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**SC Court of Appeals**

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 2 OF 3**

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STATE OF SOUTH CAROLINA        )   TRANSCRIPT OF RECORD  
COUNTY OF SPARTANBURG        )   CASE NO. 2019-CP-46-00051

-----  
January 20, 2023

BEFORE:   The Honorable J. Mark Hayes, II

-----  
Daniel P. Cedrone and Poly-Tech Industrial, Inc.,  
Plaintiffs,  
vs.  
Composite Resources, Inc,  
Defendant.

-----  
APPEARANCES:

Keith Munson, Esq.  
Attorney for the Plaintiffs

Jeremy C. Martin, Esq.  
Attorney for the Defendant

Official Court Reporter/Transcriber  
Cynthia D. Weaver

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I-N-D-E-X

(WHEREUPON, there were no exhibits marked or  
testimony taken during this hearing.)

Court Reporter/Transcriber Certificate.....72

1 (COURT REPORTER'S NOTE: Due to remote platform  
2 interruption and audio interference throughout the  
3 hearing, those instances are denoted with  
4 (inaudible) in the transcript.)

5 P-R-O-C-E-E-D-I-N-G-S

6 THE COURT: Let's go back on the record on the  
7 matter of Cedrone, et al, versus Composite Resources,  
8 2019-CP-46-00051.

9 This is a continuation of the hearings that we  
10 began on this past Tuesday. We have consulted with the  
11 lawyers. We did have an emergency with one of the staff, so  
12 we have moved from a court reporter assisted recording to  
13 the WebEx recording system. And we are going to begin  
14 picking up where we left off.

15 I believe Mr. Munson has now been provided a copy  
16 of the Supplement to the Amended Answer and Counterclaims  
17 and he was going to provide some additional arguments before  
18 we turn it over to reply to the defendants.

19 MR. MUNSON: Thank you, Your Honor.

20 Yesterday, we did receive the proposed  
21 supplemental supplement to the answer and the affirmative  
22 defenses adding the affirmative defense for advice of  
23 counsel. I had the opportunity to preliminarily cross  
24 reference that against the elements for advice of counsel  
25 that the parties advice in good faith and have provided full

1 and accurate information to its attorney and had reasonably  
2 relied on that advice. And that it faithfully followed that  
3 advice and was able to, at least initially, identify some  
4 support in South Carolina that advises counsel's defense is  
5 potentially recognized. Went back and looked at the Rule  
6 which allows for relief to be freely given when justice  
7 requires and when it does not prejudice any other party.

8           When we originally objected to this, Your Honor,  
9 they had filed it in October, we were hoping that there  
10 would be a trial at the beginning of this year. That's not  
11 going to happen, so the prejudice that it would impact the  
12 possibility of a trial at the beginning of the year has  
13 evaporated. Based on representation of the parties it  
14 doesn't look like adding this affirmative defense would  
15 force this case into additional week of trial.

16           We -- one of our objections also was that we  
17 didn't have the proposal to actually look at and we had a  
18 strong preference for a supplement versus an amendment. All  
19 those things seem to be -- all those things now have been  
20 addressed.

21           And so we would -- I'm not consenting. I'm not --  
22 I'm not saying that justice requires this, I'm not saying  
23 that there's not prejudice, but I'm withdrawing my  
24 objections. And I don't want to consent, because I only got  
25 this yesterday, and if it's allowed without my consent, I

1 have 15 days under the Rule to reply to the affirmative  
2 defense. But, otherwise, it seems that most of the  
3 objections that we have raised have been substantially  
4 addressed. And so we would -- that's where we are on this  
5 particular motion, Your Honor.

6 Oh, and I would -- I would just ask that if the  
7 Court's inclined to allow the supplement they would deem the  
8 supplement filed today if it makes that decision today, or  
9 deem it filed whenever the Court makes that decision. And  
10 instruct the defendant to supplement all of its discovery  
11 responses to provide information based on this defense in  
12 response to all prior discovery responses within 30 days.

13 Thank you, Your Honor.

14 THE COURT: Yes, sir.

15 MR. MARTIN: It sounds like without saying that he  
16 consents, he consents. And so I can certainly comply with  
17 Mr. Munson's request to supplement our discovery within 30  
18 days, that's not a problem. And if Your Honor has any  
19 further questions for me on that motion then I'll be happy  
20 to answer them.

21 THE COURT: Thank you, I do have a couple of  
22 questions, not necessarily determined on the issue of allow  
23 the supplement.

24 The clarity for me. The way that I read the  
25 supplement is that it has the potential of interjecting a

1 lot of historical facts that might not be relevant to the  
2 trial of the case when the primary part of this case has  
3 been presented to me over the last few years has been a  
4 contractual matter. And my understanding this is a defense  
5 to the claims that have been brought by the plaintiff where  
6 the plaintiff's potentially could receive punitive damages.

7           And the way that I expressed it last time about  
8 bifurcation of the trial, because I wanted to be -- I have  
9 some concerns that the jury is being asked to do some heavy  
10 lifting, simply with the issues that are already before it  
11 and that's been before this Court, and then to throw in  
12 there a historical development of the contract and ask them  
13 to digest that and separate that out from their decision  
14 that they might have to make on the causative action as  
15 being presented to them, I have some concerns about on that.

16           I articulate that now, because Mr. Munson is not  
17 objecting to the amendment, but I still have some concerns  
18 and I want to express those now so that if we get to the  
19 trial of the case nobody is blindsided if I -- if I raise  
20 these issues, because I -- even though as I explained to  
21 y'all, it was my misstatement when I said y'all were asking  
22 for two weeks, might be three weeks, that was my mistake, I  
23 was looking at another case, you're still asking for a week  
24 and that's still substantial lift for a court.

25           But it might be that, you know, if this issue with

1 punitive damages becomes part of this case and, again, it  
2 might -- punitive damages might not be part of this case. I  
3 mean, the defendants have filed motions that we're not going  
4 to address that eliminates the possibility of punitive  
5 damages so it could be this is just an academic discussion  
6 we're having.

7           But be aware that I have some concerns over the  
8 trial of the case if -- if -- if this issue goes forward as  
9 outlined in the supplement to amend answering counterclaims,  
10 I have some issues -- I have some concerns as to the proper  
11 way that we can try this issue.

12           But, with that being said, Mr. Munson has kindly  
13 and generously going to allow you to not consent to it, but  
14 I'm going to order that the motion to supplement the amended  
15 answer and counterclaim as presented to me would be allowed  
16 and that you would be required to then do as you just said  
17 comply with his request to comply with those discovery  
18 requests that are unknown to me what he's talking about, but  
19 apparently you can do that, so, okay.

20           All right. That's all I got to say about it.

21           MR. MARTIN: Your Honor, may I?

22           If -- I heard Your Honor's concerns, I appreciate  
23 Your Honor's concerns. I think that after we've gotten to  
24 the point where we been through all the motions including  
25 the reconsider and the summary judgment motions on the other

1 things that are outstanding that Your Honor just referred  
2 to, I feel very confident that we'll be able to figure out  
3 how to -- how to do it.

4 THE COURT: If it has to be done at all.

5 MR. MARTIN: If it has to be done at all, that's  
6 exactly right, Your Honor.

7 THE COURT: Okay.

8 MR. MARTIN: Okay. Your Honor, would you like me  
9 to move on to the motion to reconsider?

10 THE COURT: Just a moment.

11 MR. MARTIN: Yes, sir.

12 THE COURT: Okay. So now we're going to move to  
13 the motions for reconsideration that relate to the order  
14 that I previously issued. There's the motion for  
15 reconsideration and then there's supplemental motion for  
16 reconsideration. I would propose, unless y'all feel  
17 otherwise, just let the defendants have at it on both of  
18 them and let Mr. Munson have at it on both of them and then  
19 have a reply, okay? Then that's what we'll do.

20 MR. MARTIN: Yes, sir.

21 THE COURT: All right. I'll be more than happy to  
22 hear from you.

23 MR. MARTIN: Your Honor, may I approach?

24 THE COURT: Yes.

25 MR. MARTIN: Here's what I'd like to do with Your

1 Honor's permission. I'd like to hand you a copy the order  
2 that's signed and a copy of a word document version of the  
3 preliminary email that you provided to the parties with  
4 respect to the order. All right, Your Honor?

5           And I've numbered the -- sorry, I hand numbered  
6 your preliminary email and then you have the order. And I'd  
7 like to be able to refer to you -- refer you back and forth  
8 to these, if you don't mind.

9           Your Honor, there are -- excuse me, I'm sorry.

10           There are four issues that I'd like to raise with  
11 Your Honor's order as it was entered granting plaintiff's  
12 motion for partial summary judgment. Three of them that I'd  
13 like to address first I believe are rendition errors, Your  
14 Honor, I think they're transcription errors. There are  
15 errors that were made by plaintiff's counsel when he  
16 transcribed or took your preliminary order and reduced it to  
17 the written order.

18           Now, I believe that what happened were changes  
19 were made to the wording or things were omitted from your  
20 wording, frankly, that changed the intent of your order.  
21 Now, of course having not been here at the time, I'm trying  
22 to reconstruct what happened. I've read all the transcripts  
23 of the hearing, of course. I've read all the motions. I've  
24 read Your Honor's preliminary email order ruling many, many  
25 times and I've read the final order. If I'm wrong about

1 what Your Honor intended, I'm sure that Your Honor will let  
2 me know, but I would like to look at this together.

3 So, Your Honor, if we turn to Page, handwritten  
4 Number 3 of your preliminary order, I find your finding, and  
5 this is the only finding that I found in your preliminary  
6 order, and it is a finding that plaintiffs have established  
7 as a matter of law that the defendant is contractually  
8 obligated to pay plaintiffs the amounts reflected in the  
9 contract of Page 11 of 11 past the termination date.

10 My understanding of what Your Honor was deciding,  
11 based on everything that you wrote, was that you were  
12 denying defendants argument that the contract was  
13 indefinite. You were denying defendant's argument that the  
14 contract was perpetual and that you were determining that a  
15 termination of the contract did not eliminate the  
16 contractual obligations for the commissions on Page 11 of  
17 11.

18 I did not understand from your order -- from your  
19 preliminary order that Your Honor was attempting to affix  
20 liability or to determine an amount of money or we're  
21 figuring out an amount of money that the defendant was  
22 supposed to pay.

23 Now, if we pick up the actual order that I got,  
24 that was written by the plaintiffs, when we turn to Page 18,  
25 just a couple of pages from the end, I've highlighted there

1 what's shaded, in the decretal language, the language that  
2 was written for the Court is, For as long as Composite  
3 Resources is associated with the making and selling of CAT  
4 tourniquets, Composite Resources was and is obligated to pay  
5 plaintiffs a \$1.75 per combat tourniquet sold for which this  
6 amount has not already been paid and for all combat  
7 tourniquets which are sold in the future.

8           Now, the first error in that transcription is what  
9 plaintiff's counsel did is they changed from it saying the  
10 amounts in the contract on Page 11 of 11 past the  
11 termination date, some statement about what the contract  
12 obligates and instead reduced it to this \$1.75 per  
13 tourniquet. Now, that's just a plain error.

14           Composite Resources wasn't and isn't obligated to  
15 pay \$1.75 per tourniquet sold. By plaintiff's own judicial  
16 admission, in their summons and complaint, Paragraphs 21 and  
17 22, plaintiffs judicially admitted that this contract was  
18 amended by agreement in 2012, effective 2013, to reduce the  
19 commission from \$1.75. And so for, you know, ten years  
20 or -- sorry, just doing the math -- six years -- sorry, six  
21 years prior to the filing of this lawsuit by agreement the  
22 amount of commission paid was not \$1.75.

23           And so it's just plain an error. It's -- it's not  
24 correct. And when it's combined with the language that  
25 says, Composite Resources is obligated to pay plaintiffs

1 \$1.75 per combat tourniquet sold for which this amount has  
2 not already been paid, it's an obligation or a requirement  
3 that CRI would have to go back and undo the agreement and  
4 pay an amount that's more than plaintiffs have judicially  
5 admitted in they're seeking and that's, of course, not  
6 appropriate. And so that language in the order just cannot  
7 stand. And Your Honor should know that the commission --  
8 the commission amount was actually changed by agreement on  
9 two separate occasions. The one in 2012/2013 that's been  
10 judicially admitted by the plaintiffs in their summons and  
11 complaint and the second time by agreement in 2000 -- in  
12 April of 2017.

