are
20 heard.

21 I'll let Mr. Kaeske address that but we seem to be
22 intertwined in a lot of issues and -- but that, that is
23 important to us in regards to Mr. Cedrone's testimony and
24 the errata sheet that has been filed.

25 THE COURT: Well, I, I read the motion concerning the

1 striking the errata sheet. It seemed to be -- I've never
2 had a motion to strike an errata sheet before.

3 And so I was gonna take the motion -- that motion last
4 since it was the last filed and I was also gonna take it, as
5 y'all argued your motions, as a way to attack the
6 information that plaintiff was gonna present the same way
7 that plaintiff, in his documents, have attacked the way that
8 the defendants have summarized -- the way the defendants
9 have characterized the depo -- the deposition testimony of
10 Mr. Settarong (phonetic).

11 MR. KAESKE: Your Honor, Mike Kaeske.

12 May it please the Court?

13 THE COURT: Uh-huh.

14 MR. KAESKE: I, I think however you'd like to deal with
15 it I'm happy to deal with it that way. It sounds like
16 Mr. Munson's prior argument with respect to the fourth and
17 fifth counterclaims is gonna be a illegal one with respect
18 to how the motions for or, sorry, how non-compete provisions
19 work. If the challenge is not gonna be to Mr. Cedrone's
20 testimony and the errata sheet, then I don't think it
21 matters as much which order you'd like to take those in.

22 But to the extent the argument from Mr. Munson would be
23 that the testimony of Mr. Cedrone doesn't rise to the mere
24 scintilla or, or what have you, then, because of the changes
25 in the errata sheet, then obviously comes more into play.

1 But we can discuss that, as you said, as we move along.

2 THE COURT: I mean, you know -- well, obviously I think
3 my prediction that we would not get through today is gonna
4 be correct cause we have not even started yet and now we're
5 arguing and having discussions over the manner in which
6 we're gonna hear the motions.

7 Okay. So---

8 MR. MUNSON: I -- can I just briefly on the motion?

9 THE COURT: All right.

10 MR. MUNSON: I'm sorry. I've not responded to that
11 yet. I have drafted a response. That might be something
12 that, if we go to Friday, a virtual hearing might be
13 appropriate. Give me time to file a response.

14 I, I -- we've not attached the errata sheet to
15 anything. So, I mean we're, we're not -- we -- we're not
16 presenting that anywhere.

17 THE COURT: Okay. He says he's not gonna present it.

18 well, I tell you what. Humor me, if you will, and
19 let's do it as I first suggested and see how far we get.
20 Please point out to me, on the motion, on the motions to
21 strike the errata sheet, if you think that there's gonna be
22 arguments that I need to be aware of that I've not heard
23 that might of come from that, please let me know of those as
24 we progress through the substance of these motions.

25 How about that?

1 MR. KAESKE: Yes, sir. Thank you.

2 THE COURT: Okay. All right. So we're gonna do
3 plaintiff's motion to strike the counterclaims.

4 Is that correct, Mr. Munson?

5 MR. MUNSON: Yes. The fourth and fifth counter -- the
6 fourth and fifth counterclaims, yes, Your Honor.

7 THE COURT: Give us just---

8 MR. MUNSON: I---

9 THE COURT: Give us just one second. We have summaries
10 that my law clerk has prepared and all these. So, wait. I
11 need to find the right one.

12 This is as to the defendant's fourth and fifth.

13 Is that correct?

14 MR. MUNSON: Correct, Your Honor.

15 THE COURT: Okay.

16 MR. MUNSON: And I think at the end of last week I
17 filed a reply -- defendants filed supplements.

18 So, so this motion was filed in 2020. Defendants
19 filed, either the beginning of last week or the end of the
20 week before, some additional information. I filed a reply
21 to that attaching a couple cases. I just want to make sure
22 the Court has that.

23 THE COURT: We do.

24 MR. MUNSON: Okay. Okay.

25 I would begin by saying, Your Honor, just -- and, and

1 they pointed out at the end of their submissions, we filed
2 this in 2020 at a time in which there was a requirement to
3 plead special damages for a conspiracy case. Since that
4 time, the Supreme Court has said pleading special damages is
5 not a requirement for a conspiracy case. And so that, that
6 issue, to the extent it was argued in the papers, we're --
7 we are not arguing that anymore in light of that case.

8 This -- the fourth and fifth counterclaims relate to
9 the, the non-compete provision in the contract. The fourth
10 one essentially says that we breached the contract because
11 we violated a non-compete clause in the contract. And then
12 the fifth tries to piece together some kind of conspiracy
13 because a couple battlefield medics and doctors got together
14 and created a, a tourniquet which is a -- pretty much the
15 exact same thing that Mr. Esposito did from his experience
16 in 2000 to create the CAT tourniquet based on violating the
17 compete agreement and a, a vague confidentiality agreement.

18 So, the initial question on -- for, for both of these,
19 but more directly on the, the compete one, is, is the
20 compete clause in the contract is something that legally can
21 be enforced in South Carolina, and our supplemental filing,
22 our reply from January the 13th, so last week, attempts to
23 address that issue directly.

24 And the non-compete clause in the agreement states that
25 the representative agrees to refrain from engaging, directly

1 or indirectly, in any activity or business transaction for
2 itself or any other person, corporation, or subsidiary,
3 directly or indirectly and regardless, whether remuneration
4 is involved, contingent on otherwise, which in any way
5 competes with any operation of the company may result in a
6 conflict of interest or would otherwise adversely affect
7 proper discharge of the duties of other representatives
8 hereunder, but including, but not limited to, soliciting
9 orders for or representing or dealing in any goods competing
10 with any core products handled by the company. And that's
11 the contract page -- that's from Page 1 of the contract.

12 And South Carolina, as, as noted in our argument and,
13 and here, and I'm sure the Court knows, disfavors covenants
14 not to compete. We're a right to work state and, and finds
15 contracts and non-compete provisions as broad as this
16 provision to be unenforceable and a lot of, a lot of people
17 who write these kind of contracts write them as broad as
18 they can figuring they'll just get enforced. We'll just,
19 we'll just do it and we'll just get it enforced to the
20 extent we can get a Court to agree to enforce it.

21 And that's, that's the blue pencil rule and some states
22 apply a blue pencil rule. But South Carolina has pretty
23 much forever and strongly not applied a blue pencil rule.
24 It's not gonna rewrite the contract for the plaintiffs if
25 they -- if they can't -- if the person drafting the

1 non-compete agreement can't draft it in a way that it would
2 be enforceable in South Carolina. A Court's not gonna
3 rewrite it so that it could be enforceable.

4 THE COURT: Are you saying blue print---

5 MR. MUNSON: Blue pencil.

6 THE COURT: ---pencil?

7 Pencil.

8 MR. MUNSON: Blue pencil.

9 THE COURT: Pencil. Not print.

10 Okay. Got you. All right.

11 MR. MUNSON: Where does the I -- which I don't know if
12 you're familiar with that, Your Honor, but it's the idea
13 that I'll just go in -- if you say I can't operate my
14 dentist practice within 500 miles of your dentist practice
15 in order to protect your legitimate interests in the
16 customers that we have in the surrounding 50 mile para --
17 geographical area, a Court in states that allow blue
18 penciling takes a blue pencil and changes 500 miles to 50
19 and says gee, there now it's acceptable. And so I can't
20 have dental patients that are 25 miles away.

21 In South Carolina, a -- you, another Court, might think
22 that 50 miles is fine and that, therefore, I shouldn't be
23 seeing patients that are 25 miles away. But if the other
24 side wrote the contract to be 500 miles, South Carolina says
25 I'm not gonna blue pencil that, this thing is too broad,

1 strikes the whole thing, and I can see my dental patients
2 that are 25 miles away.

3 I attached a recent case from June of 2022, the May
4 versus Advanced Cardiology Consultants case in which a
5 non-compete agreement, which was way more restrictive than
6 the one in this case, uses the word or nine different times
7 in one sentence to make it broader and broader and broader,
8 was struck down, found to be unenforceable, no effect, and
9 the Court of Appeals affirmed that case in a pro curiam one
10 page opinion which I attached to the reply to show that the
11 state of -- the current state in South Carolina is with
12 regard to these things.

13 If you compare the non-compete agreement in the
14 Advanced Cardiology Consultant case with the non-compete in
15 the 2005 contract in this case, you, you can see that it's
16 almost exponentially broader in our case with multiple
17 references to directly or indirectly any activity regardless
18 in any way by -- whether, whether done by individuals or
19 corporations. I mean it leaves nobody, no where, nothing,
20 out of the non-compete agreement.

21 Additionally, it, it has no durational term. It has no
22 geographical term and it was just an overreach in the, in
23 the contract that is not allowed in, in South Carolina.

24 Now, the other aspect of, of, of the counterclaim
25 number four is that -- they, they may argue that they can

1 backstop their failed non-compete through a good faith
2 argument. Every contract has an obligation for good faith
3 and fair dealing and, therefore, in the doc -- in the
4 dentist example I provided, even if the 500-mile, 500-mile
5 non-compete is invalid, good faith and fair dealing would
6 say 25 miles shouldn't be allowed.

7 But to -- oh, to recognize that kind of argument,
8 letting good faith backdoor in a blue penciling of the
9 non-compete agreement is also not allowed in South Carolina.

10 And so a, a facial review of the non-compete agreement
11 from the contract, it goes -- as a matter of law, leads to
12 only one conclusion. It is disfavored in South Carolina
13 unenforceable, void ab initio, struck from the contract,
14 can't be the basis of, of any claim. Beyond that, and as --
15 and as pointed out in our motion and in the affidavit of Dan
16 Cedrone that attached the motion from 2020, that -- there's
17 no compete that -- there are no facts that establish or that
18 the, the, the undisputed, uncontested facts are that this
19 non-compete wasn't violated.

20 First of all, the non-compete relates to Poly-Tech. So
21 the two plaintiffs here, Poly-Tech, the company, that is the
22 sales representative under the contract. There's only
23 one -- the non-compete relates to the sales representative.
24 The sales representative's identified as Poly-Tech. And,
25 during the term of the contract, which ended in August of

1 2018, Poly-Tech did nothing to compete and they -- they're
2 no allegations or there's no evidence that they did.

3 Competing is, is -- requires and actually competing,
4 vying for in a retail market situation, vying for customers
5 for your good versus my good. In this case, the other
6 tourniquet, the HALO tourniquet, was -- didn't even get a
7 patent until 2018. None were made or sold until 2019, which
8 was long after the contract was terminated, that merely
9 having the idea of an improved tourniquet, okay, is not
10 competition. Making a drawing of a different tourniquet is
11 not competition. Talking to battlefield surgeons who have
12 experience with all the tourniquets that are out there, and
13 an idea about how it could be improved, doesn't create
14 competition.

15 You have competition when you have a product that you
16 put out in the market that you're sell -- that you're --
17 that is competing with my -- I'm competing for your
18 customers to buy my product.

19 well, there was no product out in the market even
20 remotely, hypothetically competing with their, with their
21 product until 2019, a year after the tourniquet -- a year
22 after they terminated the relationship with Poly-Tech and
23 Poly-Tech's not a -- an inventor of the, of the other
24 tourniquet.

25 Dan Cedrone, who's an individual, who, who is not a

1 party to the contract as an individual, is one of the
2 inventors. They, they knew who Dan Cedrone was. He's the,
3 he's the principal for Poly-Tech.

4 If they wanted a non-compete agreement with Dan
5 Cedrone, they could of had Dan Cedrone sign a non-compete
6 agreement. If they wanted a confidentiality agreement with
7 Dan Cedrone, they could of had Dan Cedrone find -- sign a
8 confidentiality agreement but, but they didn't. Only
9 Poly-Tech signs the contract and the -- and there are no
10 non-compete agreements with Dan Cedrone outside of the
11 contract.

12 So even if you looked at the patent information, it's
13 Dan Cedrone, and he's -- and a, and a surgeon, very
14 knowledgeable about tourniquets, and a medic,
15 knowledgeable -- a military medic, knowledgeable about
16 tourniquets, submitting a design for a, a different
17 tourniquet.

18 At best it shows -- I mean it's hard to even say
19 that -- hypothetically you could say it shows preparation to
20 compete. But, but, frankly, by getting a patent -- the one
21 thing that the patent does is it keeps others from inventing
22 a tourniquet using this technical different approach.

23 THE COURT: Let me ask you two questions.

24 MR. MUNSON: Yeah.

25 THE COURT: All right. You moved along on several

1 different avenues of your argument. Let's take -- go
2 towards the end.

3 Assuming that you are -- all your other arguments have
4 been incorrect, let's assume that you get down to the one
5 that becomes significant, that distinction between Mr. Dan
6 and the company, Poly-Tech. I mean you -- Dan, Dan and
7 Poly-Tech sued them.

8 And so isn't -- doesn't it -- isn't it logical that
9 they then -- if they had -- if they had that counterclaim
10 and it were valid, that it needs to be brought in this
11 lawsuit if they said that Dan is the one who's out there
12 competing against us?

13 where else would it have been brought assuming -- I, I
14 know you disagree with the facts.

15 MR. MUNSON: No, no, no.

16 THE COURT: But assuming that the facts equal com --
17 competition, where else would it have been brought?

18 MR. MUNSON: I'm -- so thank you for that question
19 because I, because I---

20 THE COURT: Oh, you're welcome.

21 MR. MUNSON: I need to point out or the -- it might be
22 helpful to point out Dan -- and this, this is a little
23 nuanced but---

24 THE COURT: Right.

25 MR. MUNSON: ---Dan Cedrone is the plaintiff in this

1 case because---

2 THE COURT: Right.

3 MR. MUNSON: ---he's an intended third party
4 beneficiary---

5 THE COURT: Because of the---

6 MR. MUNSON: ---of the contract.

7 THE COURT: I -- because it's---

8 MR. MUNSON: Yeah.

9 THE COURT: It, it---

10 MR. MUNSON: Yeah.

11 THE COURT: Because of the sales representative fees
12 that he was gonna receive when -- in particular -- went on
13 and on after it was suppose to go to him if they continued
14 manufacture -- manufacturing the tourniquet.

15 MR. MUNSON: Correct, Your Honor. But as to your
16 specific question, I would -- it would -- is this the place
17 to bring it.

18 THE COURT: Right.

19 MR. MUNSON: So, if you're saying Dan Cedrone, a
20 stranger to the contract, is competing with you --

21 THE COURT: Okay.

22 MR. MUNSON: -- then I -- maybe it's a permissive
23 counterclaim that you could bring in this case because he's
24 there. But if he's not a party to the contract, and the
25 non-compete's in the contract, what are you suing a stranger

1 to the contract for something that's in the contract?

2 THE COURT: Okay.

3 MR. MUNSON: If it's -- but -- well -- but, on the
4 other hand, with regard to Poly-Tech, it's exactly where it
5 should be. But the problem is Poly-Tech didn't compete with
6 them even -- I mean nobody competed -- even if you say
7 it's -- if you say it's competing, that didn't happen until
8 2019, a year after the thing went to -- was, was done.

9 Even then the competition was not by Poly-Tech. It was
10 by others and I mean companies all the time have people come
11 to their locations and make strangers sign nondisclosure
12 agreements and non-compete agreements. A, a company knows
13 how to reach out to all the people that it wants to bind to
14 a non-compete agreement or a confidentiality agreement and
15 they never reached out to bind Dan Cedrone to a non-compete
16 agreement.

17 The -- at -- as to the -- the confidentiality agreement
18 is different than the non-compete agreement. But it, it --
19 the law in South Carolina is that a confidentiality
20 agreement has the effect of impinging on competition, then
21 it also must satisfy the requirements of a con -- of a
22 non-compete agreement and this confidentiality agreement
23 talks about -- it really doesn't identify -- well, here's
24 what it says.

25 Poly-Tech acknowledges that, in the course of its

1 relationship, again Poly-Tech acknowledges, in the course of
2 its relationship with Composite, it will have access to
3 proprietary, confidential, and trade secret information.
4 Particularly proprietary information about the development,
5 assembly, manufacturing, or marketing of its product.
6 Poly-Tech will keep, or the sales representative, will keep
7 confidential, will not disclose, during or subsequent to the
8 term of this agreement, any information published -- of an
9 unpublished, confidential proprietary nature for its own
10 benefit after termination of the agreement. Poly-Tech will
11 not make copies of such information without the prior
12 approval of Composite, and any such reproduction of
13 materials deriving such information shall be disposed of
14 upon termination in accordance with the directions of
15 Composite.

16 well, the affidavits and the request to admit
17 information in this case show that there were no copies of
18 any documents made. There were no documents asked to be
19 returned that weren't returned. There weren't any documents
20 asked to be returned.

21 what -- what's missing in the counterclaim on this
22 part, Your Honor, and, and in the evidence responding -- in
23 the evidence attempting to, to try and save this
24 counterclaim is the identification of anything as
25 proprietary to Composite.

1 For example, at the deposition of, of Mr. Bennett, the,
2 the -- and I'll, I'll, I'll -- I have some of his deposition
3 testimony, and because of the sealed nature of it, I'd like
4 to hand it up for the Court's consideration but not file it.

5 But it -- but at his deposition, he was asked if the
6 length of the tourniquet, which is like 38-inches, was a --
7 was proprietary information and he would not agree that it
8 was not, that -- the discussion kind of went along the lines
9 of if, if in the, in the assembly plant, there was a stick
10 that, that was 38-inches long, and you held the webbing up
11 to it and cut it off so you would get a 38-inch piece of
12 webbing so the tourniquet would be uniform, they'd all be
13 38-inches long, would the fact that the tourniquet was
14 38-inches long be proprietary information protected by this
15 confidentiality agreement and he would not agree that it
16 would not be.

17 Something that anybody could go to one of these
18 tourniquets and a tape measure and measure. Couldn't be
19 more public information than that. But, but would not agree
20 that that would not be covered by this confidentiality
21 agreement.

22 So, one of the problems with the confidentiality
23 agreement -- well, first of all, just the wording of the
24 confidentiality agreement is too broad, impacts competition,
25 should be, should be measured and tested under the

1 non-compete provision, suffers from most of the same things,
2 maybe not to the same degree, as a non-compete agreement, no
3 limitation on -- well, there aren't -- there are no
4 limitations. But most---

5 THE COURT: Let me -- and slow you down a little bit
6 cause I, I got -- your argument -- or your argument though I
7 thought was that the confidentiality agreement and the
8 non-compete were viewed differently under the law. And
9 that, and that the confidentiality, I should approach it
10 differently, but, but then your argument in your brief and
11 just now you seem to be crisscrossing back over.