13 Now, plaintiffs dispute that they agreed in April  
14 of 2017 to reduce the commission a second time, but I  
15 believe that there is evidence, certainly more than a  
16 scintilla of evidence, that the commission was reduced yet  
17 another time.

18 And I also believe that, regardless of whether  
19 Your Honor changes the order as it exists today or not, the  
20 jury is going to be asked whether that commission reduction  
21 in April of 2017 was a breach of the agreement or not a  
22 breach of the agreement and, of course, this agreement can  
23 be modified.

24 So, even when Your Honor said, Finding that  
25 plaintiffs have established as a matter of law that the

1 defendant was contractually obligated to pay plaintiffs the  
2 amount reflected in the contract on Page 11 of 11 past the  
3 termination date, I think that's probably substantially true  
4 with the caveat, of course, that it's subject to any  
5 modifications, affirmative defenses, and counterclaims.

6           And that leads me into the second issue with the  
7 order. The second issue with the order as written could  
8 reasonably, and I think maybe only reasonably, could be read  
9 to fix liability on the defendant.

10           Now, I don't mean, as Mr. Munson seems to have  
11 confused our argument that, it has also fixed damages  
12 against the defendant, but it does appear from the language,  
13 and I think any reasonable reading of the language, to fix  
14 liability against the damages. This language that  
15 Mr. Munson used that, frankly, Your Honor did not use, was  
16 and is obligated, especially when it's added with the  
17 language that says, Past the date of this order, can only be  
18 read, I believe reasonably, to affix liability against  
19 the -- against the defendant. Obligated, of course, under  
20 Black's Law -- under Black's Law Dictionary says,  
21 Acknowledgment of a liability. Liability, of course, means  
22 the quality or state of being legally obligated.

23           And so when this decretal language says, Composite  
24 Resources was and is obligated to pay plaintiffs \$1.75 per  
25 combat tourniquet sold for which this amount has not already

1 been paid and for all combat tourniquets which are sold in  
2 the future, that sounds as though Your Honor has ruled  
3 against our counterclaims and affirmative defenses. Which,  
4 of course, Your Honor hadn't heard at the time that this  
5 order was -- sorry, that this motion was argued and that  
6 this order was signed.

7           And so, as we heard on Tuesday, I think there's no  
8 argument that there's not a scintilla of evidence with  
9 respect to the breach of confidentiality, breach of Article  
10 2 and Article 5, conflict of interest, breach of the  
11 covenant of good faith and fair dealing, which, of course,  
12 hasn't even been moved on. And so liability -- and, of  
13 course, the affirmative defense of prior material breach,  
14 which would preclude any liability.

15           And so I think that that language must be changed  
16 because it appears to fix liability against the defendant  
17 when we know that there are outstanding modifications,  
18 counterclaims, and affirmative defenses which would affect  
19 whether or not the defendant is liable or obligated to make  
20 any payments much less, of course, \$1.75, which is an error.

21           Now, curiously, it's difficult for me to  
22 understand, and I'm sure we're going to hear in a minute,  
23 it's difficult for me to understand exactly what plaintiff's  
24 position is on whether this was meant to fix liability or  
25 not fix liability. When I first got involved in this case

1 before, even when my Pro Hac was signed, I flew to  
2 Greenville, met with Mr. Munson in an effort to try to get  
3 this case resolved. Mr. Munson said to me what prevents the  
4 Judge --

5 MR. MUNSON: Your Honor, I object to what I might  
6 have said to him in a conversation we just described as the  
7 summons (inaudible).

8 MR. MARTIN: What would prevent the Judge from  
9 entering a order fixing an amount? And I said, Well, our  
10 counterclaims. And then we had an email exchange with the  
11 Court, where, in September, we wrote, defendant wrote to the  
12 Court and said, Your Honor, we're concerned with the order  
13 because we're concerned that the language of the order might  
14 affix liability.

15 And Mr. Munson responded in an email to the Court  
16 and said, An affirmative -- and we said -- affirmative  
17 defenses and counterclaims that haven't been ruled -- and  
18 Mr. Munson, an affirmative defense assumes all allegations  
19 in the complaint are true, Black's Law Dictionary. So, by  
20 its definition it only operates after liability is  
21 determined or assumed.

22 So the existence of unresolved affirmative defense  
23 should not prohibit the entry of the proposed order  
24 especially since the order does not include damages for  
25 which execution could be levied. I read that email as

1 saying, It's not a problem that you affix liability, because  
2 of this curious thing about South Carolina law. We, of  
3 course, responded saying, No, no, no, the way affirmative  
4 defenses work is they are defenses to liability. So if we  
5 proved an affirmative defense of a prior breach, then there  
6 can be no liability.

7           And, in any event, knowing Your Honor that we have  
8 these counterclaims and affirmative defenses of prior  
9 material breach, we've discussed them, confidentiality, good  
10 faith and fair dealing, conflict of interest, and the like,  
11 if a jury were to find that any of those was true and that  
12 Mr. Cedrone or Poly-Tech -- Mr. Cedrone as a third party  
13 beneficiary must abide by the obligations of contract or as  
14 Poly-Tech as a signatory to the contract -- breached the  
15 contract, then any further obligation from CRI to perform  
16 under the contract is extinguished. And, therefore, there  
17 could be no liability from CRI for ceasing the commission  
18 payments in August of 2018.

19           So the important thing is, is that, given what's  
20 still alive in this case, whatever else Your Honor decides  
21 about this order, it should not use language that can be  
22 misconstrued as fixing liability against CRI or saying that  
23 CRI is obligated into the future past the date of this order  
24 to make certain payments, because that's an issue that is  
25 yet to be decided.

1           Now, I thought that Your Honor had actually well  
2 dealt with that issue in your preliminary order in the way  
3 that you -- in the way that you worded it by saying that, My  
4 finding is that plaintiffs have established as a matter of  
5 law that the defendant is contractually obligated to pay  
6 plaintiffs the amounts reflected in the contract on Page 11  
7 of 11 past the termination date.

8           Of course, I would argue that maybe it should  
9 further say, Subject can modification affirmative defenses  
10 or counterclaims, but I think that that's -- that's more  
11 accurately a statement of what the contract says and not  
12 what someone is obligated to do by order of the Court, which  
13 is what I think the order as signed -- (inaudible).

14           Do you have a question on that, Your Honor, or on  
15 my argument about that, Your Honor?

16           THE COURT: Well, I think you (inaudible) very  
17 well.

18           MR. MARTIN: Well, I mean, I'm going to go for a  
19 little while, so I'd rather take the questions as they come,  
20 yes, sir.

21           THE COURT: -- (inaudible) matters of summary  
22 judgment. Lawyers argue no genuine issue as to dispute of  
23 material fact, or you argue a scintilla of evidence does  
24 exist, so there is.

25           When I approach it, I have to do that analysis,

1 and I try to do that analysis to the best of my ability, but  
2 one of the other approaches that judges do when they  
3 approach issues of summary judgment, and I think the  
4 appellate courts have told us that, Please use the  
5 opportunity of summary judgment motions to clarify the  
6 issues that will be addressed by a jury and to try and use  
7 also these motions to bring clarity and then to get cases  
8 moving along.

9 I understand you articulated reasons why you have  
10 problems with the order that I signed. Do not think that I  
11 did not read that order, because I did, and I waited until  
12 the parties had gone through the mediation before I signed  
13 the order. Even though it was blown back in my face, I  
14 think maybe by both sides, but somebody in this case coming  
15 back in my face that, well, you didn't sign the order  
16 beforehand, you waited until after mediation, mediation  
17 didn't work.

18 The reason I didn't sign the order prior to  
19 mediation is that I did not want to give one party an  
20 advantage over the other based upon what my decision would  
21 or would not be in the case. Because I still think this is  
22 a case that is substantial to both sides, has issues that,  
23 if it makes it to a jury, a jury in my 20 years of sitting  
24 up here watching jurors work, might be influenced, hopefully  
25 only influenced by the facts and the law given to them, but

1 may very well be influenced by something that the lawyers  
2 nor I anticipate that would be presented to them in the  
3 course of the trial. With all that said, there is great  
4 reason why the parties need to try to explore a resolution.

5           So if you take what was written in my email what  
6 then is your view of what's concluded that I removed from a  
7 consideration that the jury no longer has to worry about?

8           MR. MARTIN: Yes, sir, Your Honor, I understand  
9 that question and thank you.

10           Going back to what I said at the beginning. I  
11 think what I clearly understood Your Honor to be saying with  
12 the order was, I'm not going to say that a 20-year contract  
13 between these parties is unenforceable because you're  
14 telling me that it's indefinite. And I'm not going to say  
15 that this obligation is perpetual. I think those are two  
16 that you said very clearly. I think another thing that  
17 you're saying is that the act of terminating the agreement  
18 doesn't cease the contractual obligation to the  
19 commissions.

20           Now, I might disagree with that, Your Honor, and I  
21 might discuss it with you for a second, but I'm going to  
22 tell you that I'm not asking you to change that. I'm not  
23 asking for that right now when we get to my reconsider part.  
24 I think that a reasonable reading -- Your Honor has -- Your  
25 Honor has decided that it is un -- you asked me what you've

1 taken out, I believe Your Honor has decided that it is  
2 unambiguous as a matter of law that termination of the  
3 contract does not eliminate the commission obligation,  
4 period, full stop.

5 That doesn't, of course, mean that there are other  
6 things that could eliminate the termination obligation.  
7 Those things are things that the jury is going to have to  
8 decide. For example, was there a prior material breach?  
9 That could eliminate the commission obligation. Was the  
10 project discontinued? That could eliminate the termination  
11 obligation. Was the account still in existence? That could  
12 eliminate the termination obligation.

13 But what Your Honor has -- what I understand Your  
14 Honor to have said was, I don't buy that it's not  
15 indefinite. Lisa Bennett gave us a reasonable explanation  
16 for -- or a reasonable interpretation of what the words  
17 mean. And so there is a reasonable interpretation.  
18 Indefinite means there can be no reasonable interpretation.  
19 We heard one from Ms. Bennett, and so I'm going to decide  
20 that it's not indefinite. Understood.

21 Now, I will just say, so that Your Honor has heard  
22 it, that Ms. Bennett also, of course, said competition with  
23 the CAT tourniquet would be a breach for which the contract  
24 could be terminated. The clear indication being that the  
25 commissions would stop. And so I believe that there is a

1 conflict internal to Ms. Bennett's own testimony about  
2 whether termination would cease the commission obligation.

3 I think it's interesting at least to point out  
4 that when Annex C was written -- does Your Honor have a copy  
5 of the Annex C?

6 May I approach, Your Honor?

7 THE COURT: Thank you.

8 MR. MARTIN: I think -- I do think it's important  
9 to point out -- I do think it's important -- I'm sorry.

10 I do think it's important to point out, Your Honor  
11 that Annex C -- I don't know if it matters at this point who  
12 the drafters were or whatever, but Annex C was written by  
13 both parties, but the part about the commissions for this  
14 account was written by Mr. Cedrone. And I think it's at  
15 least interesting to point out that the word "discontinued"  
16 was used as opposed to terminated. Right.

17 It says, If in both Annex C1 and Annex C2, it  
18 says, Commission for this account is to continue if for any  
19 reason the regular contract discontinued. It doesn't say  
20 terminated. And then we have this testimony from  
21 Ms. Bennett who says, If he competed we could terminate the  
22 agreement. Regardless, when it says, Discontinue for any  
23 reason, I understand that a very reasonable interpretation  
24 of that would be, any reason of discontinue would include  
25 termination and I understand that is what Your Honor has

1 found and so that's what Your Honor has found.

2 THE COURT: I'm biting my tongue. No.

3 Well, thank you for all that. And I understand  
4 we're dealing the motion for reconsideration which in my  
5 view when I analyze it was a contractual issue. And thank  
6 you for telling what Ms. Bennett says or Mike's saying what  
7 the other issues in the case will be because there is  
8 clearly a letter that came from your client terminating this  
9 relationship.