12 Explain to me what tests do you want me to apply to the
13 confidentiality agreement.

14 I think I -- you -- I'm not gonna -- if you think I
15 don't understand the, the confidentiality or, or the
16 non-compete, you can explain it to me but I really---

17 MR. MUNSON: No.

18 THE COURT: ---know -- need the help with the
19 confidentiality cause what test do you want me to apply to
20 those?

21 MR. MUNSON: So, Your Honor, I -- essentially I'm
22 suggesting that -- and both should at least be considered
23 and, and that -- to the extent the confidentiality agreement
24 in effect operates as a non-compete agreement, it has to
25 pass the non-compete agreement test. If it doesn't -- if

1 it, if it doesn't do that---

2 THE COURT: Uh-huh.

3 MR. MUNSON: ---then the, the test to focus on would be
4 the confidentiality agreement test.

5 And with regard to the confidentiality side of it,
6 it -- it's, it's -- first, from its wording, it's too vague
7 to be enforceable. I don't even know -- it's impossible to
8 understand, at least from my prospective, the phraseology
9 that they will not use any information for its own benefit
10 after termination of this agreement.

11 So, I, I don't -- I -- any -- anyway that -- Poly-Tech
12 is the -- first of all, Poly-Tech is the only party to the
13 confidentiality agreement.

14 THE COURT: Uh-huh.

15 MR. MUNSON: There's no nondisclosure agreement which
16 Dan Cedrone has signed, and the evidence, even with regard
17 to the 2019 HALO sale, and we're talking 250 sales versus
18 like 25 million sales to completely different niche
19 audiences, but it seemed to be too vague to be enforceable.
20 That's the language of it.

21 Now, going to the evidence of it, in the, in the
22 drafting of the counterclaim and in the mustering of
23 evidence that might support the counterclaim, they don't
24 identify anything as, as confidential.

25 So, I mean to, to bring it up to, you know, current

1 days, we have this Trump/Biden top secret thing going on and
2 you see the photographs of the Mar-a-Lago, and you have
3 these -- when it's top secret, it's stamped top secret.
4 There's a red folder on top of it. There's a yellow folder
5 on top of it. You know what's top secret or you're not --
6 they're the -- they don't identify anything as confidential.

7 They don't say there was a sign above the stick that
8 was 38-inches long that says proprietary information. They,
9 they never identified anything to Dan Cedrone. They --
10 they've not submitted any document that says the information
11 contained herein is confidential, the information contained
12 in -- herein is a trade secret.

13 When he had discussions with them or meetings with
14 them, nobody ever said and now we're gonna, you know, we're
15 gonna go into this skiff and we're gonna talk about the
16 secret stuff. Even if they didn't go to this skiff, they
17 never said this is a trade secret. Hey, don't share this.

18 They, they make no allegations of having ever
19 identified any information that they claim has been used
20 after the termination of this agreement to their detriment
21 as anything to be protected by, by this confidentiality
22 agreement, and the, the, the -- the reality is they, they
23 want to be able to do it after the fact.

24 Oh, he knows how long -- he knows how long the
25 tourniquet is. That's a fact that he would of gotten from

1 us. And so we're -- so that fact is a trade secret and the,
2 the confidentiality agreements don't work they way.

3 They've, they've identified nothing. No -- there is no
4 evidence to defeat summary judgment in this case to identify
5 anything as a trade secret that was identified to, to my
6 client, that was identified to my client at anytime that was
7 then later used by him in a way that is damage to them and,
8 and I'll, I'll -- I'll close with this.

9 Okay.

10 THE COURT: Well, not -- I'm sure that they would say
11 other -- otherwise cause I think I've read the, the -- Mr.
12 Bennett would have a different opinion because that it -- he
13 allowed somebody to tour the facility, Mr. Cannon then what
14 the other -- Carson maybe.

15 Is that the guy's name?

16 MR. MUNSON: Correct, Your Honor. And so I would -- so
17 the, the only -- thank you for that question because I'll,
18 I'll make -- answer. I stated something about it.

19 THE COURT: Okay. Let me tell you why---

20 MR. MUNSON: It might---

21 THE COURT: ---I throw that out, why I throw that out
22 because your motion -- this is your motion. You're the one
23 that's got the burden of persuasion that this summary
24 judgment should be proper and I keep -- and so threshold for
25 this motion to survive is low. And so I'm trying to just

1 understand your arguments to why you want to say, as a
2 matter of law, these things need to be thrown out.

3 MR. MUNSON: Thank you, Your Honor.

4 So, so there are members of the public who have come
5 into this courtroom today.

6 THE COURT: Uh-huh.

7 MR. MUNSON: And if somebody didn't -- like Doctor
8 Carson and, and Mr. Cannon went to their facility, if
9 somebody doesn't tell them that the documents sitting on the
10 seat next to them is confidential or secret, that -- they,
11 they don't know to keep it confidential or secret. And
12 let's say one of them's a reporter and one of the things
13 back there is what cases are coming up. And then, in the
14 paper tomorrow, there's something about there was a case
15 between a husband and a wife that were -- that got tried.

16 well, you can't complain to that reporter for having
17 published that information when they got invited, invited
18 into this room and nobody pointed out to them that that
19 information is something that shouldn't be shared outside
20 this room.

21 So, although, although they, they do have Doctor
22 Carson, who's been on the battlefield tending to people with
23 tourniquets, identifying some changes that could be made to
24 tourniquets, improvements that could be made to tourniquets,
25 comes back to the United States, gets invited by Composite

1 Resources to come share his feedback from the battlefield in
2 2012, comes and shares his feedback about the battlefield in
3 2012, and then, in 2018, because of what he knows as a
4 surgeon with battlefield experience, decides to invent a
5 different tourniquet. Five years later they say that he
6 surreptitiously planned, in 2012, to sneak into their
7 facility and garner as much information that he doesn't
8 know, already has as a battlefield surgeon from the war to
9 use five years later to violate a confidentiality provision
10 for which they won't identify what it is that he was exposed
11 to and used and damaged them in this case.

12 So, I'll end with this.

13 THE COURT: On the -- matters of summary judgment
14 though, I'm not allowed to view the credibility. I have to
15 look for the existence of the evidence.

16 Is that correct?

17 MR. MUNSON: That is true, Your Honor. There is zero
18 evidence that they said to Doctor Carson this is
19 confidential. Oh, sign this non-compete agreement. This is
20 confidential and that he took that, that confidential
21 information, ended up in the HALO tourniquet, that -- well,
22 one, it was unpublished and not known.

23 So, so you have this surgeon --

24 THE COURT: Uh-huh.

25 MR. MUNSON: -- who's got battlefield experience, who

1 comes in and they have to show something confidential that
2 he doesn't already know, was told to him was confidential,
3 don't use it, that he went and used it, and it wasn't
4 something he already knew or could figure out as a surgeon
5 with battlefield experience, and, five years later, it ended
6 up in the HALO. They need to point to the HALO, here's
7 where the confidential thing is, and then how that damaged
8 them.

9 That -- so, yes, all they have to do is put a scintilla
10 of evidence of that before the Court and here we are and
11 they've not done that.

12 As, as they go through their, their presentation --
13 and, and I analogize this, sorry, to the Aaron Burr treason
14 trial in 1807. In 1807, Burr was tried for treason and the
15 constitutional crime of treason requires a treason -- a
16 treason is conspiracy, an overt -- and an overt act
17 confirmed by two witnesses.

18 Thomas Jefferson, hand picked prosecutor, had 135
19 witnesses who would say they were involved in a conspiracy,
20 and that Aaron Burr encouraged them to engage in overt acts
21 of conspiracy. But he didn't have any evidence of Aaron
22 Burr engaging in any overt acts.

23 The prosecutor wanted to put on the 135 witnesses and
24 let it go to the jury that -- to, to determine -- to decide
25 well, if you see -- time -- 135 people to engage in overt

1 acts, obviously he must of engaged in overt acts himself.
2 And Chief Justice Marshall, amazingly, who was the trial
3 judge of this trial, he, he wouldn't let them -- he, he told
4 the prosecutor no, you have to -- you -- then ultimately
5 you're gonna have to show that he engaged in overt acts.
6 I'm not gonna let you put those 135 witness on -- es on
7 until you put evidence on of this. And because Chief
8 Justice Marshall would -- stepped in to protect the rule of
9 law, and require them to actually prove the elements of a
10 conspiracy, Aaron Burr ultimately was, was acquitted.

11 The same thing's happening in this case. They just
12 want to -- they want to talk about the invention of the
13 tourniquet. All they want to talk about is there was an
14 invention of a tourniquet after a doctor visited their
15 facility and, therefore, that must be proof of some
16 confidential information having, having gotten out. But,
17 but, as you listen to their presentation, I ask you to ask
18 yourself or ask them these questions:

19 what's the secret?

20 what's the secret that you're talking about?

21 How is that secret designated or denoted to Poly-Tech?

22 who knew it was a secret?

23 You can't just, at your deposition, say a 38-inch stick
24 in my assembly line is a secret.

25 So what's the secret?

1 How is it designated as secret?

2 When and how was Poly-Tech exposed to that secret?

3 And after the exposure to the secret, like I walked
4 through the facility, and, therefore, I was exposed to a
5 38-inch stick used to measure the length of the tourniquet,
6 okay, if that sticks in the facility and I walked in the
7 facility, I was exposed to that. But what's your proof that
8 that exposure -- that I left there how -- with that
9 exposure?

10 So what secrets did Poly-Tech actually acquire that had
11 been identified as secrets to them and exposed to them, and
12 then how did Poly-Tech use that secret in the HALO
13 tourniquet?

14 Well, first of all, Poly-Tech never did. But even if
15 you, if you say Dan Cedrone and Poly-Tech are the same, how
16 did that secret get used in the Poly-Tech -- in the HALO
17 tourniquet and then how did using that secret in the HALO
18 tourniquet damage Composite?

19 If they, if they can't string that together, a
20 scintilla of evidence, stringing all that together, they --
21 there is no scintilla of evidence that would support summary
22 judgment in this case.

23 The -- well, I -- because the deposition was under
24 seal, I would, I would like to just hand up some excerpts
25 from Dan Cedrone's -- I mean from Johnathan Bennett's half

1 deposition that relates to the confidentiality issue for --.

2 THE COURT: Do they know these provisions?

3 MR. MUNSON: Yeah, I'll---

4 THE COURT: All right. Before you come up, let me, let
5 me ask you a question.

6 But your argument, if I understand it correctly, if I
7 get to where I'm viewing this testimony, then your argument
8 that the confidentiality provision is unenforceable has
9 already -- fall to the wayside if I get to the point where
10 I'm looking at substantive testimony from the witnesses
11 meaning that you've lost. If I have to -- if, if I get to
12 the point to where my ruling is dependent upon examining
13 this testimony, then, then your argument that the
14 confidentiality provision or clause is unenforceable, then
15 I've gotten past that and I don't -- because then I have to
16 look at the substance of it. I'm not asking a good
17 question.

18 MR. MUNSON: Yeah. No, no, no, I understand your
19 question, Your Honor.

20 I -- my point is that, just looking at the
21 confidentiality provision in the contract --

22 THE COURT: Right.

23 MR. MUNSON: -- it's too vague to be enforceable. It
24 impinges on competition. And so then, for that reason, if
25 you get beyond that to actually look for evidence, then the

1 evidence just fails. I mean if I get charged with speeding,
2 there's two elements in that. I was driving the car and I
3 was speeding.

4 THE COURT: Uh-huh.

5 MR. MUNSON: If you've got a hundred priests who will
6 stand up and say I was driving the car, there's some
7 evidence. Well, that doesn't mean I was speeding. And, to
8 defeat summary judgment, they have to have something about
9 speeding.

10 And so from -- so, in this case, they've got to touch
11 all those points, what's the secret, how was it shared, how
12 was I exposed to it, how did I take it, how did I use it,
13 how are you damaged. And they, they, they don't even do the
14 first thing by saying what they ever identified as a secret.

15 THE COURT: All right.

16 MR. KAESKE: Your Honor, may I ask is this in the
17 summary judgment record?

18 MR. MUNSON: It -- I -- it is not been filed, no.

19 MR. KAESKE: So, the -- well then we object to adding
20 new evidence at the summary judgment hearing when it hasn't
21 been made part of the summary judgment record.

22 THE COURT: All right.

23 MR. MUNSON: Thank you, Your Honor.

24 THE COURT: Yes, sir.

25 what I'll do is I'll take it as proffered evidence

1 and---

2 MR. MUNSON: Thank you, Your Honor.

3 THE COURT: ---and won't review it.

4 Now, you said this is -- this is one of those documents
5 y'all've said is confidential---

6 MR. MUNSON: The depo -- the dep---

7 THE COURT: ---attorney eyes only?

8 MR. MUNSON: Yes, Your Honor.

9 THE COURT: Okay. We'll talk about what I'm gonna do
10 with those at the appropriate point.

11 Okay. The other motions that are scheduled for today
12 were told to come in at 10:45. We're about six minutes
13 away.

14 Do you -- I think we're ready to receive your argument.
15 We can take a break now and let me take care of those
16 matters and come back to get you. I do not anticipate that
17 it would be -- it will be as long as I need. But I don't
18 think it will be very long so that we would come back maybe
19 in 30, 45 minutes.

20 MR. KAESKE: Your Honor, I'd like to do what you'd like
21 to do. If you want to hear from me now, I'll talk for six
22 minutes. If you want to hear from me later, I'll talk to
23 you in 45 minutes.

24 THE COURT: well, if you can do your argument, I'll
25 take six minutes but we've got to quit. I just don't want

1 to break up your argument and, and kill your effectiveness
2 of it.

3 well, hang on one second. Let me ask Mr. Munson.

4 Did you do your conspiracy argument, the fifth
5 counterclaim?

6 MR. MUNSON: Yes, Your Honor. Well, so the
7 conspiracy -- so the, the conspiracy -- here's, here's the
8 deal with conspiracy.

9 One, the special damages issue --

10 THE COURT: Right. That one is out.

11 MR. MUNSON: -- is, is gone.

12 Conspiracy, to some extent, I'm just fine resting on
13 the papers there.

14 But the point really with conspiracy is that conspiracy
15 requires illegal or at least intentional tortuous in --
16 activity and they base it on the confidentiality agreement
17 violation and the non-compete agreement. If the non-compete
18 agreement is out, the confidentiality agreement fails for
19 the same reason or there's no proof of a violation of
20 confidentiality leaving, leaving damages, then three guys
21 can't conspire to, to come -- to -- there's just no
22 conspiracy if there's no underlying misconduct or illegal
23 activity.

24 That's just a different -- I mean if three guys got
25 together and created a different tourniquet, there's

1 thousands of them out, the fact that three guys got together
2 to compete with these guys is not a conspiracy. That's just
3 a business. And if there's nothing untoward -- if they
4 didn't compete cause they didn't violate the con -- the
5 agreement, it didn't happen until 2019, the, the -- they
6 can't -- I mean there can't be a conspiracy.

7 If they never identified anything as a secret and
8 never -- and the secret's never ended up in the HALO
9 tourniquet, then there's no underlying misconduct and it's
10 just three guys doing, you know, engaging in commercial
11 activity which is allowed. So there, there just can't be a
12 conspiracy if there's no underlying misconduct or an illegal
13 activity, Your Honor.

14 THE COURT: And you're -- the three guys you're talking
15 about, that is Cannon and Carson?

16 MR. MUNSON: And, and Dan Cedrone.

17 THE COURT: And Mr. Cedrone.

18 MR. MUNSON: Yes, Your Honor.

19 THE COURT: Cedrone.

20 Okay. All right. I, I took all of your six minutes.
21 I'm sorry.

22 I tell you what. Let's, let's take a break. I don't
23 like the breaking of your argument like that and let me take
24 care of the people in the audience. We'll come right back.

25 There's restrooms across the hall. If y'all come -- if

1 we're still together in October hearing arguments here in
2 Spartanburg, we'll be in a new courthouse. Maybe we'll have
3 better facilities. But I don't have much to offer you right
4 now. But there's restrooms across the hall. I think, I
5 think we do have some type of canteen downstairs.

6 (WHEREUPON, a short recess was taken at this time.)

7 THE COURT: Thank y'all for your patience while we took
8 care of those items.

9 All right. I'm now ready to receive the defendant's
10 arguments.

11 MR. KAESKE: Thank you, Your Honor.

12 May it please the Court.

13 You did a fine job with your estimate as to how long
14 that would take by the way.

15 Your Honor, if you don't mind, you suggested that we
16 might go into this afternoon, which, of course, is great
17 with us. You also suggested that there's a possibility we
18 may go to Friday.

19 I want to say as the one who probably travels the
20 longest to get here, if we do do something on Friday, I am
21 happy to be here in person and I would personally prefer to
22 be with the Court in person as opposed to virtually. But
23 obviously I'll do whatever you'd like us to do.

24 As far as the motion on the fourth and fifth
25 counterclaims is concerned, if Your Honor wouldn't like to

1 direct me as to where to go, I'd prefer to start backwards
2 and, and work forwards.

3 THE COURT: That'd be great.

4 MR. KAESKE: I'd like to start with Your Honor's
5 question, which I thought was a good one, which is isn't
6 this the right place for CRI to bring whatever issues its
7 got with Mr. Cedrone, and, of course, it is. And the first
8 thing I'd like to point Your Honor out to is Mr. Munson and
9 the plaintiffs have pointed out that Mr. Cedrone is a third
10 party beneficiary to this contract.

11 well, Section 30 -- 609 of the second restatement,
12 sorry, 309 of the second restatement of contract says very
13 clearly, and this is cannon of third party beneficiary law,
14 that if you're a third party beneficiary and you accept --
15 expect to receive the benefits of a contract, then you're
16 obligated to, to live by the obligations of the contract.

17 Specifically, Section 309 says, in Number 4, a
18 beneficiary's right against the promotor or, sorry, the
19 promissor is subject to any claim or defense arising from
20 his own conduct or remedy. And that's a very basic
21 principle that you don't get the benefit from a contract and
22 breach the contract.

23 In the comments, Comment B, it says where there's a
24 contract, the right of beneficiary is subject to any
25 limitations imposed by the terms of the contract.

1 So, to the extent that there is a no conflict of
2 interest, no competition, do not breach my confidentiality
3 provisions in Article 2 and Article 5 of the sales
4 representative agreement, if Mr. Cedrone wants to be a third
5 party beneficiary of that contract, then he has to abide by
6 its obligations. That's the first issue with, with respect
7 to this Cedrone/Poly-Tech difference.

8 The next thing that I'd like to talk -- point out to
9 Your Honor about the Cedrone/Poly-Tech difference that
10 plaintiffs are trying to make is that the summary judgment
11 evidence is very clear and Mr. Cedrone has admitted in his
12 deposition that the only way Poly-Tech acted with respect to
13 CRI was through him. There wasn't another Poly-Tech person
14 as far as tourniquets are concerned, and the relationship
15 between Poly-Tech and CRI is concerned, all the actions were
16 taken by Mr. Cedrone.

17 Mr. Cedrone is the one that was the signatory to the
18 contract on behalf of Poly-Tech, and as Mr. Cedrone said
19 specifically in the deposition that I took of him, he said
20 if Poly-Tech were to comply or not comply with the contract,
21 it would be through the actions of Mr. Cedrone.