10 MR. MARTIN: Yes, sir.

11 THE COURT: Period.

12 MR. MARTIN: Yes.

13 THE COURT: It's in black and white, okay. So but  
14 thank you for sharing all of that. That's what you intend  
15 to present to a jury. Thank you very much.

16 MR. MARTIN: Your Honor, may I --

17 THE COURT: I just want you to understand that  
18 that is floating out there and so I am absorbing it and I'm  
19 digesting it because -- anyway, thank you very much.

20 MR. MARTIN: May I continue?

21 THE COURT: Sure.

22 MR. MARTIN: And, Your Honor, if you don't mind,  
23 can I follow up on what Your Honor just said?

24 THE COURT: Sure.

25 MR. MARTIN: I think this -- I raised this on

1 Tuesday and we're living this case and my client's lived  
2 this case and Your Honor is having to breathe from a  
3 firehose every time that we're in front of you and --

4 THE COURT: I don't breath from a firehose. Is  
5 there a firehose up here?

6 MR. MARTIN: I feel like I am one right now.

7 Anyway, here's what I want you to understand. I'd  
8 like Your Honor to recall that this relationship the  
9 business relationship between CRI and Poly-Tech preexisted  
10 this contract by some almost 10 years. And that  
11 relationship was the relationship and you asked kind of why  
12 are we talking about stuff that's old and it's because we  
13 need to understand what is the context of that agreement and  
14 the context of that agreement is that it doesn't just apply,  
15 of course, to tourniquets.

16 And so if, as I believe the evidence will prove,  
17 and I certainly believe there is more than a scintilla of  
18 evidence, if it's true that commissions for this account can  
19 cease if the project discontinues, for example, there would  
20 still be a sales representative relationship between CRI and  
21 Poly-Tech for all kinds of other client accounts.

22 And so Your Honor said, Look, there's a letter out  
23 there that your client sent. Yes, my client terminated all  
24 business relationships with Poly-Tech, we noticed on in June  
25 of 2018, effective August of 2018.

1           So if the project had -- consider this Your Honor,  
2 if the account was gone and the project had discontinued,  
3 this -- the agreement was still in place, Mr. Cedrone was  
4 still a sales representative of CRI for all kinds of  
5 different accounts, the Nitech account, the Gravigate  
6 account, the XYZ account, for other accounts.

7           And so the fact that he sent a termination letter  
8 terminating the rest of the regular agreement I don't think  
9 bears on whether or not there was still an obligation to  
10 make payments for the commissions under Annex C Part 2. I  
11 think Annex C Part 2 tells us whether there's a commission  
12 obligation. And the commission obligation is that  
13 commission for this account is to continue past termination  
14 as long as the project continues.

15           And so if the project is discontinued prior to any  
16 termination, then the termination would have been and was,  
17 frankly, effective only as to the rest of the relationship  
18 between CRI and Poly-Tech. And I believe, Your Honor, that  
19 as you hear more of the evidence in the case you'll learn  
20 and the jury will learn that that's exactly the way that  
21 this relationship worked.

22           THE COURT: Well, for fear of being called a  
23 flamethrower again, let me ask another question.

24           MR. MARTIN: Of course, sir.

25           THE COURT: All right. You see, I've approached

1 this, and I believe that the pleadings establish it, that  
2 the first issues that are going to be addressed in this case  
3 is going to the issue of the contract and this issue of was  
4 it ambiguous was it not ambiguous and was it breached?

5           Because if there was no breach of contract this  
6 case becomes real simple. And if the terms of the contract  
7 are defined, it really, in my opinion, and I say this for  
8 your education, I'm not throwing flames.

9           MR. MARTIN: Yes.

10           THE COURT: Then that contract is going to be  
11 binding on both the plaintiff and the defendant. Period.  
12 Because a court -- I think there's a lot of cases in South  
13 Carolina that the appellate courts tell a trial court, You  
14 cannot rewrite this contract. You've got to take what is  
15 given to you by these parties, otherwise I'm going to be  
16 stepping on the shoes of both the plaintiff and the  
17 defendant and I'm going to try to decide, Well, this should  
18 have been or this is what they meant, or this is what they  
19 didn't mean. When it was their obligations, if they want to  
20 look to the courts for help in enforcement of a contract  
21 that has been breached, or they want to -- or parties look  
22 to a court to say, Well, no, we've got a contract, this  
23 contract then shields us from something. Then it's the  
24 obligation of the parties to come into court with clarity  
25 with that contract. Because, otherwise, courts then are put

1 it, in my opinion, courts then are put it in situations to  
2 where we then have to go outside of what the parties have  
3 agreed to and I believe you have a -- I believe that  
4 somebody's argued to me, these are sophisticated parties.

5 MR. MARTIN: Yes, sir.

6 THE COURT: These are not mom and pop store  
7 operators. These are sophisticated parties and I dare say  
8 both are probably well presented when they entered into this  
9 agreement.

10 MR. MARTIN: I don't think either side was  
11 represented when they entered into the agreement, but they  
12 are sophisticated parties. And I do believe, Your Honor,  
13 that when we look at this commission obligation I do believe  
14 that -- I believe two things. I do believe that it is  
15 ambiguous, but I do believe that there is a reasonable  
16 interpretation.

17 I believe that the part that Your Honor has  
18 determined to be unambiguous can be determined to be  
19 unambiguous by Your Honor. I understand that my argument is  
20 my argument. You say you've determined unambiguously that  
21 termination does not extinguish the commission obligation,  
22 but I think that there's still a question for the jury as to  
23 whether or not commissions are due in a contract that says  
24 commissions for this account as long as the project  
25 continues.

1           And so, look, this moves me to the -- we're  
2 obviously entangled now in an actual motion for  
3 reconsideration -- motion for reconsideration as opposed to  
4 just how I think it's been transcribed.

5           THE COURT: (Inaudible) -- argument and tell me  
6 how it was transcribed incorrectly. And I'm sorry if I --

7           MR. MARTIN: No, no, no, I'm accepting it. I was  
8 going to say I just want you to know we're moving on and I  
9 would like to move on.

10          THE COURT: Sir?

11          MR. MARTIN: The part that I -- the part that I  
12 believed was the problem with the words is when you said --  
13 when it's written, "was and is obligated," as opposed to  
14 making it a contractual obligation.

15          But, Your Honor, here's what I've asked for your  
16 indulgence for nine minutes and 57 seconds. If you were to  
17 allow me -- a picture paints a thousand words -- allow me to  
18 play nine minutes and 57 seconds of evidence that I have  
19 attached to my motion, which is my deposition of Mr. Cedrone  
20 on the issues of project and account, I think that you will  
21 see that there is a reasonable interpretation of this  
22 agreement that says that if there is not an account or the  
23 project has discontinued that the commission obligations are  
24 over and that it was understood by the parties what project  
25 meant, this three-party deal, where Phil Durango was a

1 necessary party and that account meant something.

2 But when we look at this language, Mr. Munson and  
3 the plaintiffs have argued to you that account really just  
4 means product, just means tourniquets, and project just  
5 means tourniquets.

6 Now, Your Honor, as far as I can tell from your  
7 order, hasn't gone through an analysis of deciding whether  
8 the term "project" is unambiguous or deciding whether  
9 "account," whatever that means, is unambiguous those words  
10 aren't in your (inaudible) no you were not, that's exactly  
11 my point.

12 THE COURT: Why is this (inaudible) motion  
13 (inaudible).

14 MR. MARTIN: A fair question, Your Honor.

15 Because I believe the way that the order is  
16 written, if it fixes liability and decides that the amount  
17 is obligated to be paid now and into the future, then that  
18 has decided essentially that the project is still  
19 continuing. And so if -- if the order as written stands,  
20 then I think there's an argument that Mr. Munson has made  
21 that it's over, that liability has been affixed. I mean,  
22 this is what Mr. Munson said on October 20th in response to  
23 our motion for leave to amend to add the advice of counsel  
24 defense. He said, Apparently realizing that the recruitment  
25 counterclaim will not survive the impact of the Court's

1 September 29th, 2022 order granting partial summary  
2 judgment, on and on and on. And so the argument has been  
3 made that our counterclaims are gone because of the way the  
4 order has been written.

5           And so, if Your Honor already agrees with me that  
6 that's not what you intended then the order can be changed  
7 or vacated or whatever needs to happen. But the implication  
8 has been made and I think, frankly, reading the language as  
9 an appellate court might, makes it sounds as though those  
10 issues have been decided, when maybe they weren't decided by  
11 the Court and they do stand for the jury.

12           That's all.

13           MR. MUNSON: I'm going to object to claim  
14 testimony. One, we weren't notified that they wanted to do  
15 that. Two, it takes it -- whatever it is it takes it out of  
16 context. And three, this is a summary judgment motion that  
17 was filed a year ago under the rules for summary judgment,  
18 if you didn't think -- if you thought there was additional  
19 evidence that needed to be presented to the court in regards  
20 to that motion, there's a procedure to ask for the motion  
21 not to be heard. That didn't happen. They didn't require  
22 any additional information for the court to handle this  
23 motion for summary judgment. And to reopen summary judgment  
24 every time a deposition happens before the order is entered  
25 or a motion for reconsideration can be granted creates a

1 circus that the rules don't allow it, Your Honor.

2 MR. MARTIN: Should I respond to that, Your Honor?

3 Well, all of this is in the record. I don't know  
4 why we wouldn't want to look at Mr. Cedrone answering the  
5 questions so that Your Honor can see it. I could stand up  
6 here for ten minutes, read them all to you, and ask Your  
7 Honor to follow me, but I think that you'll get it by -- by  
8 watching. All of it is in the record that you've probably  
9 already read.

10 THE COURT: If it's already in the record, then I  
11 don't need to hear it again, then. And you may use any  
12 reference in your arguments that you wish to, because to do  
13 otherwise, I think to do otherwise I think does push up  
14 against a common sense application of the rules. And  
15 there's got to be some guardrails to these motions for  
16 reconsiderations and I think Mr. Munson has articulated one  
17 of those guardrails.

18 Because -- because if I let you do this, then he's  
19 going to want to do something, then you're going to want to  
20 do something, and it's going to be a never ending process.  
21 And there's got to be -- there's got to be some conclusion.  
22 In every piece of litigation, somebody is going to -- if it  
23 goes to a judge or to a court, at some point somebody is  
24 going to have to win and lose. Okay?

25 And I think that you're doing an excellent job

1 articulating your client's positions and why you believe in  
2 those positions and where you believe that I have erred or  
3 need clarification. I don't think that is going to aid the  
4 Court to sit and watch or listen to a deposition.

5 MR. MARTIN: I've heard Your Honor.

6 THE COURT: Okay.

7 MR. MARTIN: And with respect -- with respect to  
8 some of Mr. Munson's other arguments, to the extent that  
9 Your Honor has any concern, I think that if portions read,  
10 our discussion about Rule 54, Rule 59, and the interplay,  
11 and how as opposed as to what Mr. Munson said, Hey, there's  
12 a new deposition now you get to file a new motion. That's  
13 exactly what Rule 54 is for. We've provided Your Honor with  
14 case law.

15 This order, at first we were concerned that it was  
16 a final order, because Mr. Munson used the word "final" a  
17 bunch of times in his motions and because of the way that it  
18 could be read to appear to fix liability. And so we styled  
19 the motion of Rule 59, and we filed the Rule 59 Motion. We  
20 have subsequently taken additional testimony.

21 Mr. Munson has maybe now admitted that this is an  
22 interlocutory order, but we, of course, know that it's an  
23 interlocutory order when we just a hearing on Tuesday about  
24 how -- and we're talking about how the trial is going to go  
25 on and so it's not a final order.

1           Since it's not a final order, Rule 54 is, of  
2 course, the appropriate motion and Rule 54 absolutely allows  
3 supplemental evidence. As a matter of fact, South Carolina  
4 courts and, of course, circuit courts, frankly, most all  
5 federal courts, have talked about Rule 54 as the motion  
6 that's used to -- in the circumstance where there's  
7 additional evidence.

8           In any event, Your Honor, the -- I've heard you  
9 about not wanting to watch the deposition. I would just  
10 like to point out some particular things that are in the  
11 record that I think it's important for you to understand.