22 And so I think that this argument that well, that was
23 Mr. Cedrone in his individual capacity acting with respect
24 to tourniquets using information that Poly-Tech had used --
25 had gained from CRI but it wasn't Poly-Tech acting, that --

1 that's hard because where -- when does he take his hat off
2 from being Poly-Tech?

3 Is it just when's he cheating?

4 And, and so I think that there's an issue with respect
5 to that.

6 Also I'd like to point out to the extent that there is
7 any question about Poly-Tech versus Mr. Cedrone, Mr. Cedrone
8 admitted in his deposition that it was Poly-Tech that
9 manufactured this competing tourniquet, that it was
10 Poly-Tech who developed the manufacturing process for the
11 competing tourniquet, that Poly-Tech markets the competing
12 tourniquet on its website, and that Poly-Tech manufactured,
13 using Poly-Tech people and Poly-Tech materials and Poly-Tech
14 facilities, manufactured the prototypes and marketing
15 samples of the tourniquet that were handed out to compete
16 with the CAT tourniquet.

17 So I think that there's plenty of evidence that both
18 Mr. Cedrone was acting in these situations and that
19 Poly-Tech itself was acting in these situations.

20 Now the question is were any of those actions a
21 violation---

22 THE COURT: Can I ask---

23 MR. KAESKE: Yes, sir.

24 THE COURT: ---you a question?

25 Is there a reason you didn't point out the language in

1 the agreement that talked about Composite and its
2 representative and my understanding is that, in this case,
3 there's no dispute that the only representative of, of
4 Composite was Mr. Cedrone?

5 MR. KAESKE: That's right, Your Honor.

6 The only representative of -- the only representative
7 of Poly-Tech -- the only representative of Poly-Tech --
8 sorry.

9 The only representative of CRI is Poly-Tech through Mr.
10 Cedrone. That's exactly right.

11 THE COURT: I, I guess -- I guess the reason I, I
12 mention that is this case seems to be framed in front of me
13 more of a, of a document agreement type of situation. And
14 in the agreement itself it talks about Poly-Tech and it says
15 and its representative.

16 And so, if it -- as opposed to -- and I appreciate your
17 pointing me out -- pointing me in the direction of, of, of
18 the thesaurus on about the third party beneficiaries. But
19 it seems like you get there just basing it based on the
20 agreement itself and the facts as, as I know them.

21 MR. KAESKE: I, I believe you're right, Your Honor. I,
22 I was responding to Mr. Munson's argument.

23 THE COURT: Okay.

24 MR. KAESKE: I believe that Poly-Tech, acting through
25 Don -- Dan Cedrone is the sales representative and that is

1 who is obligated under the contract.

2 THE COURT: Okay.

3 MR. KAESKE: I agree with you.

4 And, and so---

5 THE COURT: I'm trying to make it simpler for me you
6 know.

7 MR. KAESKE: Thank you, Your Honor.

8 Sometimes I don't always make it simple --

9 THE COURT: No.

10 MR. KAESKE: -- as you do.

11 The next thing that I'd like to comment about -- yeah,
12 I, I think we've covered the Cedrone/Poly-Tech issue.

13 So then next, working in reverse, we were talking about
14 or Mr. Munson and, and the Court were talking about the
15 issue of confidentiality and on the -- Mr. Munson challenged
16 me, I guess, asked the Court to make sure that you got
17 answers to these questions what was the secret, who knew it
18 was a secret, when was Poly-Tech exposed to the secret, and
19 how did they use the secret?

20 well, I don't know why we were talking about a 38-inch
21 stick because the secret I think is very clear from our
22 supplemental materials and that is that Dan Cedrone took the
23 confidentiality distributor pricing information from CRI and
24 he passed it along to his HALO partners so that "they could
25 make sure that the United States government got a better

1 deal than the one they have now" and the deal that they have
2 now is the one with the CAT tourniquet.

3 I'd point Your Honor, if you have our supplement -- if,
4 if you have our supplemental response to the motion for
5 summary judgment handy, I'd ask you to turn to Page 8. And,
6 if you don't, I can just, I can just read it for you.

7 THE COURT: I've got a lot of information. I'm sure
8 I've got that somewhere. Give me just a moment.

9 MR. KAESKE: Yes, sir.

10 (Pause.)

11 THE COURT: Is it supplemental material to the motion
12 for reconsideration?

13 MR. KAESKE: No, sir, the -- sorry. The supplement --
14 defendant's supplemental response in opposition to the
15 plaintiff's motion for summary judgment.

16 THE COURT: What page did you want me to look at?

17 MR. KAESKE: Page 8, Your Honor.

18 THE COURT: Okay.

19 MR. KAESKE: Now, Your Honor, be -- before I direct you
20 to what I'd like you to look at on Page 8, let me give just
21 a brief bit of background.

22 I think it's important for Your Honor to understand, as
23 in -- as it pertains to the facts of the case, that the
24 tourniquet which was first developed in 2004, by the time
25 2012 came along, it had become -- began to become a

1 commodity product meaning at one time it was new and bright
2 and shiny and it was the only tourniquet on the market. But
3 as time passed, more tourniquets came on the market and it
4 began to compete not on the basis specifically of its
5 advantages to other tourniquets but instead based on
6 pricing. And so there was constant pricing pressure on the
7 CAT tourniquet.

8 So, that's backdrop for understanding, as Mr. Cedrone
9 did understand, that the pricing information with respect to
10 the CAT tourniquet was proprietary information. And the way
11 that it worked in 2017 was that CRI manufactured the
12 tourniquet and sold it to its distributors. They had a, a
13 single distributor in the United States called North
14 American Resources, or sorry, Rescue, which is in
15 Greenville, and then they had various distributors around
16 the world.

17 The price at which those distributors purchased the
18 tourniquet from CRI was not the same. Different
19 distributors paid different prices and the price at which
20 those distributors bought the tourniquet from CRI was not
21 publically available. It was highly guarded, confidential,
22 proprietary information that Mr. Cedrone, and frankly Mr.
23 Cedrone was one of only a few people, that had that
24 information and Mr. Cedrone knew that, and frankly whether
25 Mr. Cedrone knew that or not, and whether that was

1 proprietary information or not is a fact question for a
2 jury. It's not a question that's as a matter of law.

3 But Mr. Bennett has provided the Court an affidavit
4 that is Exhibit I believe 5 to that motion that's in front
5 of you. It could be Exhibit No. 6 but I believe it's
6 Exhibit No. 5 and that is Mr. Bennett's affidavit testimony
7 saying how important the distributor price -- pricing
8 information was, and that the distributor pricing
9 information was proprietary, confidential, not public
10 information, and that testimony is uncontroverted.

11 And so, for the purposes of defeating their motion for
12 summary judgment, we have that.

13 Now, with that background, Your Honor -- I'm sorry. It
14 was neither Exhibit 5 nor 6. Apparently it's Exhibit No. 4.

15 THE COURT: So that's the secret is the distributor
16 pricing information?

17 MR. KAESKE: Yes, sir, and I think the Court can
18 clearly understand how the price at which someone purchases
19 this tourniquet is proprietary information if it's not -- if
20 it can't be publically found. Mr. Cedrone, in his
21 deposition, admitted that the information wasn't publically
22 available.

23 And so, if we look at Page Number 8 and you look at
24 what I've excerpted here in the clip, it says so what
25 Poly-Tech did is Poly-Tech took the information that they

1 got from CRI. They gave it to Ce -- Dan Cedrone and then
2 Dan Cedrone passed that information along to William Cannon
3 and William Carson, correct, and the HALO folks, right, and
4 he said, sheepishly, I suppose so.

5 And so there is no question now what the information
6 is. It's the distributor pricing information.

7 There's no question that Mr. Cedrone passed it along to
8 his partners in the HALO tourniquet and the only question is
9 whether or not that information was proprietary and
10 confidential, which you have an answer to from the
11 affidavit. But you also have the answer from Mr. Cedrone's
12 deposition himself.

13 If you forward to the next page of the document that
14 you have in front of you, Your Honor, you see at the very
15 top line Cedrone also admitted that the confidential
16 distributor pricing information that he wouldn't have known
17 if he was not associated with the CAT in order to make his
18 own alternative tourniquet competitive to the CAT, and when
19 asked whether his HALO partner, William Cannon's, question,
20 would the military pay more, sorry, would the military pay
21 less for the HALO compared to the CAT under this model was a
22 conflict of interest, he responded I don't know. But then
23 he said we will assure that the military gets a better deal
24 than their current one, which Cedrone then admitted meant
25 the HALO compared to the CAT.

1 And so we have confidential pricing information that
2 Mr. Cedrone wouldn't have known but for his relationship
3 with CRI. That information was information that was
4 provided to Poly-Tech, and to the extent there's a
5 differentiation between Poly-Tech and Mr. Cedrone, Poly-Tech
6 then gave it to Mr. Cedrone. Mr. Cedrone, in order to come
7 up with competitive pricing so that his tourniquet could
8 compete on pricing with the CAT tourniquet, gave that
9 information to his partners in the HALO and he did all that
10 while he was being paid seven million dollars by CRI in
11 commissions on the CAT tourniquet.

12 So, that brings us to the next issue, Your Honor, and
13 that is the issue -- unless Your Honor has any questions
14 with respect to the facts.

15 The next issue is the question of law which is how does
16 the confidentiality provision work and is it a valid
17 confidentiality provision. Your Honor asked Mr. Munson what
18 test should you apply and I don't know frankly, Your Honor,
19 that there is a test under South Carolina law to decide
20 whether a confidentiality provision works or doesn't work.
21 Confidentiality provisions work.

22 Mr. Munson, and the plaintiffs, have cited you to a
23 single case, the Fay case, and that was a case where --
24 which is a very peculiar case decided on very peculiar set
25 of facts where the Court struck down a confidentiality

1 provision because elsewhere in the contract the parties had
2 agreed that if Fay, or whichever party it was frankly, if
3 Fay had taken a job at another company, he would necessarily
4 have to give up confidential information. That was a term
5 of the contract.

6 We don't have anything like that here, and, and based
7 on those facts and those facts alone, the Court said that
8 because that confidentiality provision, given this
9 contractual agreement that if he took any other position
10 he'd have to give up confidential information, that worked
11 as a competition, a non-com -- non-compete. And so then you
12 had to apply the non-compete analysis to it.

13 First of all, that was also -- so those, so those are
14 peculiar facts and it was also, by the way, an
15 employer/employee situation, not an independent contractor
16 situation between two sophisticated parties like this one,
17 and, and, and I'll get into that more in a second.

18 So, if we look instead at the South Carolina Supreme
19 Court case of Mill -- Milliken, for example, that case tells
20 us that the South Carolina Supreme Court tells us that there
21 doesn't need to be a term for the confidentiality provision,
22 that confidentiality can survive the termination of an
23 agreement or, sorry, of a contract and that confidentiality
24 agreements are, are viable and enforceable in the State of
25 South Carolina.

1 So---

2 THE COURT: So no---

3 MR. KAESKE: Yes, sir.

4 THE COURT: Has no boundaries in South Carolina?

5 MR. KAESKE: I'm sorry, Your Honor?

6 THE COURT: There's no parameters to the
7 confidentiality?

8 MR. KAESKE: There's no test that I know of.

9 THE COURT: No---

10 MR. KAESKE: Confidentiality provisions, Mr., Mr.

11 Munson has argued, for the first time here today, not in any
12 of his papers, that this confidentiality provision is vague.

13 I, I haven't heard that before. I don't believe it is

14 vague. I believe that this confidentiality provision, and

15 if, if we'd like to look at it together -- if, if we'd like

16 to look at it together, Your Honor, it's Article Number 5 of
17 the contract.

18 Do you have the contract handy?

19 THE COURT: I have everything handy. Now, finding it's
20 one thing.

21 MR. KAESKE: Well, would you like me to just read it to
22 you?

23 Can you proceed that way or, or we can have you find
24 it?

25 THE COURT: Sure. You can read it to me. That'd be

1 great.

2 MR. KAESKE: Okay. This is what it says, Your Honor.

3 It says representative acknowledges, in the course of
4 its relationship with the company, it will have access to
5 proprietary, confidential, and trade secret business
6 information, particularly proprietary information, about the
7 company's development, assembly, manufacturer, and marketing
8 of its products. Clearly distributor pricing relates to the
9 marketing of its products.

10 Now, there's nothing in this confidentiality provision
11 that obligates CRI to designate things ahead of time as
12 confidential like a stamp that says top secret like the
13 documents at Mar-a-Lago or, or anything like that. And, as
14 a matter of fact, whether something, as I've stated just a
15 little bit ago, whether something's proprietary or
16 confidential or not is a question for the jury and, and I
17 think that the testimony is un -- well, the testimony is
18 uncontroverted that this distributor pricing information was
19 confidential.

20 THE COURT: Do me a favor.

21 MR. KAESKE: Yes, sir.

22 THE COURT: If I accept your argument and this case
23 goes to trial, you're gonna need to give me a jury
24 instruction on that though if the jury is going to make that
25 decision other than me just throwing that word out there to

1 them.

2 MR. KAESKE: Yes, sir, and I think that -- I, I believe
3 that, under the way the jury question will go, of course
4 they'll be an instruction about what, about what information
5 is. But the question will be did they comply with it. Did
6 Cedrone and Poly-Tech comply with the agreement, and then
7 they'll be given the text of the confidentiality provision.

8 But I, I do imagine that they'll be an instruction that
9 we can provide the Court as well.

10 Would you like me to continue?

11 THE COURT: Yes, sir.

12 MR. KAESKE: Then, Your Honor, it says representative
13 will keep confidential and will not disclose during or
14 subsequent to the term of this agreement. It was during the
15 term of the agreement. It was in -- I believe it was
16 between March and May of 2017 when Mr. Cedrone was still
17 being paid hundreds of thousands of dollars a month in
18 commissions where he disclosed the distributor pricing
19 information.

20 So, representative will keep confidential and will not
21 disclose, during or subsequent to the term of this
22 agreement, any information of an unpublished confidential
23 and proprietary nature for its own benefit. It was clearly
24 for Poly-Tech's benefit as the manufacturer of the competing
25 tourniquet and Mr. Cedrone's individual benefit as a third

1 party beneficiary under the contract and as the man that was
2 a partner in the alternative tun -- tourniquet.

3 So, I think that it's clear that there's a breach of
4 confidentiality. I think that the factual evidence is
5 uncontroverted and I think that the motion for summary
6 judgment with respect to the breach of Article 5 needs to be
7 overruled.

8 Now, we move to the issue -- unless Your Honor's got
9 any further questions with respect to confidentiality?

10 THE COURT: Not right now.

11 MR. KAESKE: Okay, sir. I would then move onto the
12 issue of non-compete.

13 Now, there are two things that I think it's very
14 important for the Court to understand. I'm sure the Court
15 does understand, having read all the materials, that
16 there's -- that non-competes, in every case that Mr. Munson
17 has cited, that the plaintiffs have cited in their briefing,
18 non-competes are different when they're between an
19 independent -- independent contractors, sophisticated
20 parties, and when they're between employers and employees.
21 Every single case that you've been provided by the
22 plaintiffs is a situation that involves two sets of
23 circumstances that are completely inapposite to where we are
24 today.

25 One, they're non-competes between employers and

1 employees. Two, they're issues of competition and the
2 enforcement of a non-compete after the termination of the
3 contract. We have neither of those situations here.

4 First, Mr. Cedrone was a sophisticated party. He was
5 an independent contractor. The standard with respect to
6 non-competes is much more lax with respect to non-competes
7 and sophisticated parties. Specifically independent
8 contractors.

9 I---

10 THE COURT: You use the word lax.

11 Lax as in more enforceable against independent
12 contractors?

13 MR. KAESKE: Less.

14 THE COURT: Less enforceable.

15 MR. KAESKE: Less. Here's the, here's the concept.

16 The concept is that where you have an employer and an
17 employee, that's typically an unequal -- a situation of
18 unequal bargaining power, power. And when you have an
19 employee contract, excuse me, where the employer's saying in
20 order for you to take this job I'm gonna enforce this
21 non-compete against you after you're done in my employment,
22 the law recognizes that that's a, a, a position of unequal
23 power and it looks a stance at non-competes.

24 However, they're a couple things that you need to know
25 about that. Oh, oh, sorry, and then, to answer your

1 question, but when you're talking about independent
2 contractors, where the independent contractors -- especially
3 where the independent contractors are sophisticated parties
4 as they are in this case, it -- non-competes are, are much
5 more allowed and the standard is much lower to defeat a
6 non-compete, sorry, to, to enforce a non-compete.

7 Non-competes will be enforced between sophisticated parties
8 because sophisticated parties have more equal bargaining
9 power and they can make these decisions.

10 That's that.

11 But if you talk about the employer/employee
12 relationship for a minute, in, in South Carolina law,
13 employees owe a duty, excuse me, not to compete with their
14 employer by common law. It almost rises to the level of a
15 fiduciary duty.

16 So, in South Carolina, it's understood that if you're
17 an employee, you don't have to have a non-compete to say you
18 can't compete while you're an employee. The issue of
19 non-competes, with respect to employer/employees, is the
20 issue of the enforcement of non-competes after the
21 employment is terminated and this is not a situation between
22 an employer and employee. And it's also not a situation
23 where the competition, and remember that this provision
24 talks about conflict of interest and, and, and acting
25 adversely to the interest of the company as well, that --

1 the, the breaches of the provision, Article 2, took place
2 while this contract was in place. It was undisputedly in
3 place.

4 Mr. Cedrone, when I asked him in his deposition,
5 admitted you were under a contract. You were being paid
6 under the contract when you joined forces with these other
7 gentlemen and developed, marketed, trademarked, filed for a
8 patent, manufactured, used the confidential pricing
9 information of CRI and during the year from August of 2017
10 until August of 2018 when CRI stopped paying Mr. Cedrone.
11 Mr. Cedrone was paid seven million dollars while he was
12 working with the other defendants on the alternative
13 tourniquet.

14 THE COURT: Give me a citation to that deposition that
15 you just quoted.

16 MR. KAESKE: Yes, sir. It might be -- take me just a
17 second.

18 THE COURT: Sure.

19 MR. KAESKE: Be patient with me and specifically what
20 you'd like to hear is, is it -- which part?

21 THE COURT: The part that you just stated that he said
22 under oath that -- what -- during -- while he was employed,
23 he received several million dollars and joined forces with
24 those -- I forget. I didn't write down---

25 MR. KAESKE: Yes, sir.

1 THE COURT: ---the way you classified---

2 MR. KAESKE: Yes, sir.

3 THE COURT: ---those two people but you called them
4 people.

5 MR. KAESKE: Yes, sir.

6 Sir, if you could -- Your Honor, if you would please
7 turn to Page 15 of the supplement that we've provided to
8 you.

9 THE COURT: All right.

10 MR. KAESKE: You see in the excerpted photo of the
11 test -- testimony, it says sir, there was a contract in
12 place that you were under and getting paid under, correct?

13 Yes.

14 You got paid seven million dollars, and during that
15 period of time you were being paid seven million dollars,
16 you designed an alternative tourniquet, correct?

17 Yes.

18 And then if you move on to the next page, you'll see
19 ex -- these are not photo excerpted, but quoted excerpts
20 from his deposition testimony, where I went through a litany
21 of things. I said while you were being paid seven million
22 dollars you did this and the things that are quoted there
23 are the things that he did.

24 He got a trademark on an alternative tourniquet while
25 he was being paid seven million dollars. He filed a patent

1 on an alternative tourniquet while he was being paid
2 seven million dollars. He made prototypes for the
3 tourniquet that was going to "unseat the CAT" which is what
4 his partner said in an email while he was being paid
5 seven million dollars.

6 He made bulletins, for example, that showed that HALO
7 tourniquet next to the CAT tourniquet showing competition
8 between the two of them while he was being paid on the CAT.

9 He gave the CAT distribution pricing to their HALO
10 partners to come up with a competitive price to the CAT
11 while he was being paid for the CAT, and he made training
12 videos of how to use the competitive tourniquet where he put
13 his tourniquet side-by-side with the CAT tourniquet while he
14 was being paid on the CAT.

15 And I would refer -- Your Honor, those are Pages 216 to
16 219 of his deposition where I went through that questioning
17 with him.

18 THE COURT: And the HALO tourniquet partners, those
19 are, are who?

20 MR. KAESKE: Those were Carson and Cannon.

21 THE COURT: Carson and Cannon.

22 MR. KAESKE: Yes, sir.

23 And so Carson and Cannon were, as Mr. Munson pointed
24 out, they're -- one's an orthopedic surgeon. One's a former
25 combat medic. They've been under nondisclosures and toured

1 the CRI factory. Mr. Carson had been after Mr. Cedrone to
2 make a competitive tourniquet for years, and, in August --
3 on August 3rd of 2017, Mr. Cedrone got the three of them
4 together and said I think I've got a deal for you that you
5 want to hear about and then they started making an
6 alternative tourniquet while Mr. Cedrone continued to take
7 commissions on the CAT.

8 As a matter of fact, Your Honor, when you get to, just
9 as a brief aside, when we get to the issue of conspiracy, it
10 went so far that Mr. Carson, and this is in the summary
11 judgment supplement as well, Mr. Carson said in an email I
12 want assurances that we're going to be able to continue to
13 manufacturer this product after Dan gets dragged into a
14 lawsuit.

15 So, they knew, they knew the wrongdoing that they were
16 engaged in because in, and frankly there are more emails
17 like that in -- that are in the record, sorry, that are --
18 that have been produced. They're not in the summary
19 judgment record. But the one that we did provide to Your
20 Honor in the summary judgment record says Mr. Carson,
21 before -- you know, during the period of the contract, while
22 Mr. Cedrone was being paid seven million dollars in
23 commissions on the contract saying I want assurance that
24 we're gonna be able to make this -- continue to make this
25 product after Dan gets dragged into a lawsuit.

1 okay. So, back to the issue of con -- non-competes in
2 general.

3 So I, I believe that we've shown more than a scintilla
4 of evidence to the Court that, during the period of time
5 that the contract was in place while Mr. Cedrone was being
6 paid under the contract, that he had a conflict of interest,
7 that he was competing. Frankly Mr. Munson has suggested
8 that, in order to compete, you have to be stealing sales. I
9 don't believe that that's the law in the State of South
10 Carolina. I also believe that it's a jury question that the
11 jury is gonna be asked whether or not whatever he did rose
12 to the level of competition.

13 But I'd remind Your Honor that Article 2 doesn't just
14 talk about the competition. It talks about the conflict of
15 interest.

16 And so if, if I haven't already made this clear,
17 because we're talking about conduct that took place during
18 the term of the contract, it's irrelevant whether or not the
19 competition position -- provision had a term or not. During
20 the period of the contract, an employee got a common law
21 ob -- duty -- obligation to not compete. Independent
22 contractors can absolutely agree that you may not compete,
23 that you may not have a conflict of interest during the
24 period of your employment, and we are not talking about
25 breaches of the Article 2 after the termination of the

1 agreement.

2 we're talking about breaches of Article 2 that took
3 place between August 3rd of 2017 and August of 2018 when
4 it's uncontroverted, not in dispute in any way, that Mr.
5 Cedrone was paid seven million dollars and Mr. Cedrone
6 himself admitted that he was under contract with CRI during
7 that period of time.

8 So, the---

9 THE COURT: Are you making the argument then that even
10 if, not saying I am, but even if I agreed with Mr. Munson
11 that the, that the terms of the agreement were somehow
12 unenforceable, that then you're gonna rely on the common law
13 obligations to enforce this idea of good faith and fair
14 dealing?

15 MR. KAESKE: Yes, sir. Yes. Oh, especially with
16 respect to good faith and fair dealing. Absolutely, Your
17 Honor.

18 THE COURT: Okay.

19 MR. KAESKE: Yes, there -- absolutely. Yes.

20 And, and, like I said, I, I, I don't believe that -- I,
21 I -- and in addition -- sorry.

22 I don't believe that the case law that the plaintiffs
23 have cited applies to conduct during the term of the
24 representation in this case or during the term of the
25 employment, and I believe, and I don't think that there's a

1 question that South Carolina law applies a more lenient
2 standard to the enforcement of non-compete provisions when
3 independent contractors are involved as opposed to when
4 employers are involved.

5 And so now, Your Honor, what we've shown the Court, I
6 believe, is that, in addition to entitling us, I mean CRI,
7 in, in addition to entitling CRI to recover the seven
8 million dollars that they paid while Mr. Cedrone was
9 cheating, violating Articles 2 and 5, these breaches also
10 excused any future commission obligations that CRI had
11 because you can not expect the benefits of the contract if
12 you don't comply with the contract and that will go directly
13 maybe this afternoon to the motion to reconsider.

14 If you don't mind, Your Honor, I'll just go over my
15 notes real quick.

16 THE COURT: Certainly.

17 MR. KAESKE: I believe that I've covered everything
18 that I wanted to say in response to what Your Honor has
19 asked and what Mr. Munson said.

20 I might just add this. Two things.

21 One, Mr. Munson said to the Court that there's
22 absolutely no evidence that we did anything to compete
23 during the term of the contract. I think that we've shown
24 that not to be true. But he also said, and I wrote this
25 down, you need to be able to show I'm competing for your

1 customers. And one of the pieces of evidence that we've
2 provided to Your Honor that's in the -- it's right there in
3 the briefing, was a situation where -- two things -- two
4 different situations actually.

5 One was a situation where Mr. Cedrone and Poly-Tech,
6 cause Poly-Tech manufactured these tourniquets that -- the
7 alternative tourniquet, Mr. Cedrone and Poly-Tech
8 manufactured alternative tourniquets and then they gave them
9 to a group of Marines trying to get the Marines, who use CAT
10 tourniquets, to use the HALO tourniquets instead.

11 They were -- those Marines were going out on a training
12 exercise. This took place during the term of the contract.
13 Mr. Cedrone gave like 30 of these tourniquets to this
14 lieutenant colonel from the Marines so that they could go
15 out on their training mission and they could use the HALO
16 tourniquet to convince them that they'd prefer the HALO
17 tourniquet over the CAT tourniquet.

18 It's, it's undisputed that the United States military
19 is the number one purchaser of the CAT tourniquet and that
20 that is a -- in direct competition with them. And so when
21 Mr. Munson said I have to show that I'm competing for your
22 customers, I think that's exactly what competing for your
23 customer is, giving them some of yours to try to get them to
24 be convinced to use it over someone else's.

25 And then there's another situation where, in, in

1 marketing and trying to get people interested in the CAT
2 tourniquet, Mr. Cedrone took samples of the CAT tourniquet
3 and provided them to the nephew of a vice president of the
4 NRA and took them to the annual NRA dinner at -- in Dallas
5 so that he could hand them out so that people could become
6 interested in, in the CAT tourniquet, sorry, in the HALO
7 tourniquet over the CAT tourniquet, which is another example
8 of I'm competing for your customers. I'm giving out my
9 product to try to get people interested in me instead of
10 interested in you.

11 The last thing I'd like to say about this is, is---

12 THE COURT: Can I ask you a question?

13 MR. KAESKE: Yes, of course.

14 THE COURT: This is not a legal question.

15 Early on in this case years ago the lawyers brought in
16 a CAT tourniquet and showed me what it is.

17 What is a HALO tourniquet?

18 MR. KAESKE: Well, the HALO tourniquet is a tourniquet
19 that works on a lever. And so if you remember I believe --
20 I probably have a tourniquet here.

21 Well, no, I, I don't. Oh, I'm sorry, Your Honor. I
22 don't see it.

23 THE COURT: That's all right.

24 MR. KAESKE: In any event, the HALO tourniquet is a
25 tourniquet that works on a windless. It's a stick.

1 THE COURT: Works on a what?

2 MR. KAESKE: Windless. W-I-N-D-L-E-S-S and --
3 windless.

4 And so the way that it works is you put it on. You
5 velcro it to yourself. There's a stick, the windless, and
6 the windless tightens an internal strap.

7 And so you crank the windless like this and then there
8 are some brackets that hold the windless in place so that it
9 stays tight. That's the tensioning mechanism for the CAT
10 tourniquet.

11 The HALO tourniquet, knowing that they needed to not
12 interfere with the patent of the CAT tourniquet, works on a
13 different tightening mechanism. It works on a lever.

14 And so there's, there's a lever that you pull over and
15 it causes it to tighten. That's the -- that's what they did
16 that's different.

17 And, in the patent, I think this is also important for
18 later in the motion for reconsideration, but could be
19 important to Your Honor now, in the patent, the 9-1-7 patent
20 that the -- that Mr. Cedrone and his partners filed for
21 while he was being paid commissions under the CAT and then
22 achieved, the patent, in its very first block, says that the
23 purpose of the tourniquet is to fix problems with the
24 windless tourniquet.

25 And so right there in the patent they wrote that it was

1 meant to be a competitive tourniquet. It was gonna fix the
2 problems that it -- existed with the windless tourniquet
3 and, of course, the CAT tourniquet is the number one
4 windless tourniquet in, in -- on the planet.

5 Does that answer your question, Your Honor?

6 THE COURT: I mean it's a -- more clear, yeah. I mean
7 I didn't know what, what the difference was.

8 Okay. Thank you---

9 MR. KAESKE: Yes, sir, that's---

10 THE COURT: ---for that, yeah.

11 MR. KAESKE: That -- that's the difference.

12 And so the last thing that I did want to point out to
13 Your Honor is when we talked about non-compete provisions,
14 it's easy I think to use the shorthand of non-compete. But
15 when you look at Article 2, what it clearly says is that
16 just like with an employee in their common law duties or
17 just like with a -- you know, the common law duty of good
18 faith and fair dealing in a contract. All that that
19 provision does is it spells out you may not have a conflict
20 of interest with me while I'm paying you millions of dollars
21 in commissions on my products.

22 And one of the things that I'd like to point out to
23 Your Honor is that provision was specifically negotiated at
24 the same time that the commission obligation was put into
25 Annex C. And, and this is in the information that we've

1 provided Your Honor and this is in the dep -- deposition
2 that I took of Mr. Cedrone.

3 And so this is how it went. Mr. Cedrone wanted to
4 build a building. In order to get a loan on a building, he
5 needed to be able to prove to the bank that he had income
6 coming in.

7 So, he went to CRI and he said hey, this commission
8 you've been paying me for a year and a half, I'd like it
9 written down in our contract. CRI said no problem but what
10 they did was they rewrote, CRI, rewrote Article 2 to say you
11 can't compete. You can't have a conflict of interest. You
12 can't take any, any actions that would adversely affect your
13 representations of us and those were bargained for trades.

14 At the same time that the commission obligation was put
15 into the written contract, Article 2 was, was changed to
16 have this no conflict of interest in the -- obligation in
17 it. And, under Article 1, it said -- Article 1 says you are
18 being appointed as a representative under the following
19 terms and conditions set forth here and after.

20 And the very first thing that it says after that is
21 this Article 2 where it says you may not have a conflict of
22 interest. And that is consistent with a common law duty,
23 good faith and fair dealing, during the period of the
24 contract.

25 And so it's, it's not overbroad. It's, it's not being

1 imposed after the term of the agreement. It's absolutely
2 enforceable, and what's more, Mr. Cedrone testified in his
3 deposition that he knew it was his obligation to not have a,
4 a conflict of interest when he was accepting commissions for
5 the CAT.

6 And, and so, Your Honor, if you were to look to what
7 I've just told you about, if you were to look at Page 17 of
8 our supplement to the motion -- to the opposition to the
9 motion for summary judgment that we're talking about right
10 now, you'll see some excerpted testimony there where it
11 says, on Page 17, you do see how the 2005 contract is
12 different than the 2001 contract with respect to Article 2,
13 right.

14 He said yes.

15 And I said so when you went to Composite and said I
16 want my commission written down, what CRI did was they
17 changed Article 2 to add all this stuff about conflict of
18 interest and you not competing with the core products,
19 correct, and he said I see the difference in the text, yes.

20 And I said yes, sir. And those two things happened at
21 the same time, right?

22 Yes.

23 And this is all under, if you'll look a little bit
24 higher. I think we got certain -- to the part where I said
25 it was a trade all under my context of saying you made a

1 trade. That was your trade. The trade was you got your
2 commission written down and they got that you don't get to
3 have a conflict of interest written down. And, and,
4 throughout this deposition and pages and pages of excerpted
5 testimony that are attached to our response to this motion,
6 Mr. Cedrone was asked questions about his conflict of
7 interest and all the things that he did to have a conflict
8 of interest while he was being paid millions of dollars in
9 commissions and then -- matter of fact, Your Honor, but for
10 Mr. Cedrone's concealing of his actions with his, I hate to
11 say it but it's true, co-conspirators, CRI would absolutely
12 be the plaintiff in this case. They would not be the
13 defendant in this case.

14 what Mr. Cedrone did was he breached, breached the
15 contract multiple ways while he was being paid millions of
16 dollars, and if CRI would of known about it, of course they
17 would of taken action and they'd be the plaintiff, not the
18 defendant.

19 For those reasons, Your Honor, the motion for summary
20 judgment should be denied. There's more than a scintilla of
21 evidence of competition and confidentiality. The provisions
22 are both enforceable, and without any further questions Your
23 Honor will ask, thank you.

24 THE COURT: Thank you, sir.

25 MR. MUNSON: I'll try and be brief, Your Honor.

1 THE COURT: Yes, sir.

2 MR. MUNSON: First of all, I appreciate the defendant
3 acknowledging that they are the drafters of the 2005
4 contract, and that the language, therefore, of the
5 non-compete agreement should be, to the extent there's any
6 question, read against them as well as the other provisions
7 of the contract.

8 The, the idea -- this elevation of the conflict of
9 interest is just an attempt to try and blue pencil this
10 obviously void non-compete agreement. But what they would
11 like to do is say, even if you think that this thing is
12 invalid as to the non-compete agreement, no term, no
13 duration, blah, blah, blah. There's more to this than that.

14 That doesn't work in South Carolina. You can't draft a
15 non-compete provision as broadly as this one is drafted, and
16 then, when it gets called out, go oh, well, what about the
17 conflict of interest words in it. It's void. It's gone.
18 It's not part of this contract.

19 The law in South Carolina will not allow this thing to
20 exist and the case law that I attached, I mean in comparison
21 to the one that the South Carolina -- the Court of Appeals
22 just recently in pro curiam affirmed is a way better
23 non-compete than the one in this case.

24 You, you made the point, and it caught my attention
25 because I read this contract so many times, about the

1 contract represent -- referencing the clause representative
2 and its agents and employees. I'm not sure where, where you
3 were referring. But the only place I'm aware in the
4 contract in which representative, that is Poly-Tech, is
5 discussed in connection with its agents and employees is in
6 section or in Article 10, relationship of the parties where
7 it describes Poly-Tech as an independent contractor and then
8 it says representative, its agents and employees, shall,
9 under no circumstances, be considered as officials or
10 employees of the company.

11 So, unless you're referring to another section that I'm
12 not aware, I think that's the, the point there.

13 THE COURT: You had quoted me that, that provision in
14 your argument where you said Poly-Tech and its agents.

15 MR. MUNSON: Okay. The -- well, that's the only place
16 I'm, I'm aware of and I think the contract clearly says this
17 doesn't -- this, this contract doesn't involve -- well, the
18 argument that we'll just go to the common law and say Dan
19 Cedrone is an employee of, of ours and, therefore, we can,
20 we can bind him to some, some common law non-compete.

21 One, he's not an employee of Composite Resources and,
22 two, this contract clearly says that the employees are not
23 to be considered employees.

24 Anyway, I think that argument of giving up on the
25 language that they put into the contract, and then trying to

1 fall back on some common law argument to make a third party
2 beneficiary, who is only a third party beneficiary for
3 essentially royalty payments continuing after the contract
4 is, is terminated doesn't arise to the level of the third
5 party. I haven't looked at it. I have to go back and look
6 at this 309 restatement thing. But I think, factually, this
7 is distinguishable.

8 Essentially Dan Cedrone identifies himself as the heir
9 of Poly-Tech, and were Poly-Tech to die, he still gets the,
10 he still gets the commission payments on this project
11 continues. I, I -- but that's the first time I've heard
12 this -- the idea about this second restatement's intended
13 beneficiary. I, I think, factually, that would be -- there
14 would be significant differences between what that
15 encyclopedia or treaties is talking about and how it's
16 played out in this contract and---

17 THE COURT: To be -- to both sides, I've not digested
18 nor began to even chew on the idea of this is a third party
19 beneficiary case.

20 So, your arguments are, by my questions, do not think
21 that I have any predisposed view of those. But I'll
22 definitely now, since both of you have raised them, I'll
23 definitely consider them as they're be -- presented to me.

24 But -- so I'm looking at the -- I guess I'd say the
25 bigger issues like not -- like what vehicle are we driving,

1 not who's driving the vehicle whether it's an employee and,
2 and a contractor or, or, or third party beneficiary. I'm
3 looking at what vehicle am I in to try to decide the case.

4 And so that vehicle now -- I've heard now the
5 defendants say well, even if you get past -- even if Mr.
6 Munson is correct, we're gonna -- they're also gonna rely
7 upon a common law concept of good faith and fair dealing.
8 They're gonna apply that then to Mr. Cedrone, and, and,
9 again, I understand both of y'all presented to me this idea
10 of third party beneficiaries, employee, independent
11 contractor, all that. But what about this idea of, of
12 common law, good faith and fair dealing?

13 Do you -- factually, they presented to me an excerpt
14 from a deposition that, that they say gets them to a jury on
15 that issue.