12           One is, I asked Mr. -- on this issue, I asked  
13 Mr. Cedrone this question: In June of 2005 -- now, of  
14 course, in any contract interpretation we need to look at  
15 the parties intent when the contract was signed, it was  
16 signed in June of 2005. In June of 2005 when this contract  
17 was signed the project was Composite Resources manufacturing  
18 tourniquets on behalf of Phil Durango, correct? Yes.

19           Mr. -- I went on and I said -- I asked him -- I'm  
20 sorry, Your Honor, just a second, please.

21           I asked him: If Mark Espesito (ph), inventor and  
22 sole owner of Phil Durango, LLC, the entity under which he  
23 conducted business, that was the client account of CRI, and  
24 so, either way, If Mark Espesito had caused Phil Durango to  
25 stop being a customer account of Composite Resources any

1 time prior to 2014, the Phil Durango tourniquet project  
2 would have been over, correct? I guess that would be true.

3 The tourniquet project necessarily involved Phil  
4 Durango in June of 2005, correct? Yes.

5 Sir, you've testified previously under oath that  
6 it was never contemplated that anybody would buy the  
7 intellectual property of Phil Durango, correct? That was  
8 not contemplated, that's right.

9 I said, That's right. And because it wasn't  
10 contemplated, it wasn't on anyone's mind, there was no  
11 conversation that said, If somehow we get to manufacturing  
12 this tourniquet without Phil Durango, I'm still going to get  
13 a commission. And he said, In 2005 that was not  
14 contemplated.

15 I asked, Well, CRI was manufacturing tourniquets  
16 on behalf of Phil Durango, right? They were making  
17 tourniquets for Phil Durango, yes. I don't know what you  
18 mean by, "on behalf of" but they were the client, yes, I  
19 said, They were the account. He said, Yes, it was Phil  
20 Durango's right to have the tourniquets manufactured or not.  
21 He said, They were the project, yes. Phil Durango was the  
22 project.

23 I said, Now, in 2014 Mr. Espesito decided that,  
24 frankly, he made enough money off the tourniquet and he  
25 wasn't adding anything additional to the tourniquet project

1 and he was going to sell the tourniquet, correct? I did not  
2 know that at the time.

3 But you know now that's what happened. Today,  
4 yeah.

5 Yeah. And you were not offered the opportunity to  
6 purchase the tourniquet, right? That's correct.

7 Now, at that point CRI had been manufacturing the  
8 tourniquet for 10 years, right? Yes.

9 And you had been being paid a commission for  
10 having convinced Phil Durango to use CRI to assemble and  
11 mass produce the tourniquet, correct? Yes.

12 In 2014 you did not convince Phil Durango to  
13 continue to use CRI to mass produce and assemble the  
14 tourniquet, correct? I had no idea that was happening.

15 That's right, sir, but you weren't involved,  
16 that's my point, right? That's correct.

17 So, Your Honor, all of that testimony I think is  
18 clearly a scintilla of evidence that there is a reasonable  
19 interpretation of this contract that Phil Durango was the  
20 project. As Mr. Cedrone's own words, I didn't even elicit  
21 from him, he just said them. Phil -- they were the project.

22 And so when Phil Durango is gone, the project  
23 discontinues. And that's, I think, an absolutely  
24 reasonable -- I believe there's no question in my mind  
25 that's the way the whole thing worked. I think that's a

1 reasonable interpretation that renders it impossible to  
2 decide that as a matter of law "project" meant making the  
3 tourniquets without regard to whether or not Phil Durango is  
4 still involved.

5           Mr. Cedrone testified in his deposition that Phil  
6 Durango was a necessary part of the tourniquet project in  
7 2005 when the contract was signed.

8           And so I believe that any jury who hears this  
9 case, because there is this evidence, is entitled to decide  
10 whether project means what they say it means, which is the  
11 manufacturing of tourniquets without regard to whether or  
12 not Phil Durango is still involved, or whether it means -- I  
13 believe the clear language of it is, which is, that  
14 commission for the account, and account has a meaning, it's  
15 written right there, Phil Durango, LLC, continues only as  
16 long as the project continues.

17           Now, it does -- it does continue past termination,  
18 Your Honor's decided that. But if the project discontinues,  
19 the commission discontinues. And it's important to  
20 recognize the plaintiff's judicial admission that is in  
21 their summons and complaint where they say that they were  
22 being paid a commission for convincing Phil Durango to use  
23 CRI to assemble and mass produce the tourniquet.

24           And in 2014, when Phil Durango said, I'm going to  
25 sell this tourniquet either to a New York investment bank or

1 to you, CRI, if you want it. And CRI had to pay 11 million  
2 dollars for the right to continue to manufacture the  
3 tourniquet. At that point Cedrone was, as he admitted, not  
4 convincing Phil Durango of anything.

5 And Mr. Cedrone actually says in his deposition  
6 that's attached, When CRI did that, paid the 11 million  
7 dollars, bought the intellectual property, quote, Phil  
8 Durango exited the scene. And so the Phil Durango  
9 tourniquet project was over. And that's the substance, Your  
10 Honor, of the motion -- of my actual reconsideration part of  
11 my argument.

12 There's another, I think, technical problem with  
13 the order, and that's this -- if I can totally switch gears  
14 on you -- this is less an issue of how the jury will hear  
15 the case and it's more an issue of what the -- what the --  
16 sorry, what the order looks like and whether the order  
17 exists the way you want it to exist. And this is what I  
18 mean by that: Your Honor referred, in your preliminary  
19 email, to extrinsic evidence and you did so in the context  
20 of the indefinite -- indefinite argument which you injected.

21 For pointing out purposes, I would just point out  
22 that you did, on Page 2, you did acknowledge that defendants  
23 argue that if the agreement terminable as a matter of law  
24 pursuant to the termination provision then the agreement is  
25 at best ambiguous as to the terms for which the plaintiffs

1       conceded construction.

2                You, of course, were not moved by the argument  
3 that it was, however, indefinite and not subject to a  
4 reasonable interpretation. I've just shown you a very  
5 reasonable interpretation and so I can kind of understand  
6 Your Honor's ruling on that.

7                If we look at Page 4, you then talked about your  
8 decision about the indefiniteness part, and how you didn't  
9 accept that argument. And when you did, you said, From an  
10 analytical position the Court notes that the position  
11 advanced by the defendant is that the last provision of  
12 Annex C is as a matter of law indefinite and thus legally  
13 unenforceable. Defendant's position is that it's not  
14 ambiguous and that's why I read you that other part, Your  
15 Honor. I do believe that we have argued in the alternative  
16 and I think having reread the hearing transcript that there  
17 may have been miscommunication on the defendant's part with  
18 the Court that maybe made that note.

19                Again, all the papers, as Your Honor pointed out  
20 earlier in the order, it's always been the defendant's  
21 position that it is ambiguous in the alternative to this  
22 indefiniteness this argument. In any event, you said -- or  
23 the Court said, I'm sorry, Your Honor -- The Court views the  
24 defendant's position as meritless, the position about  
25 indefiniteness. This Court's view of the defendant's

1 position is supported by the testimony of Lisa Bennett to  
2 the effect that, as long as Composite Resources is making  
3 the tourniquets, Poly-Tech would get paid.

4 I understood that by Your Honor to say, Look, even  
5 Ms. Bennett said there's a reasonable interpretation. It  
6 can't be indefinite if there's a reasonable interpretation.  
7 You then went on, Your Honor, to say, though, if you look  
8 down to the part I've highlighted, Nevertheless, simply  
9 because this Court has looked at the supplemental materials  
10 it has done so to confirm further support it's view of the  
11 contract terms from the four corners of the document that --  
12 tell me if I'm wrong, but I think that what you meant there  
13 was that it's -- that it's not indefinite and from the facts  
14 that are actually uncontested in this litigation.

15 Then you said, Thus, because supplemental  
16 materials were reviewed no inference should be drawn that  
17 the contested material terms were ambiguous and needed  
18 further factual development. I understood that statement,  
19 Your Honor, to say, I wasn't relying on intrinsic evidence  
20 to decide that this motion should be granted in favor of the  
21 plaintiffs.

22 Now, however, when we go to the actual order, you  
23 can see that starting at Page 6, as drafted by the  
24 plaintiffs, they have set up an alternative sustaining  
25 ground in the form of extrinsic evidence and wrote it into

1 this order. On Page 6 they start by citing law that Your  
2 Honor didn't cite, didn't refer to, didn't ask the  
3 plaintiffs to refer to that, Even if this Court were to  
4 determine the contract was ambiguous, it may yet examine  
5 evidence extrinsic to the contract that is included in the  
6 summary judgment materials and, if that evidence is as a  
7 matter of law dispositive of the interpretive issue, grant  
8 summary judgment on that basis. That's -- that language is  
9 clearly been put in to support an alternative sustaining  
10 ground on reliance on extrinsic evidence in the event the  
11 appellate court was to decide that the contract was  
12 ambiguous.

13           If you then go to Page 12, on Page 12 it says,  
14 Because the relief -- at the bottom -- because the relief  
15 sought in this motion for partial summary judgment is  
16 compelled by the contract and the reading of the defendant's  
17 amended answer and discovery responses.

18           Now, Your Honor didn't refer to the discovery  
19 responses in your preliminary ruling. So now plaintiffs  
20 have started to talk about the extrinsic evidence in a way  
21 that (inaudible). And then this paragraph that you wrote  
22 where it says, Nevertheless, no inference should be drawn.  
23 That's taken out, it's not in this order, and instead on  
24 Page 13 it says, Although not the basis for granting the  
25 relief set forth in this order, the Court's review of

1 supplemental material confirms that the contracts terms set  
2 forth in the four corners of the contract support entry of  
3 partial summary judgment establishing that the contract  
4 obligates defendant to pay plaintiffs the tourniquet  
5 commissions and raw material profit payments at the rate  
6 that set forth on Page 11 of the contract during the term of  
7 the contract beginning in June of 2005 extending beyond the  
8 termination of the sales representative relationship on  
9 August 31st of 2018 and lasting for so long as the combat  
10 tourniquets are produced and sold.

11           And then three pages are spent referring to  
12 extrinsic evidence that is not in Your Honor's preliminary.  
13 And I don't know that, frankly, it was even argued during  
14 the hearings and I haven't currently checked to see whether  
15 it's part of the summary judgment record or not, but I guess  
16 we can assume that it is.

17           Then, if we go to -- I'm almost done with this  
18 part, but I need to show you how it all fits together, Your  
19 Honor, thanks for your patience.

20           On Page 15 it says, Here plaintiffs provided  
21 specific discovery responses in deposition testimony from  
22 Composite Resources operation director at the time the  
23 contract was executed that directly supports plaintiff's  
24 motion.

25           Now, I believe that that's in opposition to your

1 language that no inference should be drawn that it's  
2 ambiguous the extrinsic evidence supports a finding. But  
3 then it goes on to say, Defendant filed no counter evidence  
4 with its filing in opposition to the motion.

5 Now, when I -- when I read that part I asked  
6 Mr. Munson wasn't there something filed? Because I'm just  
7 getting involved in the case right, Your Honor, I said,  
8 Wasn't there something filed? Didn't the defendants file  
9 any motion -- I mean, any evidence? Because it sounds like,  
10 as Mr. Munson wrote it, that no evidence was filed.

11 Now, this language that is, of course, you know,  
12 not in your preliminary email that the defendant filed no  
13 counter evidence with its findings. Now, if I were  
14 reviewing for it, I think I might understand that to mean,  
15 Plaintiffs filed a bunch of evidence, defendants filed no  
16 evidence, as a matter of law I can decide that the extrinsic  
17 evidence supports my ruling as an alternative supporting  
18 ground.

19 But we raised that and, of course, there were some  
20 56 pages of evidence that was provided included other  
21 portions of Ms. Bennett's testimony that said that if there  
22 was a breach of contract -- excuse me, Your Honor -- if  
23 there was a breach of contract, the breach of contract could  
24 be the basis for termination, of course, with the  
25 implication that then the commission obligation would be

1 over. And that there -- the submission of the patent, for  
2 example, which as we discussed on Tuesday shows right on it,  
3 that it was the competing tourniquet of Mr. Cedrone was  
4 designed to compete with the windless -- on Tuesday -- to  
5 fix the problems the windless tourniquet. And so there's  
6 some, at least, conflicting evidence.