16 MR. MUNSON: So, with regard to that, Your Honor, I, I
17 disagree with his paraphrasing of Dan Cedrone's testimony
18 here and would ask the Court to look at the -- at, at the
19 stuff that was, was presented. For example---

20 THE COURT: Well, we got theirs on what Thursday,
21 Friday?

22 MR. MUNSON: Yes, yes.

23 But, first of all, there was never -- there was -- I'm
24 jumping -- I, I -- there were some things in there that he
25 said Dan Cedrone said that, that -- for example, that

1 there -- that he's competing. Dan Cedrone never competed.

2 Now, Dan Cedrone knew he was getting confidential
3 information with regard to the distributor for pricing. Dan
4 Cedrone's testimony over and over and over again during that
5 deposition was that the distribution pricing appeared on
6 the -- on his paystub exhibits that he got every month
7 forever, that Mark Esposito's similar information was
8 disclosed to him on those monthly, monthly, monthly, monthly
9 reports that came with his pay -- that came with the, the
10 independent contractor pay.

11 None of those documents were marked confidential. He
12 never considered them confidential. Nobody told him they
13 were confidential.

14 And so the argument -- so there is no admission by Dan
15 Cedrone that he was given confidential distributor pricing
16 information. According to Dan Cedrone, that was not
17 confidential. He, he got it every month forever.

18 THE COURT: The defendant says that's a question for
19 the jury though.

20 MR. MUNSON: Well, it's not a question that it was
21 never -- that it wasn't marked.

22 So, the question of was it a secret, so, maybe, maybe
23 that is an issue for the jury.

24 Was it a secret?

25 Dan Cedrone says it's not a secret. Poly-Tech says

1 it's a secret.

2 was it ever designated to Dan Cedrone as a secret by
3 Poly-Tech?

4 No.

5 was it ever -- were any damages -- was it ever used as
6 a secret?

7 Maybe that's a jury question. But that -- there is no
8 evidence that there were any damages associated with the --
9 with that information. They're, they're no sales of --
10 there are no sales of HALO tourniquets to the, to the
11 distributors of their company or to any of the military
12 entities.

13 So they're -- I mean they're -- there's just no --
14 there's no evidence of any damages arising out of that and
15 it's like my discussion earlier about speeding. I have to
16 be in a car and I have to speed. Maybe they have a lot of
17 information that I was in a car. But they don't have any
18 that I was speeding.

19 That's no -- there's no information here about any
20 damages arriving -- deriving from the fact that Dan Cedrone
21 shared with Doctor Carson and Mr. Cannon the information
22 that was sent to Dan Cedrone every month for 15 years and
23 never marked confidential.

24 You know, there's -- a lot of this -- he made seven
25 million dollars when he was competing with -- Poly-Tech made

1 seven million dollars while Dan Cedrone was competing with
2 Composite is, is just not true. Preparing to compete is not
3 the same even if he made -- Dan's preparing to compete,
4 Poly-Tech's actions -- preparing to compete is not competing
5 and I -- I'll refer the Court to the restatement third of
6 agency Section 805, which is reference in a case called
7 Taser Intern versus ward, which is 224 Arizona 389, 2010.
8 In that case, Taser -- somebody worked for Taser prepared to
9 compete.

10 In, in its motion for summary judgment, Taser argued
11 that ward violated his fiduciary duties by failing to inform
12 Taser he planned to form a competing business. Ward
13 contends, under clear legal authority, he had no duty to
14 disclose his plans to leave the former competing business.
15 The Court agreed, and then citing the restatement, in
16 general, an employee or other agent who plans to compete
17 with a principal does not have a duty to disclose the fact.
18 Preparation is not competing. And, at best, they have some
19 evidence that what they were doing could be useful if they
20 competed.

21 But, again, getting a patent over a different
22 technology that could possibly compete with a windless
23 tourniquet goes both ways. If you use the patent, maybe it
24 could compete. But if you don't use the patent, then you're
25 keeping everybody else -- you're keeping all of CRI's

1 existing competitors from coming up with a better design
2 because you have patented that technology.

3 So, at the point of---

4 THE COURT: I'm not sure I understand that.

5 MR. MUNSON: At the point of getting -- this is the
6 point, Your Honor.

7 At the point of getting a patent, that is not a
8 competition because a patent can be used to compete and a
9 patent can be used to stop competition. So, just getting a
10 patent does not equal competing and there's no sales of HALO
11 tourniquets until 2019, which is several months after the
12 contract was terminated by Composite.

13 with, with regard to the lax, when it's business to
14 business, it's lax. When it's an employee, the non-compete,
15 no, no new business, is, is more strictly enforced.

16 The business to business cases are generally a company
17 selling a company to another company. I'm selling my car
18 dealership to you and the non-competes in those situation
19 where the seller agrees not to compete is significant
20 because if I, as the seller, agree not to compete, then my
21 business is worth more, I can sell it to you for more. It
22 has a specific purpose in that commercial's equally
23 sophisticated parties buy/sell situation.

24 But in the situation like this, which is basically a
25 employee relationship situation, they're being retained as

1 a, as a sales representative. It's an outside sales
2 representative versus an inside sales representative if,
3 if -- it would of been an inside sales representative, they
4 would agree that the extremely strict standard would apply.
5 They wanted to take it's an outsaid sales representative and
6 they want to make that equal to the guy's buying and selling
7 a car dealership as opposed to what it's way more analogous
8 to and that is an inside sales representative.

9 So, I -- although, granted there is a laxer standard
10 when applied to two sophisticated parties in an arm's length
11 transaction not similar to an employee --
12 representative/employee situation, this one's way closer to
13 the other one and I talked about this in the stuff that I
14 submitted last week, the difference between these two.

15 The test is still the same. We're not talking about a
16 different test. The test -- that the test doesn't apply.
17 The test is still the same. It's just that when -- in a
18 buy/sell situation when a seller's trying to sell his
19 company, there's a reason because it increases the value of
20 the good will and makes that transaction more valuable to
21 apply it with less strictness in that situation.

22 But the test is same and the -- and this, this
23 provision is off the chart fails the test and is void ab
24 initio and anything in it doesn't exist and you can't blue
25 pencil it out by saying let's just talk about the conflict

1 of interest provision. You can't blue pencil it out by
2 saying let's go to good faith and fair dealing. You can't
3 blue pencil it out by saying let's let a jury determine what
4 compete is or non-compete.

5 They drafted this provision. They way overreached in
6 terms of South Carolina law, and, and it needs to just be
7 stricken from the contract and not have any, not have any
8 existence in this case going forward, Your Honor.

9 I will leave it there on -- and, and refer you back to
10 our, our papers, Your Honor.

11 THE COURT: I've also heard argument from them today
12 that, if I read it -- I read over it and didn't digest it,
13 that now they're going to argue that there's some type of
14 consideration argument that, at the time that the -- that
15 this provision was renegotiated, your client was in the
16 business of -- was out getting a -- building a building?

17 MR. MUNSON: I, I, I don't understand how that relates
18 to anything. There is -- in -- I, I don't know -- I don't
19 know that there was consideration -- they redid the entire
20 contract. I'm -- I don't understand that argument, how, how
21 by my client building a building -- I don't know what that
22 consideration supports.

23 Like there's a -- and I'm not making an argument that
24 this is a -- so, maybe this is what it relates to.

25 Sometimes I'm an employee of a company. I've been an

1 employer for years. The employee suddenly puts a
2 non-compete provision in front of me and says sign this and
3 then I sign it and I later argue there was no new
4 consideration for that non-compete agreement, and,
5 therefore, it's invalid. There's case law that says that
6 non-compete agreement is invalid because there was no new
7 consideration when that provision was added to my employee
8 relationship.

9 I have no idea what that has to do with this case. I
10 am not arguing that somehow, because this non-compete
11 provision got put into this contract after the parties had
12 an existing relationship, that new consideration was
13 required for it to be included. So, maybe I -- I may not be
14 smart enough to understand how that has any significance to
15 this case.

16 THE COURT: All right.

17 MR. KAESKE: Your Honor?

18 THE COURT: Okay.

19 MR. KAESKE: Your Honor, I'm, I'm sorry. I know it's
20 his motion.

21 Am I allowed to ask -- to respond or have you heard
22 enough?

23 THE COURT: Briefly. But then he gets to close to
24 anything that you say.

25 MR. KAESKE: I'm, I'm fine with that if Your Honor

1 wouldn't mind me just taking a couple of---

2 THE COURT: Briefly, yes.

3 MR. KAESKE: ---moments.

4 I, I think that what Mr. Munson -- I mean I wrote it
5 down. What Mr. Munson just said is this is basically an
6 employee relationship.

7 They've said for years that they weren't an employee.
8 If they are an employee, then they've got a common law duty
9 not to compete. I think -- this is the thing that I want
10 Your Honor to leave the courtroom with if you don't mind
11 with respect to the issue to non-competes.

12 Every case, every case that Mr. Munson has cited with
13 respect to non-competes is a non-compete between an employer
14 and an employee that is seeking to be enforced after the
15 term of the contract, after the term of the contract. And,
16 obviously, in those situation there's a question is there a
17 term, how long is the term, is the term reasonable. That's
18 not this situation.

19 Now, we do have a claim for breach of good faith and
20 fair dealing. He has not moved on that claim. That is a
21 viable claim. And, and to the extent Your Honor was to
22 decide it, I'm not conceding this in any way because I think
23 this is a, a valid provision as it applies during the pro --
24 during the period of the relationship. But to the extent
25 that Your Honor was to decide that for some reason it's not

1 a valid non-compete, as in what happens after it's
2 terminated, and what's the term of it, and what's the
3 territory, it is a codification, it's a recital of the
4 common law duty of good faith and fair dealing between an,
5 between an independent contractor and, and the company that
6 it's representing.

7 And so the idea that this thing fails because it
8 doesn't meet employer/employee scrutiny when we're talking
9 about conduct during the period of the agency, during the
10 period of the relationship, and, and there's no term
11 required, it, it just doesn't make sense and, like I said,
12 it's a, it's a, at, at worst, a codification of the good
13 faith and fair dealing.

14 A couple other real quick things that I wanted to
15 share.

16 THE COURT: You mean the terms of the agreement is a
17 codification of the good faith and fair dealing?

18 MR. KAESKE: That's exactly what I mean, Your Honor.
19 Thank you very much.

20 The other thing that I wanted to say is this idea of
21 preparing to compete is not competing, I, I don't believe
22 that -- well, I think whether it was competition or whether
23 it was preparing to compete, and didn't rise, rise to the
24 level of competition is, of course, a fact question.
25 There's no way, upon this record, that it could be upheld

1 that, as a matter of law, the things that Mr. Cedrone and
2 his partners and Poly-Tech did during the period of their
3 relationship with CRI isn't a scintilla of evidence for the
4 jury to decide whether there was competition. And so it's
5 gonna be for the jury to decide whether it was just
6 preparation or whether it was competition.

7 There's also the conflict of interest, and, and if you
8 have a question about whether their intention and whether
9 their actions rose to the level of -- rose to the level of
10 competition, I'd ask Your Honor to look at Page 9, and
11 moving on to Page 10 of the -- our response to this motion
12 for summary judgment where the testimony is excerpted from
13 Mr. Cannon, who is one of the three partners with -- in that
14 HALO tourniquet where he said in any amount that the goal of
15 the HALO tourniquet was to unseat the CAT as the number one
16 tourniquet in the world.

17 So your partner in HALO says he wants to unseat such
18 well entrenched tourniquets as the CAT, and then Mr. Cedrone
19 said -- he says appealing to a civilian market represents a
20 viable alternative and I said if we're unable to unseat the
21 CAT, which is his goal, he says it right there, and Mr.
22 Cedrone answered right.

23 And so, in any event, I think I've said enough. Thank
24 you, Your Honor.

25 MR. MUNSON: Real briefly, Your Honor.

1 THE COURT: Yes, sir.

2 MR. MUNSON: Like three points.

3 One, this idea of a common law duty is an employee's
4 duty to its employer. The -- that -- whether Dan Cedrone is
5 an employee of Poly-Tech or not, nobody's suggesting Dan
6 Cedrone is an employee of Composite Resources. And so, some
7 common law confidentiality -- I mean non-compete agreement
8 or con -- even confidentiality agreement just simply is
9 non-analogous here.

10 what I said was the independent contractor relationship
11 of the sales representative makes a -- what's often times an
12 inside position, sales representative, just an outside
13 position and this situation is way more akin to a sales rep
14 -- internal sales representative non-compete situation than
15 it is to a car dealer selling his car dealership. And my
16 paperwork just -- has one case where a sole proprietor of a
17 jewelry store sells his company with a non-compete and that
18 case essentially treats it way more like the employee
19 situation than it does the buy/sell between the car
20 dealership, which is what they would argue for and, and I
21 think my situation, situation in this case is even further
22 from the jewelry retailer.

23 So -- and, again, the test is the same. The idea that
24 preparation to compete could be included in compete in this
25 contract only makes this non-compete provision that much

1 more void.

2 The idea that the good faith and fair dealing rule is
3 the codification of the language used in this contract is
4 exactly my point. When you throw the contract out, you
5 can't -- when you throw the contract term out as void ab
6 initio, you can't use it for any purpose, which is the law
7 in South Carolina. Trying to backdoor that in by blue
8 penciling it with a good faith and fair dealing on the
9 language that got thrown out of the contract does not work.
10 And I'd like to end by going back to the confidentiality
11 provision.

12 The idea -- I mean the -- yeah, the confidentiality
13 information. If you take Dan Cedrone out of this scenario,
14 out of the conspiracy here for a minute, you have, you have
15 a surgeon with battlefield experience with these tourniquets
16 and a medic with battlefield experience with these
17 tourniquets being invited to Composite Resources to share
18 their experiences to -- for whatever reasons that might be
19 beneficial to Composite Resources.

20 while they're there, they get shown around the joint.
21 Hey, you want to see the place. They go see the place.

22 Five years later, a surgeon and a medic come up with an
23 idea to make a better tourniquet and their argument is that
24 is a conspiracy based on confidential information they
25 obtained five years earlier from a tour of a facility. To,

1 to -- it -- it's just hard to imagine that that gets past
2 summary judgment.

3 The only difference here is Dan Cedrone's involved.
4 But that doesn't make the information any more confidential,
5 the information any more used, or the conspiracy any more
6 conspiratorial.

7 That's all I have, Your Honor.

8 THE COURT: All right. Thank you.

9 I might have one question that I'm gonna have to ask
10 defendant. That means you get to answer as well cause it's
11 your motion.

12 Mr. Munson made the statement, and correct me if I say
13 the statement wrong, applying or obtaining a patent is not
14 considered competition.

15 Do I say -- is that what you said?

16 MR. MUNSON: That's correct, Your Honor.

17 THE COURT: Now, this case has once been removed to
18 federal court based upon the belief that this was a patent
19 case.

20 Under patent law, is that is what -- is his statement
21 of law been established through patent law?

22 MR. KAESKE: Not as far as I know.

23 THE COURT: Okay.

24 MR. KAESKE: And, and Your Honor---

25 THE COURT: So you disagree with that statement that

1 applying for a patent can't be competition?

2 MR. KAESKE: Yes, sir, and I'd also say that Mr.
3 Cedrone made such an admission when I asked him in his
4 deposition.

5 THE COURT: Okay.

6 MR. KAESKE: I, I asked him specifically, if you don't
7 mind as a quick, as a quick---

8 THE COURT: All right.

9 MR. KAESKE: ---for your---

10 THE COURT: He gets---

11 MR. KAESKE: ---information.

12 THE COURT: He gets to go last just as I think you do.

13 MR. KAESKE: And that's fine.

14 THE COURT: Yes, sir.

15 MR. KAESKE: But, but the information about this is, is
16 this.

17 Look. Mr. Cedrone admitted multiple times in this
18 deposition that it doesn't do CRI any good for there to be
19 more patented tourniquets out there whether they're being
20 made or not being made.

21 The, the issue with the tourniquet market, and Mr.
22 Cedrone knows this, the issue with the tourniquet market is
23 that people are -- is that -- it use to be that CRI had the
24 only game in town. Now there's a bunch of different
25 tourniquets, and the idea that any tourniquet might be

1 better, might be different, might be cheaper, all of that is
2 against the interests of CRI and it's all competing with,
3 with CRI.

4 If Mr. -- Mr. Cedrone admitted, and I think I've got a
5 piece of their testimony right here, Mr. Cedrone admitted
6 that, if he would of done what he did in 2017, if he would
7 of done that in 2004 before the contract was signed or in
8 2005 when the contract was signed, there's no way he would
9 have ever gotten the contract signed. There was no way he
10 would of ever been involved in this project if he would of
11 done what he done, if he'd of gone out and applied for a
12 patent.

13 And so just the -- just the criticism in the patent
14 that says it's gonna fix the problems with the windless
15 tourniquet is, is competition and is a conflict of interest
16 with the CAT tourniquet and it's certainly more than a
17 scintilla of evidence in that regard.

18 Thank you, Your Honor.

19 THE COURT: Okay. You lost me on the connection back
20 to something in 2005.

21 MR. KAESKE: Well, if -- let me try one more time.

22 THE COURT: Okay. You lost me on the connection cause
23 I haven't focused on something that happened historically
24 like that in this case.

25 MR. KAESKE: Yes, sir.

1 THE COURT: Because the issues in the case are more
2 closely in time. These are around I'd say, at earliest,
3 '15, '16, '17, '18 and then what happened after '19 if y'all
4 are gonna get into damages.

5 MR. KAESKE: That -- that's right, Your Honor.

6 THE COURT: 2005 has never been brought up in this case
7 before.

8 MR. KAESKE: I, I think I went too fast.

9 Let me take a couple extra steps because I was trying
10 to conserve time.

11 So, Your Honor will recall that this contract was
12 signed in June of 2005.

13 THE COURT: Uh-huh.

14 MR. KAESKE: And so the -- to the extent that Your
15 Honor is going to consider or that we ought to consider what
16 the intent of the parties was as to the meaning of any of
17 these provisions at the time the contract was signed, we
18 look to the time of 2000 and---

19 THE COURT: I thought your argument was just that this
20 provision that I'm looking at was redone back in -- when his
21 client was gonna get some building and got a loan.

22 MR. KAESKE: Yes, sir, and that was 2005. Sorry. I,
23 I -- to make things easy, I'll just withdraw that reference
24 to back in time---

25 THE COURT: No, if you feel---

1 MR. KAESKE: ---with Mr. Cedrone.

2 THE COURT: ---like it's an -- important, you let me
3 know about it in this.

4 MR. KAESKE: Well, I think I've said a lot more
5 informative things than that. And so I, I don't need to
6 confuse the Court about it. My point is just Mr. Cedrone---

7 THE COURT: I'm just trying to understand your
8 argument.

9 MR. KAESKE: Yes, sir, and I'm sorry.

10 Let, let me try it this way. I, I -- maybe you can
11 follow this.

12 Mr. Cedrone admitted in his deposition that he knew
13 that if he would of done in 2005 what he did in 2017 that he
14 would of never gotten this contract in place. Therefore,
15 Mr. Cedrone knew that what he did in 2017 was a breach of
16 the contract. That was the point that I was trying to make.