7           So, Mr. Munson writes in his response to our  
8 motion to reconsider that when he wrote "counter evidence"  
9 what he meant was the evidence that was submitted didn't  
10 actually counter what was submitted by the plaintiffs.

11           Now, that statement coming from the Court, I think  
12 would necessarily lead someone to believe that Your Honor  
13 had gone through an analysis. That you had looked at the  
14 evidence that the plaintiffs had submitted. That you had  
15 looked at the evidence that the defendant had submitted.  
16 And that you had then done an analysis where you decided as  
17 a matter of law the evidence that the defendant submitted  
18 was not a scintilla of evidence and therefore could not  
19 support an alternative reasonable interpretation and thus  
20 could be an alternative supporting ground.

21           I don't -- I mean, Your Honor will tell me, but I  
22 don't believe that that's what Your Honor did. It's not  
23 referenced anywhere in your preliminary ruling. What you  
24 said was, No inference should be drawn that the contested  
25 material terms were ambiguous and needed further factual

1 development. And so I believe that what's been injected  
2 into the -- into the order -- and, look, I understand  
3 maybe -- well, that's what's been injected into the order is  
4 at least confusing as to what Your Honor's intention was  
5 with respect to the extrinsic evidence.

6 I don't think you meant it to be an alternative  
7 supporting ground based on the way I read your preliminary  
8 order, but maybe you did. And if you did, then you  
9 should -- then I would respectfully ask the Court to  
10 consider making that clear, but I'd also respectfully ask  
11 the Court to consider that maybe there is alternative  
12 evidence and maybe the reference to extrinsic evidence  
13 probably is unnecessary.

14 Mr. Munson has, in his response, said, No, no, no,  
15 it's not -- first he said, No, no, no, it's just dicta, the  
16 counterevidence and description these parts that I've read,  
17 he says, That's just dicta from the Court. But then -- but  
18 then he writes in the same page, Your Honor, don't remove it  
19 because it'll take away one of the legs of the stool that's  
20 supporting your decision. Of course, dicta doesn't support  
21 our decision, dicta has -- (inaudible) a decision.

22 And so, again, there's an internal inconsistency  
23 plaintiff argument as to what they intended when they wrote  
24 counterevidence and whether they intended to write that the  
25 Court did rely on extrinsic evidence to the extent that it

1 should be an alternative supporting ground or not. And so I  
2 think at a minimum, Your Honor, that that needs some  
3 clarification.

4 I've been asked to tell you and I think it's a  
5 good suggestion I did not mean that you are a flamethrower  
6 or that -- I meant that I feel like I'm being a firehose to  
7 you and I hope Your Honor -- (inaudible).

8 In any event, I think -- I think that there -- I  
9 think that those are my arguments with respect to the motion  
10 to reconsider and if you have any questions of me I'll be  
11 happy to try and answer them.

12 THE COURT: We'll hear from Mr. Munson.

13 MR. MUNSON: Thank you, Your Honor. Okay.

14 I think I'll try to take it in the same order and  
15 hopefully be brief so we can get out of here.

16 First of all, I am 100 percent confident that I  
17 can defend every word in that order on appeal.

18 THE COURT: -- (inaudible) (the audio was not on  
19 for the first few seconds the judge was talking) -- I cannot  
20 adopt as part of the way that I do things. I give these  
21 preliminary rulings, not as a matter of finality, to say  
22 that this is the end of all ends as far as the questions  
23 being presented to the Court. It is meant as a way to  
24 assist the lawyers in how this Court is approaching the  
25 issue that's been presented to it and what is looked at and

1 where this Court desires to have its ruling made.

2 Now, I'll give you an analogy, in the area of post  
3 conviction relief, the supreme court has already directed to  
4 the trial courts that, Judges, you're pretty much going to  
5 have to start preparing your own orders. So now in complex  
6 PCR matters, we are approaching it, we don't have the luxury  
7 in complex litigation, at least in the criminal/civil realm,  
8 to be able to issue these types of preliminary rulings.

9 I appreciate the argument in wanting to clarify  
10 and link these two together, but I will tell you, this is a  
11 complex case and I spent a lot of time going through the  
12 information that was given to this Court as well as took a  
13 look at what information this Court was given to at the time  
14 that it was presented to me.

15 It is not uncommon from this Court to view in  
16 making these types of substantial rulings -- and I'm sorry  
17 to cut you off -- in making these types -- I'm throwing some  
18 flames up here, okay -- in making these types of rulings to  
19 use this as process to get to what the truth is. And it is  
20 not uncommon for after a substantial ruling has been made,  
21 even a final ruling has been made by the Court, to then take  
22 it through a motion for reconsideration and actually do  
23 180-degree shift.

24 And I know it aggravates lawyers to death when  
25 I've done that, because I then get another motion for

1 reconsideration. I can tell that they're all aggravated  
2 because I feel like I'm throwing enough flames at them  
3 again.

4 But I use this as a process. I mention that  
5 because don't -- while it is not perfect, it is a -- it is  
6 a -- it was a substantial effort on the part of this Court  
7 to reach the decisions that it -- that it reached when it  
8 issued this preliminary ruling. And this preliminary ruling  
9 was based upon what this Court was given at the time. And  
10 that's all that I can do. I cannot create evidence that is  
11 not given to me.

12 MR. MUNSON: Yes, sir.

13 THE COURT: I cannot create law that's -- I'm not  
14 supposed to create law that's not given to me. So I do the  
15 best that I can. All right. Yes, sir. Sorry about that.

16 I will not throw anymore flames, I promise. I'll  
17 try not to.

18 MR. MUNSON: And I'll just briefly note that my  
19 proposed order sat for 17 weeks without comment before the  
20 Judge -- before you issued it.

21 On the -- on the Rule 54 issue, I would just point  
22 out their motion doesn't mention Rule 54, their supplemental  
23 motion doesn't mention Rule 54. Rule 54 is not mentioned in  
24 here.

25 I will admit I use the words "final motion for

1 summary judgment" because I'm trying to avoid the Rule 54  
2 issues. But they did not bring a motion on either  
3 Rule 54 -- you did not issue your order as a final motion.  
4 So to me it seems like that issue is not part of this.

5 On that -- I don't want to get bogged down on a  
6 deposition that was taken afterwards about parol evidence  
7 that doesn't have anything to do with the unambiguous  
8 language on the contract. But just -- I just want to point  
9 this out, because it kind of harkens back to the  
10 paraphrasing of deposition testimony from -- from earlier  
11 this week and what we heard today.

12 The quest -- the answer that Mr. Cedrone gave was,  
13 They are the project, they are the project. In a -- in a  
14 back and forth about whether the CAT tourniquets were the  
15 project or Phil Durango was the project. His testimony was  
16 they were the project.

17 Now, Counsel has paraphrased that to say he meant  
18 Phil Durango was the project. But that equally could mean,  
19 and it did mean, that CATs were the project. The word --  
20 just looking at the structure of the sentence, the word  
21 "they" is plural; "CATs, tourniquets" are plural; Phil  
22 Durango is singular.

23 So if he thought using the plural word "they" and  
24 replace it where "project" was, has to be Phil Durango,  
25 that's just -- that's incorrect, that was not his testimony,

1 his testimony was "they." That's -- with regard to this  
2 particular issue, that's a side note, because this is just  
3 about what is in the four corners of the contract, which  
4 both parties asked this Court to do in the scheduling order.

5 I mean, that's just an unusual provision in the  
6 scheduling order provides for either party to move the Court  
7 to determine the unambiguous terms of the contract. That's  
8 all that was done. That's what the order relates to. And  
9 the part about this extraneous information really has  
10 nothing to do with the order.

11 I said this before, and I'll just say it briefly,  
12 they take every opportunity to argue their entire case with  
13 regard to any motion and that's what's happening here. I  
14 just want it to not go unnoticed.

15 The obligation versus liability issue, I tried  
16 screen obligations, that's what contracts do. What are  
17 those obligations created unambiguously within the four  
18 corners of the contract? That's what this motion was about.  
19 The courts -- you know, we went through that, therefore, it  
20 was judged as at part of this, which is essentially the most  
21 significant language here, and it doesn't say liability, it  
22 just says obligation in the order.

23 It's clear that the Court understands the  
24 distinction between liability and obligation, because in the  
25 order on Page 2 the Court talks about how plaintiff has

1 asserted on Page 2 that the defendant is liable. So we've  
2 asserted that the defendant then is liable.

3 THE COURT: What are you looking at?

4 MR. MUNSON: I'm looking at your order.

5 So the Court in the order uses this phrase  
6 "liability" with regard to what the plaintiffs are arguing  
7 in their case, and then separately uses the word "obligated"  
8 with regard to what it's finding about the unambiguous  
9 language of the contract. So it's clear there's a  
10 distinction because both words are used in the order between  
11 liable and obligation. Beyond the fact that a contract  
12 defines obligations between parties and to interpret the  
13 unambiguous language of a contract would require to identify  
14 what the obligations are. It doesn't have -- as we've  
15 talked about it this week, as we've noted in our papers,  
16 that's distinct from whether or not there's liability that  
17 results in damages that results in a judgment.

18 So to suggest the fact that the Court can identify  
19 the obligations that the parties agreed to in the four  
20 corners of the contract does not mean that the Court has  
21 jumped the gun, or has the shadows of judgment based on that  
22 are unfounded from the language of the order.

23 The -- on the -- on the transcription point, I  
24 mean, between -- I think we dealt with this already, but  
25 just trying to defend myself, the defendant is contractually

1 obligated to pay plaintiffs in the amount reflected in the  
2 contract. And so reflected in the contract is the \$1.75 per  
3 tourniquet. All I did was take the amounts reflected in the  
4 contract and put them in the order.

5           Now, this issue about \$1.42 versus \$1.75, we laid  
6 out the -- in our -- in our responses. But if this order  
7 said we had to pay them \$1.42, it would be -- they would  
8 have an argument for reversal. I mean, to some extent it  
9 seems to me they're trying to get you to change your order  
10 to make it more reversible. But the contract says \$1.75, if  
11 it's not \$1.75 in terms of what a judgment should say,  
12 because, of course, the dealing changed the -- made it \$1.42  
13 and a jury might find it's \$1.42, or because my client  
14 decided hogs get slaughtered and pigs get fat, and so is  
15 only seeking \$1.42 versus \$1.75. That -- that has nothing  
16 to do with what the obligations are created in 2005 between  
17 the parties based on the language in the four corners of the  
18 contract.

19           I don't know what this has to do with anything  
20 really, but this third-party beneficiary concept that -- I  
21 think they overstate that. If somebody is a third-party  
22 beneficiary, suddenly they're obligated for everything  
23 that's in the contract. And I'll just give you a simple  
24 example. If you -- if I agreed to sell you my 1966 Mustang,  
25 and the agreement was that I would pay -- I would pay

1 Mr. Kaeske the money, so he's the third-party beneficiary  
2 because I'm going to pay him the money and you're going to  
3 sell me the -- you're going to pay -- anyway -- the money  
4 goes to the third party to buy the Mustang.

5           If I -- if I don't give the Mustang to the other  
6 party, he's not obligated just because he's a third-party  
7 beneficiary to get a Mustang and give it to the person, he  
8 just doesn't get the money. So, I mean, he doesn't get the  
9 benefit of the contract. He's not bound by obligations of  
10 the contract.

11           I'll just point that out because I think they  
12 overstate the idea of what a third-party beneficiary's  
13 obligations and duties in a contract are. And I think  
14 that's especially highlighted in this case when he's only  
15 the third-party beneficiary after the contract is  
16 terminated.

17           So, you know, he doesn't -- even as a third-party  
18 beneficiary in this case has no obligations related to the  
19 contract in its predetermination basis.

20           With regard to the -- with regard to the -- I  
21 think it's clear from the order with regard to the counter  
22 evidence argument that they made that the point relates to  
23 no counter evidence about Lisa Bennett's testimony, no  
24 counter evidence regarding the entire summary judgment  
25 process. It's has -- whether -- whether that's in the

1 order -- there's nothing wrong with the order.