17 He knew it was wrong back then. He knew it was wrong
18 all along. He knew it was wrong in 2017, and the way in
19 which it was wrong was it was competition and a conflict of
20 interest. And if he'd of been competing and had a conflict
21 of interest at the time the contract was signed, it never
22 would of been signed. That was simply the point that I was
23 trying to make.

24 THE COURT: Yes, sir.

25 MR. MUNSON: That's not his testimony. He testified

1 that if he were selling -- if he were out selling other
2 tourniquets at the time that this happened, probably
3 wouldn't have gotten this contract. But, in 2017, he wasn't
4 selling tourniquets. He was thinking about tourniquets with
5 some other people who were thinking about tourniquets. I'll
6 leave it there.

7 My point about the patent is not a legal matter. It's
8 a factual matter.

9 One way to, to, to stop competition is to patent
10 something. A lot of companies who have a product, who have
11 a mousetrap that's doing gang busters, will invent a better
12 mousetrap and they'll patent it but they'll never take it to
13 market because that stops me from patenting that better
14 mousetrap and taking it to market or even not patenting.
15 Just making their new, their new mousetrap.

16 So, my, my only point is that patenting things, from a
17 factual standpoint, is one way to, to engage in competition.
18 It's also a way to stop competition.

19 So, the fact of patenting is not definitive about
20 whether it is competing or not competing cause they're used
21 both ways. That's -- that was my point, Your Honor.

22 THE COURT: Okay. All right. Harry, we start back at
23 2:30?

24 THE LAW CLERK: Yes, sir.

25 THE COURT: All right. We got to break until 2:30.

1 I've got just a few. The afternoon docket is significantly
2 reduced. So, if -- if y'all have time I'd like to get --
3 pick back up this afternoon.

4 I can't get the other people here earlier. This lady
5 as well as these people in the red jackets, I got to give
6 them time for lunch. So I can not reduce our lunchtime.

7 So let's get back together with y'all -- if y'all want
8 to say 2:45 and then we maybe run around 4:30 or so. And I
9 will check on the availability of Friday for me and then we
10 can discuss that if we need to have Friday before we leave
11 today.

12 Thank y'all very much.

13 We'll step down.

14 (WHEREUPON, a lunch break was taken at this time.)

15 THE COURT: Okay, gentlemen. Thank y'all very much for
16 the arguments this morning.

17 Let me gather my thoughts just for a, just for a moment
18 for my last hearing. Get my notes together.

19 (Pause.)

20 THE COURT: All right. I have sent in a request about
21 Friday. I've not heard back but my understanding is it's
22 being relayed to the Chief Justice to see if we are going to
23 be allowed to conduct the hearing on Friday. Hopefully we
24 will know in very short order. I was told that they would
25 get the message to him and he would let us, he would let us

1 know.

2 okay. All right. The next -- the reason I mention
3 that is because I'd like to do the motion to reconsider the
4 prior decision all at one time as opposed to breaking it up
5 and -- but I would like to really get that one done.

6 So let me suggest something to you. Not knowing that
7 we're gonna do -- if we're gonna be here on Friday, I -- we
8 can either start that motion with the understanding that my
9 expectations is that we would not finish that motion today.
10 And then we can try to do the motion to amend after that or
11 else we can go ahead and do the motion to amend to see how
12 far we get with that and either stop with the motion to
13 amend and then get back together with the motion to
14 reconsider.

15 MR. KAESKE: Your Honor, if I may?

16 THE COURT: Uh-huh.

17 MR. KAESKE: I think Your Honor's thoughts are good
18 that we should do the motion to reconsider all at once.

19 THE COURT: Uh-huh.

20 MR. KAESKE: And if I heard Your Honor correctly
21 earlier that we're maybe gonna stop at 4:30?

22 THE COURT: I've, I've got -- I've -- yeah, I've got an
23 obligation. I've got to go to a youth justice committee and
24 I've got to serve as a judge in a mock trial for high school
25 students tonight. So I've got to make that. So I don't, I

1 don't want to be late for that.

2 MR. KAESKE: Then I -- then I think Your Honor's
3 suggestion is a good one. Let's move on to the motion to
4 amend and let's do the motion to reconsider on Friday.

5 THE COURT: Okay. All right. Let me get -- let me
6 pull that notebook out. And then we also have that motion
7 to exclude the or to strike the -- what do you call it?

8 MR. KAESKE: The errata sheet.

9 THE COURT: Yeah, the errata sheet. Yeah, maybe we can
10 do both of those.

11 MR. KAESKE: And, Your Honor, if you wouldn't mind just
12 giving me a second to re -- get my thoughts together --

13 THE COURT: Certainly.

14 MR. KAESKE: -- since I was on the reconsider.

15 THE COURT: Absolutely.

16 You mean on the motion to amend?

17 MR. KAESKE: Yes, sir, because my head's on the --

18 THE COURT: Okay.

19 MR. KAESKE: -- on the reconsider.

20 THE COURT: Okay. If you heard what I just heard you
21 need to get your motions straight.

22 (Pause.)

23 THE COURT: Okay. Are -- everybody ready?

24 MR. KAESKE: I am, Your Honor. Thank you.

25 THE COURT: Okay. We're now gonna move to the

1 defendant's motion for leave to amend or supplement amended
2 answer and counterclaims.

3 Be more than happy to hear from you.

4 MR. KAESKE: Thank you, Your Honor.

5 May it please the Court.

6 I, I think maybe I'll start with a brief, a brief
7 factual background that gets you to where we got in filing
8 this motion.

9 That is, of course, you know that I and Mr. Martin are
10 newcomers to the game. We both, of course, appreciate you
11 letting us appear pro hac.

12 We were first brought into the case in September. Our
13 pro hacs were signed I think some time in the third week of
14 September.

15 In September, around the 15th, not around the 15th,
16 on the 15th, was Your Honor's dispositive motion deadline,
17 and as motion deadlines can go, they caused people to start
18 thinking about stuff, what needs to have motions filed
19 against it, and what doesn't.

20 There are three claims in this case that are made by
21 the plaintiffs that implicate the state of mind of
22 Mr. Bennett and CRI in terminating the contract.

23 Now, of course Your Honor's heard a bunch about the
24 prior material breach that we believe occurred on the
25 Article 5 confidentiality, Article 2, good faith and fair

1 dealing, or competition, or the conflict of interest or
2 what -- whatever we want to talk about it. But, of course,
3 Your Honor knows that, in August of 2017, CRI ceased making
4 any further commission payments to Poly-Tech and, at, at the
5 same time, what CRI did was they send a letter terminating
6 the sales representative agreement.

7 Now, if I could make sure that Your Honor understands,
8 and you probably do, but what I'd like Your Honor to be sure
9 to understand is that there is this language in Annex C of
10 the contract that talks about the regular contract. And I,
11 I think what the parties meant by that when they signed it
12 was that Mr. Cedrone, prior to the 2005 contract, had a
13 preexisting relationship with CRI for a number of years, I
14 think dating back to 1995, where Mr. Cedrone was acting as a
15 sales representative first with no contract. Then, under a
16 2001 contract, then the 2001 contract was amended when the
17 tourniquet commission obligation was added and Article 2 was
18 changed as we discussed this morning.

19 So, there's a preexisting relationship between
20 Composite Resources, and Poly-Tech, John Bennett, and Dan
21 Cedrone, and the relationship was this.

22 Mr. Cedrone, who sold plastics, would, from time to
23 time, visit with customers who wanted to buy plastics who
24 needed something to be made, and because Mr. Cedrone wasn't
25 a manufacturer, he would refer those people to Mr. Bennett

1 for the manufacturing, manufacturing capabilities.

2 And so this is a, a bit of a thing that's worth
3 understanding and that is that Mr. Cedrone didn't actually
4 sell products. He wasn't a sales representative who went
5 out and sold products. He was a sales representative who
6 sold the manufacturing capabilities of CRI.

7 THE COURT: Now, I appreciate the narrative background.
8 Let me ask you a question.

9 MR. KAESKE: Yes, sir.

10 THE COURT: Give me the narrative background to justify
11 the position of wanting to amend the answer to assert the
12 defense of reliance upon counsel.

13 MR. KAESKE: I, I think I do. But, Your Honor, if you
14 think that I'm going too far afield, I'll, I'll be more
15 precise.

16 THE COURT: No, I, I just want to be sure because we're
17 taking in a lot --

18 MR. KAESKE: Yes, sir.

19 THE COURT: -- and we're on a particular motion now.

20 MR. KAESKE: Yes, sir.

21 THE COURT: And so I'm trying to be sure I'm absorbing
22 what you want me to know other than you're just giving me a
23 historical background of what went on way beyond what I
24 believe the issues are in this case.

25 MR. KAESKE: I, I think that's fair, Your Honor.

1 THE COURT: Okay.

2 MR. KAESKE: Let me, let me move on.

3 THE COURT: All right.

4 MR. KAESKE: So, moving forward, the -- when the
5 tourniquet deal came into play --

6 THE COURT: Right.

7 MR. KAESKE: -- I, I do think it's important for Your
8 Honor to understand how that project was envisioned and set
9 up and how it worked and that is---

10 THE COURT: Because we're dealing with -- allegations
11 are a breach --

12 MR. KAESKE: Yes, sir.

13 THE COURT: -- alleged breach, alleged termination that
14 occurred by way of a letter from your client that set the
15 date -- I thought it was 2018. Mine might be wrong.

16 MR. KAESKE: It was.

17 THE COURT: Okay.

18 MR. KAESKE: August---

19 THE COURT: 2018 when it was gonna be terminated?

20 MR. KAESKE: Yes, sir.

21 THE COURT: Okay. And so this stuff going back to
22 2001, 2002, 2003, the reason I ask the questions --

23 MR. KAESKE: Yes, sir.

24 THE COURT: -- and, and I want to understand this
25 because I'm also having to plan for a trial. I have now

1 been requested two weeks. I tried to set this case for
2 trial twice.

3 I'm now hearing that we might need three weeks and so
4 I'm trying to also comprehend what facts are gonna be
5 presented to this jury that I now am gonna have to use the
6 powers that be and have to go to Columbia and convince them
7 that I have to now re-get -- re-set the Court's schedule to
8 try to get three weeks of time when I've already tried to
9 set this time for this trial -- for this case twice before.

10 MR. KAESKE: I know you have, Your Honor.

11 THE COURT: Okay.

12 MR. KAESKE: And, and let me just say, in case there's
13 some confusion, I, I hope to be trying the case with Your
14 Honor's permission. I don't think we need three weeks to
15 try this case. I, I, I think that, depending on how long
16 you allow for jury selection and things like that, I think
17 five or six trial days out to do it. I don't think we need
18 three weeks.

19 Now, I haven't conferred with Mr. Munson about that but
20 I -- Your Honor---

21 MR. MUNSON: Three weeks is not coming from us, Your
22 Honor.

23 MR. KAESKE: The, the---

24 MR. MUNSON: I don't know where that came from but
25 that's not coming from us.

1 MR. KAESKE: In, in any event, Your Honor, I don't
2 think there are that many witnesses. I don't, I don't
3 believe that there are probably going to be any experts.
4 And so I think that there are probably, you know, maybe less
5 than 10 witnesses.

6 THE COURT: All right.

7 MR. KAESKE: And so I, I, I don't -- if, if that's a
8 concern for Your Honor in terms of us getting set, I'd like
9 an opportunity to revisit that with you, with Mr. Munson, to
10 see---

11 THE COURT: Well, I'm just -- I, I -- excuse me for
12 interrupting.

13 The reason that I questioned your narrative is because
14 I want to hear it if it's important for future events that I
15 have to take -- that I have to consider because---

16 MR. KAESKE: Yes, sir.

17 THE COURT: ---those things are important because then
18 I have to figure out well, how much is this jury gonna hear
19 because also, with your type of motion, you're asking me to
20 amend and bring in this defense. I also have, have started
21 the process of, of, of saying, at some point, we have to
22 have an issue of bifurcation if, in fact, I allow the
23 amendment to take place.

24 MR. KAESKE: A bifurcation, Your Honor?

25 THE COURT: Correct.

1 MR. KAESKE: Bifurcation of?

2 I'm sorry. I'm not following.

3 THE COURT: Between the issue of punitive damages
4 and---

5 MR. KAESKE: Oh.

6 THE COURT: ---and the normal trial because---

7 MR. KAESKE: I understand.

8 THE COURT: ---I already -- the way I perceive the way
9 your defense, if it goes forward, is gonna be presented is
10 that it's gonna require the jury to hear a lot of facts that
11 probably are not gonna come in in the actual trial of this
12 case.

13 MR. KAESKE: On --?

14 THE COURT: On the issue of breach or issue of
15 liability---

16 MR. KAESKE: Let me---

17 THE COURT: ---for the counterclaims.

18 MR. KAESKE: Let me address that, Your Honor.

19 THE COURT: Okay.

20 MR. KAESKE: First, I don't believe that there's a
21 straight up punitive -- I, I may be mistaken and, if I am,
22 I'm sure we can revisit it later. I don't believe that
23 there's a straight up punitive damages claim because breach
24 of contract doesn't typically involve punitive damages. But
25 there were three claims that I don't think would get

1 bifurcated.

2 One is fraud and a breach of contract. That implicates
3 state of mind and it requires willful -- I mean -- well,
4 it -- fraud. It requires fraud.

5 There's the breach of the sales representative act
6 which allows for punitive damages and a willful and wanton
7 standard. But it's not, I don't think, the kind of thing
8 that would be bifurcated. It's a straight up statutory
9 claim, breach of the sales representative act, and then the
10 other one is conversion, which is also a straight up claim.

11 And so I don't think that that would be bifurcated. I
12 think it would all happen at the same time.

13 THE COURT: well, that's probably something that we
14 will address when we get closer to trial --

15 MR. KAESKE: Yes, sir.

16 THE COURT: -- because I was concerned that -- my
17 understanding is your motion was based on the fact that the
18 issue of punitive damages was being raised, and the fact
19 that then you needed to go into the state of mind of your
20 client based upon what a lawyer had told him.

21 MR. KAESKE: Yes, sir.

22 THE COURT: And---

23 MR. KAESKE: That's true.

24 THE COURT: If that being the case, then I am concerned
25 that the jury is gonna hear facts that relate to the state

1 of mind of your client that they're not gonna hear at the
2 trial of this case concerning the issue of liability because
3 they're gonna be inconsistent or they may very well be
4 information that the jury's gonna hear coming out of a mouth
5 either of a lawyer or a client that's gonna let the jury
6 hear a version of the law that I do not approve of because,
7 historically, in courts that I have control over, judges are
8 the decision makers on what the law a jury hears, not the
9 lawyers, nor a witness from the witness stand --

10 MR. KAESKE: Yes, sir.

11 THE COURT: -- unless it is a medical -- unless it is
12 some type of legal malpractice case.

13 MR. KAESKE: Understood.

14 THE COURT: Okay.

15 MR. KAESKE: Understood.

16 And so I, I guess how it, it ultimately gets done we'll
17 talk about at some future time.

18 THE COURT: Okay.

19 MR. KAESKE: But I think that you've got a good handle
20 on what the, what the facts are. I think, if this is a
21 plain old breach of contract claim, then the state of mind
22 is not relevant.

23 THE COURT: Okay.

24 MR. KAESKE: We have filed motions for summary judgment
25 that aren't yet set on this conversion and on the sales rep

1 act. And so, once those get heard, I mean I think that
2 this -- frankly this advice of counsel information plays
3 into that. But I think that those claims themselves have --
4 are deficient as far as the plaintiff has pled them. And
5 what the evidence is, that's for another day.

6 But the way that those claims, as I understand them
7 under South Carolina law work, is there is a requirement of
8 showing a particular state of mind, and that state of mind
9 would be rebutted by the advice of counsel evidence.

10 And so you're, you're right that that's what we're
11 asking for and that's why we're here.

12 Did I make sense?

13 THE COURT: Yeah, you made sense.

14 MR. KAESKE: Okay.

15 THE COURT: Let me ask you a question.

16 MR. KAESKE: Yes, sir.

17 THE COURT: He's rep -- he's raised an issue that
18 there's no answer, proposed answer. We'll say -- and then
19 the reply has been well, it's not required under the rules.
20 And so if you're gonna require something, let -- give us
21 a -- let us give a brief summary of the facts.

22 In a case of this nature where it's been going on, on
23 for this length of time, even if it weren't a case going on
24 this length of time, and, and with the issues and even more
25 common issues, it's, it's usually tradition that I do see

1 the proposed answer.

2 MR. KAESKE: Then, Your Honor, I will get you one
3 forthwith and I'm sorry that you haven't seen one. You,
4 you -- you've correctly recited our argument, which is we're
5 not sure that one's necessary. South Carolina law says, or
6 at least as interpreted by the Fourth Circuit, says that
7 it's not really an affirmative defense that needs to be
8 pled. That, instead, it's evidence that goes against the
9 state of mind, which is all part and parcel of any cause of
10 action that asks for -- that, that makes the state of mind
11 or willful and wantonness an element of the claim. And so
12 that -- while it's not necessarily an affirmative defense,
13 it doesn't necessarily need to be pled.

14 I do believe that, in the papers that we filed with
15 respect to the motion to amend, that we've given frankly as
16 much or more ev -- information than you might see in an
17 amended answer and the amended answer basically just to say
18 that, that Mr. Bennett and CRI received advice of counsel
19 that they were no longer obligated to make the payments
20 under the, under the sales representative agreement because
21 the account no longer existed and because the project was
22 over.

23 And so that information is already in the papers that
24 are in front of you. But we can certainly and quickly turn
25 that into a, you know, proposed sections or supplement to

1 our answer and I think there's even that discussion that we
2 would need to a file a -- an amended answer or supplement to
3 the answer that we've already got. I think Mr. Munson had
4 to -- maybe even suggested that all we needed to do was file
5 a supplement, that we didn't necessarily need to file an
6 amended answer.

7 So, however you'd like to -- us to deal with that, we
8 can, of course, deal with that and---

9 THE COURT: I don't want to make you -- I don't want
10 things easy -- more difficult than what they already are.

11 MR. KAESKE: Yes, sir.

12 THE COURT: But this is a case that is, by any stretch
13 of imagination, a, a benchmark is gonna be a complex case to
14 get resolved if by no other measure by the number of issues
15 that this Court is gonna be required to, to handle. And I
16 like to have some control or I like to have knowledge of
17 what's going on so that I can actually control not the case
18 itself. But I got a lot of moving parts I got to handle --

19 MR. KAESKE: Yes, sir.

20 THE COURT: -- not the least of which is I got to be
21 sure the lawyers, I keep y'all in control. I have to be
22 sure that the jury receives the information that the jury
23 needs to receive, that they don't get overly thrown
24 information that may prejudice them or get them to look at
25 an issue that's really not an issue in the case as well as I

1 got to control Court Administration. I got to control
2 staff. I got to control a lot of different moving parts
3 that I have to take care of.