2           The reference to the extrinsic evidence is maybe a  
3 fool's error to think that if a court reversed on the four  
4 corners of the contract that there would be other sustaining  
5 grounds because the only interpretation would be consistent  
6 on our argument on the four corners of the contract. But  
7 the order really just identifies that as an issue. Says  
8 it's not the basis for the order and essentially that puts  
9 it in the record that maybe disadvantages my side because it  
10 shows that you didn't -- it shows that the Court alone  
11 wasn't convinced enough to make that a leg of its ruling.

12           And whether there's other -- whether there's  
13 evidence that would be contrary to another sustaining  
14 argument ground is in the record. That would be a fight at  
15 the appellate court. The idea was to try and keep from just  
16 cycling back to the appellate court, coming back, then  
17 having uncontested evidence from Lisa Bennett, who was the  
18 only one who participated in the contract. And then going  
19 back -- and then having summary judgment granted again based  
20 on the uncontested evidence. But it seems to be neither  
21 here nor there because it's not the basis of the order and  
22 therefore its inclusion doesn't make it improper. You know,  
23 that -- and it's kind of -- (inaudible).

24           Defense Counsel made a suggestion today that  
25 the -- that the Page 11 was drafted by my client and there's

1 no testimony from my client that he drafted the final  
2 version of this contract or the -- or the wording that  
3 appears in the last page.

4           And this document, CRI PT1, which is the June 7,  
5 2005 email between Lisa Bennett, Dan Cedrone, and Johnathan  
6 Bennett regarding the tourniquet contract changes which has  
7 been endlessly referred to in this case, significantly  
8 because it's the day of and the day before the contract was  
9 signed, is from my client to Lisa saying, Here's the  
10 information you need to amend per our last conversation to  
11 create the 2005 contract.

12           And one of those, just to point out that the  
13 language on Page 12 happens after this email from my client,  
14 Upon the unlikely event of my death, product commission will  
15 be reduced to 10 percent. While the contract says that it  
16 will be reduced to 10 percent, the commission for this  
17 product will continue at 10 percent for any reason if the  
18 regular contract is -- is changed.

19           So this reference by my client about reducing it  
20 to 10 percent on January the 7th shows that the 10 percent  
21 provision is not in there at that time and it's not  
22 something that he drafted. And then you go to Page 11 of  
23 the contract, and there it is, it's in there showing that it  
24 gets in there because Lisa Cedrone -- I mean, Lisa Bennett  
25 from Composite Resources takes that information that she

1 needs to amend per their last conversation.

2           So all the evidence in this case is that -- is  
3 that the final version of the 2005 contract was drafted by  
4 Composite Resources. And that was confirmed on Tuesday when  
5 defense counsel went on and on about the non-compete  
6 agreement having been included in the final version of the  
7 2005 contract after his client conferred with counsel and  
8 probably got the language from counsel and that's a  
9 significant issue in this case.

10           But, frankly, based on that if there's any change  
11 made to the order it should be that the final version of the  
12 2005 contract was drafted by the defendants. And what's  
13 striking about that is when you compare those statements  
14 with the discovery responses in this case, we asked them,  
15 Identify every person Johnathan Bennett consulted with about  
16 the sales representative agreement before signing it.

17           Answer, John Bennett did not consult with anyone  
18 before signing the sales representative agreement. Yet, on  
19 Tuesday, he went to see a lawyer and got the non-compete  
20 agreement added to the contract in 2005, and he verifies  
21 that interrogatory answer.

22           We asked a request to admit -- admit that  
23 Johnathan Bennett consulted with legal counsel regarding the  
24 terms of the sales representative agreement prior to signing  
25 it. Denied. And he admitted if they had admitted and

1 provided an appropriate answer to this interrogatory like  
2 they did on Tuesday we would have been suggesting that this  
3 order also include that final version of the 2005 contract  
4 was drafted by CRI.

5           And, finally, even in the Standard Interrogatory  
6 Number 3, when we asked for the -- who's got information  
7 about the issues in this case. They identified three  
8 parties. One is my client -- well, they only identified  
9 two -- two parties that had anything to do -- that knew  
10 anything about the contract. And that was my client and  
11 Johnathan Bennett. Johnathan Bennett is familiar with the  
12 contract at issue in this case and that's the only one they  
13 identified.

14           So Johnathan Bennett is the only one at CRI that  
15 knows anything about it. CRI goes to a lawyer, drafts the  
16 final version with the non-compete agreement. My client the  
17 day before says, Here's the information you need to do the  
18 final version, the information you provide is reflected in  
19 the final version. It's pretty clear that despite their  
20 interrogatory answers and their request to admit denial,  
21 that they were responsible for the final version of the 2005  
22 contract.

23           I mean, I'm just going to end with this, because I  
24 think it's just this simple, we put in the scheduling order,  
25 please read the contract, interpret this for -- interpret

1 the language of it by the four corners, which is the law in  
2 South Carolina. Court -- and eventually a court is going to  
3 have to do that before you get to trial.

4 We asked for how the Court did that, it sat for 17  
5 weeks, we didn't complaint about -- we really don't complain  
6 about the -- the actual, you know, therefore being adjudged  
7 kind of language, other than they want to -- they want to be  
8 confused about what obligated means. And the other -- the  
9 other stuff -- there's nothing -- there's nothing  
10 inappropriate about it. It's supported by the record. And  
11 think that the Court really shouldn't change any of the  
12 language in the order because, otherwise, we're just going  
13 to be in this cyclical of motion for reconsideration, motion  
14 for reconsideration.

15 Thank you, Your Honor.

16 MR. MARTIN: Your Honor, may it please the Court.

17 I'd like to deal with the last issue first,  
18 because I think it doesn't have anything to do with the  
19 motion for reconsideration, but it is who drafted the  
20 document. You weren't asked to decide who drafted the  
21 document, that wasn't in the instruction.

22 The motion that the defendant drafted, Mr. Munson,  
23 has somehow gotten confused about what I said on Monday when  
24 he read those interrogatory answers. Lisa Bennett, who the  
25 email was, as he just said, about the writing down of what

1 Mr. Cedrone told her to put into the agreement. It was Lisa  
2 Bennett who sought the lawyer, not Johnathan Bennett who  
3 sought the lawyer. So the interrogatory answers were  
4 absolutely correct.

5 Lisa Bennett, and that document that's been  
6 produced, Lisa Bennett sent the draft in March 2005 to a  
7 lawyer. Subsequent to that, the parties continued with the  
8 negotiations of the document. By the way, in March of 2005,  
9 when Lisa Bennett sent that draft to the lawyer, Mr. Cedrone  
10 had already written this part of Article C that says the  
11 part about, To the estate of Dan Cedrone, et cetera, et  
12 cetera.

13 And so, anyway, you haven't been asked to do  
14 anything with respect to that. The order shouldn't be  
15 changed with respect to the -- to the extent of that. And  
16 being the scribe does not mean you're the drafter, but I  
17 think -- Your Honor, the -- okay.

18 So back to the -- back to the motion to  
19 reconsider. Here's the first thing that I would say.  
20 Mr. Munson has admitted to you that he used the word "final"  
21 so that we wouldn't file a Motion 54, then instead we filed  
22 a Motion 59. Well, we filed a Motion 59, because of the way  
23 he used the "final" so we wouldn't do that. But, the fact  
24 of the matter is, is that a Rule 54 Motion can be brought at  
25 any time. I can take all of our filings that we filed

1 already. I mean, excuse me, Your Honor, but I could take  
2 all of our motions for reconsideration and restyle it rule  
3 54 it and file it today and it wouldn't cure hear it. There  
4 is no time bar on that prior to us going to trial.

5           And, as a matter of fact, I don't know if  
6 Mr. Munson missed this or what, but we absolutely went  
7 through an entire analysis in our supplemental motions about  
8 Rule 54 versus Rule 59 and we said we're bringing this all  
9 under Rule 54 and it's timely, and you can hear it at any  
10 time. That is absolutely in our papers. And so, either  
11 way -- and by the way the reason that we did that is because  
12 of the supplemental evidence of the deposition that I took  
13 of Mr. Cedrone.

14           Your Honor raised a great point, which is to say,  
15 I can only make the decisions based on the evidence that are  
16 in front of me at the time. And I wholeheartedly agree with  
17 that. And, frankly, Your Honor, I regret that we didn't  
18 have the deposition that I took of Mr. Cedrone on  
19 November 4th when you made that decision. But you have it  
20 now and we've asked you to consider it. I think that it  
21 clarifies for Your Honor and I would hope that it clarifies  
22 for Your Honor, a lot of things about the way these parties  
23 dealt with each other what the actual meaning of the  
24 contract was.

25           For example, when we go to Mr. Munson's argument

1 about "they," the "they" that I read to you could mean  
2 tourniquets in this testimony. I don't even understand how  
3 that's possible. First of all, he focused on the point that  
4 he uses the word "they." Well, I used the word "they" and  
5 that's why he used the word "they".

6 Let me read it one more time: CRI was  
7 manufacturing tourniquets on behalf of Phil Durango, right?

8 They were making tourniquets for Phil Durango,  
9 yes, they are.

10 I don't know what you mean "on behalf of," but  
11 they were the client. Yes.

12 They were the account. Yes.

13 It was Phil Durango's right to have the tourniquet  
14 manufactured or not. They were the project? Yes.

15 He's clearly referring to Phil Durango as the  
16 "they." Because I referred to them as the "they."

17 In any event, the -- the language I think of the  
18 project meant the three of them making tourniquets for Phil  
19 Durango with Cedrone being paid a commission for convincing  
20 Phil Durango to use CRI. Phil Durango left the scene.  
21 Cedrone stopped convincing Phil Durango to use CRI. CRI had  
22 to convince Phil Durango -- 11 million dollars to allow it  
23 the right to continue manufacturing the tourniquet. The  
24 project was over. Phil Durango was dissolved. The account  
25 was gone. That is absolutely a reasonable interpretation of

1 the way that the contract was supposed to work.

2           With respect to the language of the order, I guess  
3 that my question to Mr. Munson would just be: Do you  
4 believe that it establishes liability or not as it's  
5 written? Do we get to put on our counterclaims or not? And  
6 if the answer is, No, it doesn't establish liability and yes  
7 you get to put on your counterclaims. Then, respectfully, I  
8 believe the language -- that the order should either be  
9 vacated or the language should be changed. Because this  
10 idea that CRI is obligated to make the payments past the  
11 date of the order and is obligated to pay \$1.75 for which  
12 amounts haven't already been paid sure sounds like affixing  
13 of liability without regard to whatever the counterclaims  
14 are.

15           Next, Mr. Munson has repeatedly said, Look,  
16 whether it's \$1.75 or \$1.42. I'll just point out to the  
17 Court that it's not \$1.42, it's 62.5 cents. And so it's a  
18 significant difference, \$1.75 is absolutely not correct.  
19 It's either at 62.5 cents or \$1.25. But if there is a  
20 liability finding against Mr. -- against CRI a jury will  
21 have to decide what is the appropriate amount. Is it the  
22 amount that plaintiffs have judicially admitted to, which is  
23 \$1.45 on a very, very small amount of tourniquets or \$1.25  
24 on absolutely the overwhelming majority of tourniquets, or  
25 is it actually 62.5 cents.

1           I wrote down when Mr. Munson said that the order  
2 states what the obli -- and this was the quote I wrote down,  
3 What the obligations are created in 2005. But when it says  
4 "is obligated to pay," that's not what the obligations are  
5 that's created in 2005, those are the obligations today.  
6 And so I think that provides further support that this  
7 language is at best confusing.

8           On the issue that Mr. Munson raised with respect  
9 to third-party beneficiary, respectfully, to Mr. Munson,  
10 he's wrong about the law on third-party beneficiaries. He  
11 hasn't cited any law about third-party beneficiaries. We  
12 brought Your Honor the restatement about how beneficiaries  
13 worked. That fact of the matter is nobody gets the benefit  
14 of the contract while breaching the contract. That's a very  
15 basic tenet of contract law. You don't get the benefit of a  
16 contract, if you don't abide by the contract. And that  
17 applies to third parties as well as it applies --  
18 third-party beneficiaries as well as it applies to the  
19 signatories to the contract.