4 It would benefit me if I had a document in black and
5 white on a new issue in this case considering how long this
6 case has been going on and the number of times that I've met
7 with these lawyers.

8 You, the first time. Both of you the first time.
9 welcome to Spartanburg. Good to have you here.

10 MR. KAESKE: Yes, sir.

11 THE COURT: That it would be nice that if I'm going to
12 say I'm going to grant a motion to amend the complaint or to
13 amend an answer to actually have -- to, to see what it is
14 that I'm, I'm amending because there are, as you mentioned,
15 orders have already been issued by this Court, I think
16 amended several times, that relate to the issue of
17 discovery.

18 And so I'm sure that probably if there's something in
19 there, this gentleman on the other side of the courtroom, he
20 has proven himself to be a tenacious advocate, and he will
21 look at everything in the world. And I have sat through, I
22 know you weren't here, I think Mr. Harrill was here, that
23 I -- we went through an entire day of discovery that he
24 didn't give to y'all and I had to go through the document by
25 document and order him to give you everything that you asked

1 for and I'm trying to just be sure that I know what I'm
2 getting myself into in planning and knowing -- and what
3 reasonably to expect in -- as this case moves along.

4 MR. KAESKE: Yes, sir.

5 THE COURT: So, if you would, there's any number of
6 reasons why I would appreciate that---

7 MR. KAESKE: I---

8 THE COURT: ---so that we get some idea of what's going
9 on cause---

10 MR. MUNSON: Your Honor, we -- I think we -- I'm sorry.
11 I think we -- they intend to do a supplement as opposed to
12 an amendment and we would agree with that so they wouldn't
13 have to redo the entire amendment. Just a supplement of
14 adding this affirmative defense.

15 THE COURT: And how do you think a supplement's gonna
16 benefit me?

17 I know y'all agree to it but I got to be able to
18 understand it.

19 Now am I gonna understand this thing?

20 MR. MUNSON: I, I think if you had it with their
21 answer -- with their existing answer --.

22 THE COURT: Okay.

23 MR. MUNSON: My, my assumption is an amendment would
24 just be regurgitating what's already in their answer and
25 then adding this affirmative defense. So what we'd rather

1 have is just them add the affirmative defense as a
2 supplement to tag on to the answer and, and to the amended
3 answer, as opposed to a completely new document. we're
4 concerned---

5 THE COURT: And I can buy that. I mean---

6 MR. MUNSON: Yeah.

7 THE COURT: So, so it's like -- it, it still is -- it's
8 still in the form of a formal pleading.

9 MR. MUNSON: Yes, Your Honor.

10 MR. KAESKE: Yes, sir.

11 MR. MUNSON: Yes, Your Honor.

12 THE COURT: Okay. But it's not -- he's not gonna have
13 to go through with the---

14 MR. MUNSON: The answer---

15 THE COURT: ---and make all the other counterclaims---

16 MR. MUNSON: And the---

17 THE COURT: ---and everything else?

18 MR. MUNSON: Yes, Your Honor.

19 THE COURT: Okay. Well, I can buy that.

20 MR. MUNSON: Thank you.

21 THE COURT: That's reasonable.

22 MR. KAESKE: And so---

23 THE COURT: Is, is that what -- did he correctly state
24 what you're requesting?

25 MR. KAESKE: Yes, sir.

1 THE COURT: Okay.

2 MR. KAESKE: And so I think that what it would look
3 like, and I, and I completely respect what Your Honor's
4 saying, I'd like to see a piece of paper that's got it
5 written down so that we can consider it together. I accept
6 that and I'll have it to you before we meet again on Friday.

7 As, as a way of preview, it, it will---

8 THE COURT: well, it sounds like he's not gonna object
9 to it.

10 MR. MUNSON: Go -- no, Your Honor. I'm just saying in
11 terms of having something -- I also would like to have
12 something in black and white to actually look at. But what
13 I don't need to look at is the same answer to allegation
14 number one from our complaint that's not gonna change if
15 they do an---

16 THE COURT: Okay.

17 MR. MUNSON: ---amended complaint. I just need an
18 addendum, so to speak, to their, to their existing answer---

19 THE COURT: Okay.

20 MR. MUNSON: ---that just deals with this, this amended
21 compliant. But I would also like to see the actual
22 allegations and words that they---

23 THE COURT: Maybe I put words in your mouth. I was
24 hoping.

25 Okay. I'm sorry to cut you off.

1 Go ahead, sir.

2 MR. KAESKE: That -- that's all right, Your Honor, and
3 I'm not sure exactly where you'd like me to pick up but
4 if---

5 THE COURT: Wherever you feel comfortable.

6 MR. KAESKE: Then here's where I'd go.

7 The document that I will provide to Your Honor prior to
8 Friday is a document that will have a brief recitation of
9 the facts and it will contain the elements of the advice of
10 counsel as a defense.

11 I -- like I said, I do believe that it that -- that the
12 evidence of advice of counsel under South Carolina law,
13 especially as interpreted by the Fourth Circuit, is, is just
14 evidence that defeats an element of either of these claims
15 of conversion, sales representative act, or breach of
16 contract with fraud. But having heard Your Honor say you
17 want something in writing, we will, of course, provide it.

18 The -- continuing on with the, with the argument about
19 the topic in general, I think the facts are relatively
20 simple and those are that Mr. Bennett has always understood,
21 because he was the signatory to the document, that when --
22 that the contractual obligations to the commissions, which
23 are in Annex C of the contract, are contractual obligations
24 on a particular special account and that special account was
25 called Phil Durango, LLC.

1 The reason that I was describing to Your Honor the way
2 that the business relationship worked was so that Your, Your
3 was -- so that I could be sure that Your Honor understood
4 that the way Mr. Bennett and Mr. Cedrone, Poly-Tech and CRI,
5 did business was Poly-Tech brought to CRI accounts. Whether
6 it's Nytech, somebody who's manufacturing composite shield
7 for finding IEDs in the desert, or whether it's Phil Durango
8 who's manufacturing -- who, who wants to have manufactured
9 tourniquets, that's what C -- that's what Poly-Tech did.
10 They brought accounts that would then ask CRI or enter into
11 an agreement with CRI to manufacture products. And then Mr.
12 Cedrone would get paid, not for the sale of the products,
13 but for the fact that CRI was manufacturing products for
14 those accounts.

15 So, for example, in the judicial admission in the
16 plaintiff's petition was that the way that this project
17 worked was CRI was manufacturing tourniquets on behalf of
18 Phil Durango, LLC with Poly-Tech being paid a commission for
19 convincing Phil Durango to use CRI to assemble and mass
20 produce the tourniquets. That's a word for word quote from
21 their petition.

22 In 2014, when Phil Durango ceased being a client
23 account of CRI, the project ended and the commissions on the
24 account were no longer due because Phil Durango dissolved.
25 The entity no longer exists.

1 Mark Esposito, the inventor of the tourniquet, went
2 away. He said to CRI if you want to continue to manufacture
3 this tourniquet, you need to buy the intellectual property
4 for 11 million dollars, which CRI did. Poly-Tech and Dan
5 Cedrone weren't involved in that transaction, in setting it
6 up, in brokering it, and anything else, and, as a matter of
7 fact, they didn't know that it happened.

8 Now, the -- at the same time, however, Mr. Cedrone and
9 Poly-Tech had this existing ongoing relationship with CRI
10 related to a bunch of other accounts. Like the IED shield
11 people or the Gravigate products or any number of different
12 accounts that were also subject to this sales representative
13 agreement. The sales representative agreement, of course,
14 was not only for the tourniquets. It was for the entire
15 business relationship.

16 And so, although the Article C Part 2 special account
17 of Phil Durango went away, they still had an ongoing
18 business relationship where, from time to time, Poly-Tech
19 would bring CRI additional accounts and Mr. Bennett and Mr.
20 Cedrone, at this point, had been friends for, or business
21 associates, for eight or 11 or however many years it was,
22 and Mr. Bennett made the decision, knowing that he wasn't
23 obligated to, to continue to pay the commissions to Mr.
24 Cedrone or Poly-Tech out of gratitude and loyalty.

25 NOW---

1 THE COURT: That's -- what you're relating to me is
2 your version of the facts?

3 MR. KAESKE: I don't think -- well, except for, except
4 for legal positions that have been taken by the plaintiffs,
5 I don't know that there's any factual controversy of that at
6 all.

7 THE COURT: Okay.

8 MR. KAESKE: But, but, yes, that is exactly what I'm
9 relating to you is our, our version of the facts and---

10 THE COURT: The only reason I, I ask that, and I ask
11 that not in gest, but I ask that to make a point, is that
12 if -- with this defense, there may very well reach a point
13 in the litigation to where a jury is going to hear too
14 compelling -- two different version of facts. One that
15 relates to what was the factual background of this and what
16 should they consider as being true.

17 And then they may hear a version of facts that say
18 okay, jury, now you've got to, if you're considering this
19 issue of punitive damages, issue the intent of the mindset
20 of, of, of the defendant and having -- if you say that they
21 have, have done wrong, then you're gonna have to say -- take
22 a look at jury -- take a look at the facts as what my client
23 believed to be, not as to what the facts actually were true
24 but to what they believed. And then to look at what my
25 client believed the facts to be true and how he received

1 legal advice from counsel in acting on that.

2 That's why I raise that, that issue because I, I can
3 reasonably foresee that that might happen if this defense
4 goes forward.

5 MR. KAESKE: I do, I do hear what you're saying, Your
6 Honor, and I see where you're coming from on that. I think
7 that maybe, when we get more into the motion to reconsider
8 on Friday, that some of that will become more clear as well
9 or it will get discussed some more as well. But---

10 THE COURT: Okay.

11 MR. KAESKE: But this is a fact. This is an
12 uncontroverted fact that no one can dispute and that is
13 that, in 2017, CRI was given advice by counsel that the --
14 that there was no longer an obligation, based on this --
15 based on the fact that the account no longer existed -- and,
16 by the way, sorry, I, I -- my, my, my record is skipped and,
17 and going back.

18 I don't think it's -- I, I don't want to burden down
19 this motion with all of the---

20 THE COURT: Uh-huh.

21 MR. KAESKE: ---deposition admissions of Mr. Cedrone.

22 But when, when you said that's your version of the
23 facts, of, of course I believe that Mr. Cedrone admitted to
24 my version of the facts when I took his deposition and when
25 he described what their business relationship was, how the

1 contract was suppose to work. I believe I have admissions
2 from him on that and, like I said, I think that that's
3 probably more appropriately part of the motion for
4 reconsideration. Although, of course, I'm prepared to go
5 into it now. But I, I do believe that Mr. Cedrone has
6 admitted much of what I just said.

7 Regardless, this is an unconverted fact and that is
8 that, that Phil Durango, LLC no longer exists. They were a
9 client account. They were an account -- a client account of
10 CRI. The contract, undeniably, says commissions, these
11 words, commissions on this account and that account no
12 longer exist because the entity no longer exists.

13 And so thus there was the advice from counsel, in 2017,
14 that because the customer account of Phil Durango, LLC no
15 longer exists, in fact, the entity Phil Durango, LLC no
16 longer exists, and because the project was CRI manufacturing
17 tourniquets on behalf of Phil Durango with Poly-Tech being
18 paid a commission for convincing CRI -- Phil Durango to use
19 CRI to assemble and mass produce the tourniquets, the
20 project had discontinued and that's what the commission
21 obligation is, to pay commissions, yes, beyond termination,
22 but only until the product -- until the project
23 discontinues.

24 And that statement, Your Honor, that I made, which is a
25 little bit long, the, the one that the project was CRI

1 manufacturing tourniquets on behalf of Phil Durango with
2 Poly-Tech being paid a commission for convincing Phil
3 Durango to use CRI to assemble and mass produce the
4 tourniquets, sorry, that is an admission by Mr. Cedrone. He
5 admitted that was the project.

6 As a matter fact, Mr., Mr. Cedrone admitted in his
7 deposition "Phil Durango was the project." And so Phil
8 Durango no longer exists.

9 In any event, in 2017, Mr. Bennett's CFO, Derrick
10 Thompson, went to Mr. Bennett's lawyers, specifically
11 Mr. Klett, and asked him to take a look at the contract
12 because Mr. Bennett was still making these payments because
13 he wanted to and Mr. Klett said the obligation is no longer
14 there and, in addition, if you want to terminate the rest of
15 the agreement, you can terminate the rest of the agreement.
16 Mr. Bennett, with that advice, sends a letter, chose to
17 continue making payments to Mr. Cedrone.

18 Sixteen months or -- let me do my math right. From
19 March of 2017 when he got the advice until August of 2018
20 would be 17 months.

21 Seventeen months later Mr. Bennett, with the help of
22 counsel, stopped making the tourniquet payments pursuant to
23 a rule -- stopped making the tourniquet payments, and, in
24 addition, ceased all related -- all business relationship
25 with Poly-Tech by additionally terminating the sales

1 representative agreement through a termination letter that
2 he had help from his counsel to draft.

3 Those are the advice of counsel facts.

4 THE COURT: All right. Thank you for that.

5 Let me ask you a question.

6 MR. KAESKE: Yes, sir.

7 THE COURT: In your, in your filings you do mention
8 that there -- and I -- it's unclear, under South Carolina
9 law, as to how this needs to be raised when we see -- you
10 said Rule 8?

11 Eight?

12 Rule 8?

13 MR. KAESKE: I'm gonna need someone smart once again.

14 MR. MUNSON: Rule 8's the rule that lists---

15 THE COURT: Okay. Okay. I'm sorry.

16 MR. MUNSON: ---how the---

17 THE COURT: South Carolina Rules of Civil Procedure 8's
18 the rule that, that I think you reference.

19 Tell me, I, I -- do you -- are you familiar enough to
20 know, with this -- if it is an affirmative defense?

21 MR. KAESKE: Yes, sir.

22 THE COURT: Are you familiar enough with what those
23 elements of the defense would be?

24 MR. KAESKE: Yes, sir, I think that -- well, yes, sir,
25 I think Mr. Munson frankly appropriately stated them in his

1 briefing. We can look to his briefing.

2 THE COURT: He did?

3 MR. KAESKE: He, he listed---

4 MR. MUNSON: Yes, Your Honor. I think I---

5 MR. KAESKE: It's where the---

6 MR. MUNSON: ---with the elements of---

7 MR. KAESKE: And, and I can read them to you here in a
8 second.

9 THE COURT: Okay.

10 MR. KAESKE: But I -- basically, basically they're you
11 sought the advice of someone that you thought was a
12 reasonable attorney. You, you gave them the facts as you
13 understood them. They gave you the advice and you relied on
14 the advice.

15 If you give me one second---

16 THE COURT: Sure.

17 MR. KAESKE: ---I can read you their---

18 MR. MUNSON: So it's Page 2 from my---

19 MR. KAESKE: Thank you.

20 So, as stated, one, that he sought advice from others.

21 Two, that this advice included -- advice included
22 advice of counsel.

23 Oh, no, that's not it.

24 On then it's not on Page 2.

25 (Pause.)

1 MR. KAESKE: Yes, Your Honor.

2 Basically it's you have to invoke -- consult with an
3 attorney in good faith that you think is a good attorney,
4 and you have to give him all the information, and then you
5 have to rely on it.

6 Broken down, it's this. Before taking action, he, in
7 good faith, that's number one, two, he, in good faith,
8 sought the advice of an attorney who he considered
9 competent.

10 Three, for the purpose of securing advice on the
11 lawfulness of his possible future conduct.

12 Four, made a full and accurate report to his attorney
13 of all material facts which the defendant knew, and, five,
14 acted strictly in accordance with the advice of his attorney
15 who had been given a full report.

16 And so---

17 THE COURT: So that -- I count five.

18 MR. KAESKE: Yes, sir.

19 THE COURT: Okay.

20 MR. KAESKE: Yes, sir.

21 THE COURT: All right.

22 MR. KAESKE: I was answering your question, Your Honor.

23 THE COURT: Yes. You answer that. Now thank you for
24 that, yes, sir.

25 MR. KAESKE: Yes, sir.

1 Did you have another question?

2 THE COURT: Not now.

3 MR. KAESKE: Okay.

4 THE COURT: But thank you.

5 MR. KAESKE: Then I think that where I'd turn probably
6 is if you were considering this a motion -- if, if it is a
7 motion to amend or if it -- sorry.

8 If there is need for leave to amend, then there are two
9 legal analyses that we go through.

10 One is was there undue, undue delay, which, of course,
11 undue delay is delay that results in prejudice. The
12 prejudice needs to be something like the witnesses are no
13 longer available, the documents are gone. There's -- the
14 delay has been so long that, that the defense can or it can
15 no longer be defended against. It can no longer be
16 appropriately prosecuted and we don't have that.

17 And the second is is there undue prejudice and I --
18 there's not undue prejudice either. The Courts of
19 circuit -- South Carolina have said that undue -- that it's
20 not undue prejudice for a motion to leave -- to amend, that
21 you have to do the work to defend an otherwise valid
22 defense. And, as a matter of fact, the law is that leave to
23 amend should be given very liberally and that it can be
24 given all the way up until the last minute.

25 There's nothing that's happened in this case that I

1 believe has been in opposition to or precluded by this
2 defense. The -- oh, the only thing that could arguably have
3 to be done because we now come forward with this evidence of
4 advice of counsel is that Mr. Thompson might have to be
5 re-deposed with respect to his requesting the advice of
6 counsel on behalf of CRI. But, beyond that, Mr.,
7 Mr. Bennett was, I, I guess, going to be deposed again
8 anyway or his deposition has not yet been concluded I think
9 would be more appropriately said.

10 And so that could finish and then the two lawyers that
11 gave the advice of counsel, Mr. Klett and Ms. Manos, they
12 could both be deposed. I could make them available for
13 deposition immediately. I have dates when they're not
14 available in the next few weeks and we could put them up for
15 deposition right away.

16 Now, in arguing against our motion, Mr. Munson and the
17 plaintiffs have offered two basic things. One is some
18 commentary that we're now flip flopping on a position with
19 respect to why the payments were not being made, and this is
20 a curious argument to me because Mr. Munson has argued that
21 the, that the defendant's position has been that the
22 payments were made "inadvertently."

23 Now, the testimony from affidavits that you've seen
24 from Mr. Thompson were that the payments were made
25 erroneously. That's absolutely true. Black's Law

1 Dictionary says that erron -- erroneously is by mistake or
2 not in accordance with the facts and that's what these
3 payments were. They were not in accordance with the facts
4 of the contract and the contract itself discusses that, if
5 payments are made in error, that those amounts can be sought
6 in recoupment.

7 Inadvertent, however, means something much different
8 than erroneously and there's never been any claim that these
9 payments were made inadvertently. As a matter of fact,
10 every, every month the commissions were carefully
11 calculated. They were submitted in a commission report that
12 was sent to Mr. Cedrone and Poly-Tech and payments was made
13 by wire transfer. And so there's never been any claim that
14 these statements were some, sorry, that these payments were
15 somehow made inadvertently.

16 The other thing that plaintiff say in opposition is
17 that there are some nine discovery requests that they
18 believe that this would have been responsive to and Your
19 Honor referenced the hearing that you went through on
20 discovery, and while I didn't suffer through them the way
21 that everybody else did, I have read them and I've also
22 looked very closely at these nine discovery responses.

23 There are six of them that I don't believe can even
24 arguably apply to the advice of counsel letter from
25 Mr. Klett.

1 There are three, I suppose, that are worth discussing.
2 One is Standard Interrogatory Number 1, which is the one --
3 Standard Interrogatory Number 1. The other is Standard
4 Interrogatory Number 3. And I apologize for never being
5 able to keep straight which one of those is people with
6 knowledge of relevant facts and which one is actually
7 witnesses. But I understand those to be, under South
8 Carolina law, to be essentially people with knowledge of
9 relevant facts is one of them and any witnesses that they
10 intend to call is the other.

11 Since the defense was never raised before, obviously
12 Mr. Klett wasn't a witness that the defendants intended to
13 call. That's, as I understand it, a interrogatory response
14 that may be supplemented all the way up until the time of
15 trial. And so we would, we would, of course, supplement
16 that answer.

17 The other people with knowledge of essentially relevant
18 facts, I, I think that there's a -- I think that there's a
19 question as to whether, if you're not raising the defense,
20 it's a knowledge of relevant facts or not. But that one, in
21 conjunction with the third that I think could arguably
22 apply, which is the Request for Production Number 1. So I'd
23 like to talk about those two together.

24 Request for Production Number 1, I don't know if Your
25 Honor has it. I might just read it to you if it's---

1 THE COURT: Just read it to me.

2 MR. KAESKE: Request for Production Number 1 cited by
3 Mr. Munson says this. Please produce any and all drafts,
4 notes, modifications, draft modifications, correspondents,
5 analysis, interpretations, documents, sorry, and executed
6 copies related to the June 1st, 2005, sales representative
7 agreement between Poly-Tech and Composite Resources
8 including Annex A, B, and C and attached to the complaint.

9 Now, I think, when I read that, it -- that, to me,
10 sounds like it's asking for documents relating to the
11 formation of the contract. Drafts, notes, modifications,
12 draft modifications, executed copies, that, to me, is what
13 it sounds like it's asking for.

14 Now, in the context of raising this advice of counsel
15 issue, I can see how somebody might look at this and say
16 well, the word analysis is in there and the word
17 interpretation is in there. And technically, or maybe not
18 technically, an advice of counsel letter is an analysis of
19 the contract and it is an interpretation of the contract.
20 But I can frankly also see, Your Honor, why it wouldn't
21 occur to Mr. Klett or anyone else frankly when they're
22 answering these interrogatories that an advice of counsel
23 letter when they're not considering an advice of counsel
24 defense would necessarily apply to that.

25 Now, I've read the hearing transcript that -- where

1 there's a discussion about Request for Production Number 1
2 and the -- Mr. Klett and Mr. Harrill, who were
3 representing -- who are and were representing CRI at that
4 time clearly had a document in mind and they talk about the
5 fact that they had an attorney/client privileged document in
6 mind and that document did relate to the draft of -- it's a
7 2000 and -- it's a March, 2005 email with an attorney
8 considering the draft before the contract was signed. That
9 document ultimately got turned over in redacted form so no
10 privilege was provided. But it was given in redacted form.
11 And since there was only one privileged document that they
12 were considering, rather than do a privilege log, they
13 handed over the redacted document I believe after your
14 hearing and after that discussion.

15 So, in any event, that's, that's the issue of well, was
16 this was re -- responsive to something that it should of
17 been turned over anyway. Of course, the advice of counsel
18 letter wouldn't have been turned over.

19 What would of happened is there would have been or
20 there would of been a privilege log that was provided. The
21 privilege log that would of been provided if somebody would
22 of thought that this should of been disclosed in response to
23 one of these questions would of given, frankly, less
24 information than we've given now about the document most
25 likely. It would of just said communication with counsel

1 regarding the agreement or something like that.

2 Now we've given much more information. We've -- I've
3 got the documents here. I've got them for Your Honor to
4 review in camera or I've got a production set that can be
5 produced to Mr. Munson and the plaintiffs right now if Your
6 Honor agrees that we can move forward whether by amendment
7 or just by offering the evidence with this defense and I
8 don't believe that there's any prejudice that comes to the
9 defendant, sorry, that comes to the plaintiff as a result of
10 our request.

11 And I think that concludes my argument unless Your
12 Honor has any questions for me.

13 THE COURT: Not right now. Thank you.

14 MR. KAESKE: Thank you, sir.

15 MR. MUNSON: Your Honor, how much time do you think?
16 I mean we've filibustered my time but --.

17 THE COURT: How dare he do that.
18 What about -- I mean we got to get together anyway.
19 Can you do 15 minutes?

20 MR. MUNSON: Now?

21 THE COURT: Yeah.

22 MR. MUNSON: I can do it in 15 minutes.

23 THE COURT: Okay. Staff him.

24 MR. MUNSON: We'll do it in 15 minutes he says.

25 THE COURT: He says. I know. I got a stopwatch.

1 MR. MUNSON: So I, I can begin by saying that I, I have
2 trouble separating my outrage about this whole thing from
3 the standard in Rule 15. It -- there -- they -- they come
4 in saying we've got this defense that we're going to raise
5 and we're not sure whether it should formally be in a motion
6 to amend. So we're gonna, we're gonna move to amend. But
7 it's always been here and we were always gonna raise it.

8 If that's the case, I mean we asked them the standard
9 interrogatory out of the gate four years ago who are your
10 witnesses. If you've got an advice of counsel defense, you
11 should of identified who those witnesses were four years
12 ago.

13 Even in their motion they never identified it to --
14 when he said Mr. Klett, that's the first I knew of it. When
15 he said Ms. Manos, Manos, I've no idea who that is. Well,
16 that's the first I heard of it.

17 When he said there's a letter that Mr. Klett wrote,
18 that was the first I'd heard of it. I, I, I would ask for
19 the doc number on the March, 2005 thing that they, that
20 they've said they've already pre -- or redacted format.

21 But, but I don't understand. We had hearing after
22 hearing after hearing. You may recall the one hearing where
23 they said there was only one more email. It might be --
24 they confirm with each other and they said that there, there
25 was just one more and Mr. Klett is saying that to this Court

1 when he knows he's written a letter and given advice of
2 counsel that would be responsive to this defense that they
3 say has existed in this case from the beginning.

4 So, I -- you know, the, the undue prejudice, if, if,
5 if -- they didn't do a privilege log. They answered their
6 complaint and raised counterclaims on the, on the notion
7 that they paid my client commissions when they didn't have
8 to and my client owes them 17 million dollars because of
9 that, because somehow they inadvertently got hoodwinked and
10 erroneously made commission payments of 17 million dollars
11 and now they say oh, well before we were doing that we asked
12 a lawyer and he said we didn't have to do that and I did it
13 anyway cause I'm a nice guy out of loyalty. And later on I
14 asked him again and they said I didn't have to do that. But
15 I made those payments voluntarily anyway because I'm a nice
16 guy.

17 That information was never gonna come to us that, that
18 they made those voluntary -- that they made those payments
19 voluntarily until this, until this arose. Yet that's the
20 issue of those witnesses and that information is been in
21 this case for four years. And we still apparently, wherever
22 these letters are from Mr. Klett and, and the second opinion
23 they talk about, which must be for Ms. Manos, I -- we still
24 haven't seen that.

25 And regardless of this -- regardless of raising this

1 claim, the kin -- the, the -- this information was
2 responsive to document productions, standard interrogatory
3 requests that the Supreme Court wrote and put in the rules,
4 and we just issued out.

5 So -- and it's -- it's just outrageous that this stuff
6 has been there this whole time, that they're gonna rely on
7 it, and they've never produced it and only now, when they
8 change their strategy, it's like well, the information
9 doesn't help me and so I'm not gonna tell you about it. And
10 now they change my strategy and the information is gonna
11 help me. So I guess I better tell you about it. And, by
12 the way, since, since trial's gonna be far away, I guess
13 it's no real harm, no foul that I never told you about this
14 information that undercuts my counterclaims until now
15 because now I think it helps me.

16 Anyway, that -- most of Mr. Kaeske's presentation was
17 just rehashing the arguments that we have had over and over
18 and over again about the unambiguous language of, of the
19 contract and this Phil Durango project, project versus Phil
20 Durango stuff, I mean we have argued and argued and argued
21 about that.

22 He presents his position as if it's uncontested facts.
23 None of it's uncontested. It's all contested facts.

24 In fact, it's not even true that the -- and we know
25 that because, if you look at the contract, the unambiguous

1 language says something else, that's, that's a different
2 argument for the motion for reconsideration. But I, I --
3 it's just wearisome to constantly go over this where they
4 want to say that the, the nonsensical notion that rather
5 that Phil Durango describing the project in the contract,
6 which the subject matter was the project, they want to say
7 that the project defines Phil Durango who's not even a party
8 to the contract.

9 They just flip it on their head. You didn't accept
10 that. The words don't stay that. We've argued that over
11 and over and over again. They just presented more or
12 paraphrase every time we're together as fact, fact, fact,
13 fact, fact, fact and it's not -- it, it is not.

14 On that -- on -- but back to the motion to supplement.
15 I, I think, in addition to having to provide what they're
16 actually going to say, so, so that I can measure whether or
17 not they actually are going to make allegations that they
18 sought advice from others, that the advice included counsel,
19 that they fully invite -- fully advised their counsel of the
20 situation, that their counsel gave them advice, that they
21 relied on the advice, those elements, until I can see that,
22 I, I, I -- I mean I appreciate the Court asking them to
23 actually lay that out.

24 But it's hard, it's hard to measure the futility of
25 their suggested amendment until I see what -- until you can

1 see what the allegations are. Futility is a basis to deny a
2 motion to amend.

3 But I also think they should have to -- they should
4 have to produce the information, witnesses, summary of
5 testimony, responsive to interrogatories and our request for
6 production of documents including, one he didn't mention, is
7 give us the, the -- everybody who's gonna provide an opinion
8 and the basis of their opinion. Certainly if they're going
9 to do a letter from Mr. Klett, who -- which I haven't seen,
10 that's an opinion that they are relying on that's re --
11 that, one, is responsive to their new approach, right.

12 Okay. So it's responsive to what they're doing now.
13 It also undercuts their counterclaim that they brought
14 against us from the beginning of this case and they didn't
15 tell us about it when it undercut their counterclaim.

16 They only tell us -- they only tell us about it now
17 when it supports their new affirmative defense and that's
18 significantly what I'm outraged about and, and, and that's
19 spilling over onto this Rule 15 motion, which, which should
20 be segregated. I can't do it but I'm sure you can in terms
21 of whether, you know, the -- I, I understand that there's a
22 lot of leniency in allowing amendments in the -- to the
23 extent that justice requires.

24 I'm concerned that maybe justice doesn't require it in
25 this case because of the, the way they behaved up till now

1 in, in hiding these documents when they weren't gonna be
2 helpful and now produce them when they are and I, I -- I
3 will leave this to the Court because I'm sure they have had
4 this motion a lot -- a -- many, many, many more times than
5 I've had to deal with this motion in terms of weighing where
6 the prejudice is.

7 But, you know, we lay out a lot of the various
8 prejudices that occurred in this case. They respond. We
9 have like six points. They respond with a case that says
10 this point wasn't enough, and then another case that says
11 this point wasn't enough, and then another case, this point
12 wasn't enough.

13 Well, maybe they're six cases out there in which each
14 of my points wasn't enough. But this is a case that has all
15 six points and they don't cite any cases where all six
16 points were not enough to, to establish prejudice to stop
17 somebody from amending, amending their complaint. I
18 really -- I'm, you know, and you kind of -- I don't know if
19 you alluded to it or not but I'm somewhat ambivalent about
20 it because it destroys their counterclaim to bring this
21 defense.

22 But regardless, they've raised it. The information is
23 out there. If they decide not to bring it, and if you
24 decide not to let them bring it, it still is extremely
25 relevant to their counterclaims, should of been disclosed to

1 us. It needs to be produced and I will leave it with that,
2 Your Honor.

3 THE COURT: Thank you for that. Let me ask you a
4 question.

5 In only went -- we're not gonna get to finish with this
6 motion. So we can add this to finish it up. A couple of
7 questions for you.

8 All right. First, you said as justice requires under
9 Rule 15.

10 As justice required, is that an actual element in the
11 Rule 15 decision?

12 MR. MUNSON: I believe Rule 15 says---

13 THE COURT: As justice requires?

14 MR. MUNSON: If it's not in the rule, it's like the,
15 you know --.

16 THE COURT: Because you know the Supreme Court---

17 MR. MUNSON: We have---

18 THE COURT: The Supreme Court has added, added that as
19 justice required to, to the issue of default judgments in
20 deciding whether to relieve a, a -- relieve a party from
21 default. They have added that to that longstanding list,
22 the three elements that you've said. They've now added that
23 as justice required as a, as a fourth element.

24 MR. MUNSON: So, so, that statement may be a---

25 THE COURT: That, that is your---

1 MR. MUNSON: ---an analysis---

2 THE COURT: I'm sorry. And that was a, that was a --
3 just a discussion question.

4 MR. MUNSON: It's extremely, extremely, extremely
5 lenient.

6 THE COURT: All right.

7 MR. MUNSON: But sometimes justice may not---

8 THE COURT: Let me---

9 MR. MUNSON: ---require it.

10 THE COURT: Let me ask you to do this. My -- give some
11 thought. If you can't answer this -- cause if -- it's the
12 same question I asked defense counsel.

13 Okay. If it's -- let's say I grant this motion and we
14 conduct a trial.

15 How in the -- and let's make the assumption that you
16 have been correct and, and my prior ruling is correct and
17 that's how the trial proceeds on, on the competing -- other
18 claims.

19 How -- so that the jury -- my -- I'm still wondering,
20 and maybe give some thought to this, how in the world would
21 the case be presented with a defense that would require the
22 jury, if -- to believe that the affirmative defense would
23 require a jury to go back and rehear information and facts
24 that relate to decisions that have already been concluded in
25 the case, i.e. the decisions I've made as a result of the

1 partial summary judgment motion. Let's say that stands.

2 And then are -- with this affirmative defense, I'm
3 envisioning that then the jury has to actually hear the
4 evidence that has already been ruled upon by this Court in
5 order to determine whether or not the count -- their client
6 did, in fact, it -- disclosed the information to their
7 lawyer and then actually get the lawyer then to tell them
8 what their advice was and then see if they then followed
9 their advice.

10 It seemed like it -- it seems counterproductive with
11 what I feel like is part of my charge as being a trial judge
12 in order to see that the trial is conducted in a fair,
13 reasonable manner, and is productive. Seemed like they
14 would just be backtracking.

15 MR. MUNSON: So I, I can answer that.

16 THE COURT: Okay.

17 MR. MUNSON: That's why they bring this motion, Your
18 Honor. They want to parade in three lawyers that all say
19 they disagree with the order that you already did and they
20 want to argue to the jury that they should ignore the judge
21 and they should listen to these three lawyers who don't --
22 who -- who say the project was Phil Durango and not Phil
23 Durango. He was the project and, and that language is not
24 unambiguous.

25 Here -- here's the way to resolve it. This is the way

1 I believe that it would be resolved and that is they don't
2 get to tell the jury why they took the advice of counsel.
3 The, the issue is just I sought the advice of counsel. I
4 gave them all the information. He advised me and I took it.

5 Not I read this contract and I don't believe what the
6 judge says it says it says and then they haul -- bring
7 another lawyer in and says I read the contract but I don't
8 believe what the judge says it says it says. I think they
9 just get to say they asked me about it. I told him he
10 didn't have to pay.

11 THE COURT: Okay. Well -- and I, I appreciate your
12 comments but I think you're living in an ideal world, you
13 know, and, and, and saying that everything's got to fall
14 your way because what if, in fact, through the discovery
15 process you find out that one of the lawyers advised told
16 them something completely different and they didn't follow
17 it. Then, then it becomes Pandora's Box as far as facts
18 they get to present to the jury that might have nothing to
19 do with the, with the issues of liability. That's why I was
20 already pondering the issue of bifurcation on the issue
21 of---

22 MR. MUNSON: Well, and you do have -- I mean they
23 acknowledge that the lawyers gave him advice that they
24 didn't follow.

25 THE COURT: Yeah.

1 MR. MUNSON: The lawyers said you don't have to -- they
2 say the lawyers said you don't have to pay.

3 THE COURT: Any -- anyway, anyway.

4 MR. MUNSON: Right.

5 THE COURT: Those are, those are just rhetorical
6 questions. So, anyway, thank y'all very much for this.
7 We've got -- we'll, we'll pick back over this when we get
8 back together because I've got a new judge and he's got some
9 child obligations he's got to get to and I've got to meet
10 with -- that meeting I have to go to.

11 Gentlemen, thank you very much. This is -- I know
12 you -- y'all've never been in front of me. It's been a
13 pleasure having everybody here. This case continues to be
14 a, a privilege for me to serve on.

15 I, I, I ask questions with sincerity. I apologize if I
16 ask them harshly to people sometimes. But there's a way
17 that I'm trying to figure out what's going on as well. So,
18 y'all've been excellent lawyers and it's a privilege being a
19 judge with some high quality lawyers like this.

20 MR. MUNSON: Thank you, Your Honor.

21 MR. KAESKE: Thank you, sir.

22 MR. MUNSON: I hope the, the students outshine us
23 tonight.

24 THE COURT: Yeah. And I'll let -- as soon as I hear
25 from Justice Beatty, I will let y'all know one way or the

1 other as, as well as -- I'll, I'll let y'all know as soon as
2 we hear from him. It might, might be that he's heard. I
3 will walk back and see if -- if y'all are walking out, if
4 y'all want to just walk by the office and see.

5 MR. KAESKE: We can wait for a moment, Your Honor,
6 while you go --.

7 THE COURT: Okay.

8 MR. KAESKE: And then---

9 THE COURT: I think we got a -- okay. All right.
10 we'll try to do it as fast as we can.

11 All right.

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13 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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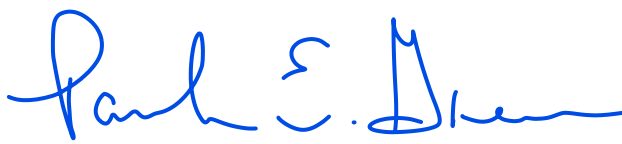
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the State of South Carolina, 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 Nonjury for York County, South Carolina, on the 17th day of January, 2023.

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

January 28th, 2023



PAMELA E. GREEN, Court Reporter