20           Mr. Munson then said, and I wrote this down too,  
21 "He doesn't have to comply with the contract, he just  
22 doesn't get the benefit of it." Well, I wholeheartedly  
23 agree with that. Mr. Cedrone can decide as he did decide to  
24 not comply with the contract but then he doesn't get the  
25 benefit of it.

1           So, Your Honor, I think when we try this case,  
2 what you're going to see is that the evidence is going to  
3 show that Mr. Cedrone breached the contract and so the issue  
4 of the termination letter becomes irrelevant because at the  
5 moment that Mr. Cedrone breached the contract, he was no  
6 longer entitled to any commissions under the contract and  
7 CRI was excused from any further performance under the  
8 contract. And that's how the law works.

9           And so there are, if that's correct that  
10 Mr. Cedrone breached the contract, there are no future  
11 damages. And so when the order says, "Was and is obligated  
12 past the date of this order," that's absolutely not going to  
13 be correct if and when a jury decides that Cedrone has  
14 breached the agreement.

15           And those conclude my arguments unless you have  
16 any questions, Your Honor.

17           THE COURT: Mr. Munson?

18           MR. MUNSON: Your Honor, I have nothing to add.

19           THE COURT: Okay. Give me just a moment, if you  
20 would. I have some questions and either or both of you can  
21 respond. All right.

22           I did not view and still do not view that my  
23 ruling was a conclusion of the case. And I use that term  
24 "conclusion of the case" because I feel there are  
25 counterclaims that are out there, there are issues, other

1 issues that the plaintiff has raised that affects the  
2 outcome of this case.

3 I do not view my ruling as being as substantial as  
4 maybe plaintiff has said outside of this courtroom to  
5 defendant, nor do I view it as fatal as defendant comes into  
6 court and argues to this Court and then claims as though  
7 it's not that fatal.

8 I don't -- I feel as if I'm hearing the two  
9 extremes. And, again, I apologize if my tone is too low,  
10 I'll tone it down. I'm trying to be helpful, to me, as well  
11 as to y'all. So I'm -- I want to be -- I want to be, for a  
12 lack of a better word, I want to be helpful. I want to be  
13 of assistance to both sides in moving this case forward and  
14 to y'all representing your client based upon what's been  
15 given to me.

16 I am still of the opinion that on the issue that I  
17 addressed in the order that I'm comfortable with, I'm  
18 confident of based upon what I perceived that issue to be  
19 and what my ruling what I read it to be. I do not read my  
20 ruling as being, as much as maybe Mr. Munson would want it  
21 to be, and maybe I would want it to be from a management  
22 standpoint of a trial, I don't see it as being that it  
23 terminates the counterclaims and brings those to some type  
24 of conclusion. At best I see that my ruling has defined a  
25 very narrow issue in this case that would relate to the

1 counterclaims.

2           Now, I use that word "minor," because I've not  
3 addressed the counterclaims yet, I've not decided those  
4 issues. And based upon the ability of both sides to  
5 articulate this case, there's a lot of stuff I don't know  
6 already, you know. I'm sure that I'll find out at some  
7 point.

8           I just don't see my ruling as being as fatal as  
9 what I'm hearing from the defendants and maybe Mr. Munson  
10 said that, you know, that, Oh, you're never going to --  
11 you're side -- you're already burned at the stake with this  
12 order, maybe he said that, but I don't read it that way.

13           I also don't read my ruling as being that on this  
14 dollar amount that it is a dollar amount that is set in  
15 stone to the position -- and when I read those emails that  
16 went back and forth between the two parties -- the reason I  
17 didn't respond is that I never ruled that a judgment was  
18 going to be entered as a result of this ruling. Because if  
19 I had the proper process would be I'd have to contact the  
20 Clerk of Court and I've got to fill out the proper forms and  
21 I've got to actually create a document that then enters a  
22 judgment.

23           I did not -- I've never read this order of being  
24 that. And so I stayed silent because I thought it was a  
25 nonissue, so I let y'all, the two sides, deal with it

1 because y'all know your case better than I do and y'all are  
2 dealing with a hundred-thousand issues and, you know, so the  
3 only issue -- I only get involved on what I perceive is  
4 issues that I'm required to get involved with, I didn't  
5 address those emails.

6           What I -- so in my mind what my intent was in  
7 ruling as I did on an issue that I perceived was a singular  
8 issues, that was -- I was told I want -- y'all -- we --  
9 Judge, we want you to take a look at this, we want you to  
10 rule on this, that I looked at as that through, not  
11 blinders, but sort of I zeroed in on that issue, the  
12 ambiguity or lack of ambiguity and made that determination  
13 and tried to issue that ruling in a way that assisted the  
14 parties in moving this case along.

15           It could be in the way that I read my ruling, and  
16 my intent, it could be that those numbers become important  
17 at some point in the future of this litigation as a basis of  
18 saying something important. That might then lead to  
19 assistance to the parties in making some mathematical  
20 calculation. But by no means was it an order that somehow  
21 would have excluded the argument that, well, even though the  
22 unambiguous part in the contract that the Judge had ruled  
23 upon says that you're supposed to get "X" amount of dollars  
24 per tourniquet. Well, that doesn't mean that you get that  
25 money, because you did certain that then violated this

1 contract, or you did certain things that negated that, or  
2 there were things that took place outside of the development  
3 of this product. That then says, you know, Judge ruled this  
4 way still could come out to be some zero. That was my  
5 intent and that was how I viewed my ruling.

6 I have no idea of what my words are any help to  
7 anybody and I don't know how I would articulate that or  
8 express that in a written order of clarity or amendment or  
9 modification but that's my -- that was my intent in the way  
10 that I issued this ruling.

11 Do y'all have any questions or anything?

12 MR. MARTIN: Could I make a suggestion, Your  
13 Honor?

14 THE COURT: Sure.

15 MR. MARTIN: I think this would be my respectful  
16 request, I've heard what you've just said, I would ask that  
17 because I think I certainly understand what you said about  
18 your intent, but I also read the words and, like, if we were  
19 going to take those words and put them in a jury  
20 instruction, which I would think that might be suggested at  
21 some point down the road, that the jury might read it and  
22 they might think, Well, what am I to do here because CRI was  
23 and is obligated yada, yada, yada. And so I understand Your  
24 Honor doesn't want to do that. My suggestion might be to  
25 consider vacating the order and then giving an instruction

1 to the jury about the part that you believe is unambiguous.

2           So, for example, we can deal with this later, if  
3 we're at the jury charge where you say culmination does  
4 not -- whatever, doesn't eliminate the commission  
5 obligation, for example. But I think, as Your Honor has  
6 pointed out, we're going to have questions about exactly how  
7 does this case gets tried. And if our counterclaims -- if  
8 our counterclaims survive the motions from Tuesday and if  
9 we're -- and/or we're moving forward on, for example, the  
10 breach of the covenant of good faith and fair dealing, and  
11 the jury is going to be asked to decide those issues and we  
12 should have -- we shouldn't be burdened by something that  
13 might not be clear.

14           The other idea would be, you know, because I do  
15 believe that there are other parts of that language that the  
16 jury is going to have to look at. For example, was the --  
17 what about the account? Was the account still there? Was  
18 the project still continuing? That we deal with it either  
19 after all of the other dispositive motions have been heard  
20 or we deal with it, you know, in the pretrial conference or  
21 something like that.

22           That's my suggestion Your Honor, respectfully.

23           THE COURT: Okay. I promise, I'm not going to  
24 throw flames. I do appreciate your suggestion, okay. But  
25 why -- but -- okay.

1           If I do that, why was I asked to do this in the  
2 first place by the parties? It's a rhetorical question, I'm  
3 sorry, it's sounding that I'm throwing flames and I  
4 apologize.

5           MR. MARTIN: I don't take offense.

6           THE COURT: Okay. No, I apologize.

7           I mean, I would consider that, but there's so much  
8 water that has gone under this bridge already in this  
9 litigation. And we did so much -- and I say "we," I did so  
10 much work, I feel like I did so much work, in doing what the  
11 parties wanted me to do in addressing this issue and put --  
12 then it all becomes for nought, you know.

13           I mean, if you talk to Mr. Munson and y'all come  
14 up with a better plan, you know, let me know, I'm more than  
15 happy to consider a better plan, but this is -- this --  
16 this...

17           Okay. Let me make myself clear. My comments are  
18 directed toward your suggestion that I withdraw the order  
19 and the remedy is being simply charge the jury. I'm not a  
20 big fan of that because of everything that's already  
21 transpired in this case.

22           You know, one of the purposes that I maybe  
23 articulated earlier, one of the purposes that I've used  
24 summary judgment, I think appellate courts have said, judge,  
25 as trial judges that use summary judgment like this, is to

1 help clarify these issues as the trial approaches and you  
2 get to a jury. So that's what -- that's what we're doing.  
3 This was a summary judgment. So I'm not a fan of that.  
4 But, Mr. Munson, if y'all agree to it and think that would  
5 be beneficial, I'll be more than happy to consider it.

6 MR. MUNSON: We're not going to agree to that,  
7 Your Honor.

8 THE COURT: Well, you don't know. Y'all might go  
9 out in the hallway and something might come up, you know.

10 MR. MARTIN: Oh, sorry, I didn't mean to --

11 THE COURT: No, go ahead.

12 MR. MARTIN: Well, I might just -- Your Honor, of  
13 course, knows this, the only things that have happened since  
14 Your Honor's preliminary, were -- there was a failed  
15 mediation. I got involved, tried to get it resolved I  
16 couldn't. I...

17 THE COURT: Well, I hope you don't stop on that  
18 last part.

19 MR. MARTIN: I won't. However, it takes two to  
20 tango. The order was entered and the depo was taken.  
21 That's it. So the point being, time has passed. But  
22 unfortunately in some ways not a lot has transpired with  
23 respect to the case based on your order other than we  
24 weren't able to get the case resolved and I took  
25 Mr. Cedrone's depositions -- depositions and now here we are. And so I

1 don't know what the best way is to deal with it, but we'll  
2 march on.

3 THE COURT: Well, I welcome to the case. I  
4 appreciate your involvement. I've enjoyed very much meeting  
5 both of you and it's a pleasure and a privilege to have you  
6 both in the court as well as any time Mr. Munson shows up.

7 But my point was not what's happened since the  
8 order, but what's transpired before the order was issued.  
9 That's where a lot of my view of, you know, a lot of things  
10 have already transpired in this case that led to this  
11 court's involvement and we went through this process. My  
12 comment meant prior to the order not subsequent, but I do  
13 appreciate all of everybody's efforts subsequent to the  
14 order as well.

15 So do y'all want to go in the back and have a talk  
16 off the record or are we finished?

17 MR. MUNSON: Well, we can have a talk, Your Honor,  
18 but I'm not in the position to have authority for anybody to  
19 make anything --

20 THE COURT: Well, I'm not asking.

21 MR. MARTIN: I think we're finished.

22 THE COURT: Okay. We wouldn't go in the back for  
23 a settlement discussion, no.

24 MR. MARTIN: We -- I think we should, we, we...

25 THE COURT: No, not just we as in -- no, we as it

1 would be everybody.

2 MR. MARTIN: Yes.

3 THE COURT: I'll tell you what, let's conclude the  
4 hearing and let's go off the record.

5 END OF REQUESTED HEARING

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CERTIFICATE OF TRANSCRIBER

Case Name/Number: Daniel P. Cedrone and Poly-Tech vs.

Composite Resources, Inc., 2019-CP-46-00051

Date of Hearing: January 20, 2023

Court Reporter/Monitor: WebEx

I, Cynthia D. Weaver, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither Counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

February 20, 2023

Cynthia D. Weaver,  
Official Court Reporter  
State of South Carolina

State of South Carolina )  
 ) Court of General Sessions  
County of York ) 2019-CP-46-00051

Daniel Cedrone and Poly-Tech )  
Industrial )  
 )  
 vs. ) Transcript of Record  
 )  
Composite Resources, Inc. )

March 10, 2023  
Spartanburg, South Carolina

B E F O R E:

The Honorable Judge Mark Hayes, Judge.

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

Michael Kaeske, ESQ  
Attorney for the Plaintiff

Keith Munson, ESQ  
Attorney for the Defendant

Samantha Stewart  
Transcriber



1 THE COURT: Thank y'all for showing up this morning. All  
2 right. We're going to do the motions in the Cedrone v.  
3 Composite Resources 2019 CP-46-00051. Unless y'all got a  
4 better order of the motions that we're scheduled to do today,  
5 I would suggest that we take the substantive motions and then  
6 deal with the errata sheet and the discovery issues last. You  
7 know? But I do want to hear on the errata sheet and the  
8 discovery issues because those are at least to this court  
9 novel. So it was been interesting to review that and read  
10 that information. But let's start with the defendant's motion  
11 for summary judgment as to the plaintiff's fifth cause of  
12 action. That's just the first on my list.

13 MR. KAESKE: Yes, Your Honor. Should I proceed?

14 THE COURT: Yeah, yes. Give me one second. Let me mute  
15 myself. Okay.

16 MR. KAESKE: Good morning, Your Honor.

17 THE COURT: Please come in prepared.

18 MR. KAESKE: Yes, sir, my -- just my computer stalled  
19 out. Sorry. Thank you, sir. Good morning, Your Honor.  
20 Thanks for having us. I appreciate you fitting us in, of  
21 course. We're here about two different claims. The first  
22 we're going to do is the fifth, of course. I mean, there's  
23 three, but they apply to two different causes of action. And  
24 they're both -- I believe Your Honor will see -- attempts by  
25 the plaintiff to turn what's a simple breach of contract case

1 into a punitive damages case. And I think that Your Honor  
2 will see through our arguments today that they're both trying  
3 to fit a square peg into a round hole. That's --

4 THE COURT: Do you want -- let me ask a question.

5 MR. KAESKE: Yes, sir.

6 THE COURT: I think I understand that and I disagree with  
7 it. There's a contention that the conversion (audio  
8 interference).

9 MR. KAESKE: Yes, sir. And I think that's also with  
10 fraud in -- which you're going to hear on the 21st. And  
11 there, of course, the claims that gave rise to our filing  
12 motion for leave to add the advice of counsel defense. And  
13 without these, I think the advice of counsel goes away as  
14 well.

15 But in any event conversion. So we can see that  
16 conversion doesn't fit with this case because -- and I think  
17 at the last hearing Your Honor told us that you've had some  
18 recent experience with conversion -- with a conversion case.  
19 First of all, South Carolina, or specifically the Supreme  
20 Court, have recognized repeatedly that where there is a cause  
21 of action for contract conversion does not lie. For example,  
22 the Owens (phonetic) case from the South Carolina Supreme  
23 Court said that no conversion where there is a mere obligation  
24 to pay a debt, citing Ambger (phonetic). The Keeles  
25 (phonetic) case, for example, a mere contractual dispute over

1 unpaid wages does not support a claim for conversion.

2           And that's what we've got here. And the reason I believe  
3 that the courts decide that and rule that, of course, is  
4 because conversion requires an ownership interest. So there  
5 needs to be proof of ownership in that thing that the  
6 plaintiffs are trying to get. And so the idea of  
7 conversion -- of course, the word "conversion" is applicable  
8 and used because you're converting what's mine, what I own, as  
9 the cases talk about it, what belongs to another. You're  
10 converting it for your own use. And that's why the case law  
11 talks about specific identifiable either chattel, or songs, or  
12 objects that are earmarked -- they use that word -- for  
13 someone.

14           So for example, if we look at the Owens case from the  
15 South Carolina Supreme Court, the Owens case has said that  
16 conversion has been assigned as an unauthorized assumption and  
17 exercise of the right of ownership or personal chattels  
18 belonging to another to the exclusion of the owner's rights.  
19 Belonging to another.

20           And then that case for that proposition was citing  
21 another South Carolina Supreme Court Case, which was Moore v.  
22 Weinberg. The Keeles case decided that in that case there was  
23 not a conversion claim that lied in addition to the breach of  
24 contract case because Keeles has not alleged a possessory  
25 interest in a document or interest instrument representing his

1 unpaid wages.

2           And it cited a case that South Carolina cases frequently  
3 cite called the Borris (phonetic) case from California, and  
4 that -- the proposition of that case as well was that the  
5 plaintiff has to allege or it has to be proven that the  
6 instrument, the money, whatever it was became the plaintiff's  
7 personal property. And there's no allegation here nor can  
8 there be any proof that any of this -- any of these  
9 commissions were Mr. Cedrone's or Poly-Tech's personal  
10 property. They were simply -- it's simply a contractual  
11 dispute about unpaid wages.

12           Now, Mr. -- sorry, the plaintiff has cited two cases, the  
13 SSI case and the Mullis case. We can talk about the facts of  
14 those case first -- those cases for a second. The SSI case  
15 involved a situation where a company owned vehicles. They  
16 were selling the vehicles at the end of the leases. And there  
17 was an agreement that the company would retain a certain  
18 percentage of the residual value and that the remainder of the  
19 residual value paid to the agent who was getting the cars  
20 sold.

21           And so that case is inapplicable, of course, because four  
22 experts differentiated from this case because there's no  
23 dispute at all that the company owned the vehicles, that the  
24 company had an ownership interest in the residual value. It  
25 was their residual value. They were giving a piece of the

1 residual value away. And so it was the -- so it was the  
2 company's money that was being converted.

3         Likewise, in the Mullis case -- in the Mullis case that  
4 the plaintiffs have cited, it's a situation with physicians,  
5 and there's no dispute that the 10 percent, or 20 percent, or  
6 whatever it was of the pay of the doctor that was being  
7 withheld was being withheld for the purposes of paying the  
8 doctor's ownership interest in the partnership. And so if  
9 there's -- there was never a dispute that that money was the  
10 doctor's. It was the doctor's money. It was being withheld  
11 to pay the doctor's debt to the partnership. It was -- but  
12 this case is completely different.

13         So this case for all these motions -- by the way, Your  
14 Honor, if you don't mind, I'm taking quick step back. I'm  
15 sure you remember this, but I think it's useful to make it top  
16 of mind. The way that this business worked was that CRI  
17 manufactured tourniquets. And Mr. Cedrone got paid a  
18 commission on those tourniquets for convincing Phil Durango to  
19 use CRI to assemble and mass produce the tourniquets. And CRI  
20 sold the tourniquets to a number of different distributors.  
21 The distributors paid CRI.

22         The money that was paid to CRI was CRI's money. None of  
23 it was earmarked for Dan Cedrone or Poly-Tech. None of it was  
24 paid for the purposes of paying a commission to Dan Cedrone or  
25 Poly-Tech. None of it was paid to CRI for the purposes of

1 paying for materials to Poly-Tech. It was Mr. -- Poly-Tech  
2 and Mr. Cedrone never had any possessory interest for any of  
3 that money. They just had an agreement with CRI that CRI  
4 would give some of CRI's money to Poly-Tech.

5 And because there is no allegation, there can be no  
6 allegation of a possessory interest or an ownership interest,  
7 there's no way it can be converted. Because the entire  
8 concept, as I said, of conversion is that you take something  
9 that's somebody else's and you make it your own.

10 And take for example NAR, the North American Rescue.  
11 They're a Greenville company that was responsible for the  
12 distribution -- is responsible for the distribution of  
13 approximately 80 percent of all the C-A-T tourniquets that are  
14 sold worldwide. Okay? This fact will be relevant to all the  
15 motions today. NAR never even heard of Dan Cedrone or Poly-  
16 Tech. Never even heard.

17 They had no relationship whatsoever. The North American  
18 Rescue 30(b)(6) depositions were taken, and North American  
19 Rescue was asked, have you ever heard of Dan Cedrone or Poly-  
20 Tech prior to today? And they said, no, never even heard of  
21 them. And so there's no way that any of the money that was  
22 given to CRI, that was CRI's money for selling CRI's  
23 tourniquets had any -- that Poly-Tech or Dan Cedrone had any  
24 ownership interest in those (indiscernible).

25 Now, Mr. Munson and the Plaintiffs have argued that -- I

1 think much of their argument focuses on the issue of  
2 identifiability, whether it's an identifiable sum. And I'd  
3 just like to respond to that argument to the extent that it  
4 comes up more. The case law clearly states that in order for  
5 there to be a conversion claim, there needs to be an  
6 identifiable sum. Mr. Munson says, look, we can calculate to  
7 the penny how much money this was; therefore, it's  
8 identifiable. That's not what identifiable means.

9       Identifiable doesn't mean you can calculate your damages.  
10 Of course, you've got to be able to calculate damages on a  
11 breach of contract or any other kind of claim. If he wasn't  
12 able to calculate the amount of money that he thought that he  
13 could -- that Poly-Tech or Mr. Cedrone was entitled to, then  
14 you wouldn't have any damages. But that's not what  
15 identifiable means.

16       Identifiable means earmarked. Like, for example, in the  
17 Owens case, which was a case where -- you may recall it was a  
18 bank situation where a woman -- wife -- there was a husband-  
19 and-wife account. \$20 a week was taken from the husband-and-  
20 wife account to go into the wife's Christmas fund. And so now  
21 it was no question her money.

22       It came from their account. That money was put into a  
23 separate account, and that was a separate and identifiable  
24 amount of money that was her money. Never any question that  
25 it was her money. And that's how that went. And so this is

1 not that kind of situation. It's not an identifiable sum that  
2 is identified as being Poly-Tech's or Dan Cedrone's money.  
3 And if you'll allow me one second, I think that those are my  
4 arguments.

5       On both of the -- on the motions that we've got (audio  
6 interference). Well, I might as well say it. So here's the  
7 thing. We were here together when you allowed us the  
8 opportunity. Mr. Munson, you'll recall, at the end was like,  
9 look, I'm not going to say that I'm going to allow it, but I'm  
10 going to allow it. And there was that kind of weird that  
11 happened. And what he said was all I asked -- all I ask is  
12 that they supplement their discovery responses. And you may  
13 recall that I was here with a manila envelope prepared with  
14 all the documents.

15       And then we went back into Your Honor's chambers, and you  
16 asked us how quickly can we get the discovery. I turned to  
17 Mr. Martin. I said how quickly can we get them the  
18 supplementation? And Mr. Munson said I want -- all I want is  
19 for you to supplement your discovery. We supplemented the  
20 discovery within ten days. They got all the documents. They  
21 got all the documents. I have made sure that they have gotten  
22 all the documents. And there isn't even an allegation that we  
23 haven't provided them all of the documents.

24       In your chambers, I told Mr. Munson, Mr. Klett is  
25 available for his deposition. Take his deposition. It's now

1 been two months. There's never been a request for Mr. Klett's  
2 deposition. He's got the documents, and he's got the  
3 discovery answers.

4 Now, what happened was that Mr. Munson decided without  
5 leave of Court, contrary to what he said to the Court, that he  
6 wanted to serve new discovery. And so he filed new discovery.  
7 He filed new discovery on the advice of counsel issue. And  
8 then he also filed new discovery completely unrelated to the  
9 advice of counsel issue.

10 We have given answers to that discovery as well. But  
11 then what Mr. Munson did is he served third-party discovery.  
12 He served third-party discovery on Nexsen Pruet, which is the  
13 law firm that Mr. Klett was at at the time that he gave the  
14 advice. Now, Nexsen Pruet has not been involved in this  
15 lawsuit. In this lawsuit, which was filed on January -- I  
16 guess, 19th of 2019 -- by February -- I don't know if it was  
17 before the answer was filed or after the answered was filed.  
18 But by February, Mr. Klett has left Nexsen Pruet, gone to Burr  
19 Forman and taken the file with him.

20 And so there's nothing that Nexsen Pruet -- Nexsen Pruet  
21 took the file, gave it to Mr. Klett. Mr. Klett went to Burr  
22 Foreman with the file, and we have now produced the stuff from  
23 the file to Mr. Munson. No allegations that we have not. Mr.  
24 Munson has decided that he should get the same information  
25 from Nexsen Pruet. And Nexsen Pruet has not yet given him --

1 has not yet responded. They've said a number of different  
2 things.

3 THE COURT: (Indiscernible) count?

4 MR. KAESKE: Yes. That's right.

5 THE COURT: That would be (audio interference).

6 MR. KAESKE: Yes, sir. Excuse me.

7 THE COURT: And (audio interference).

8 MR. KAESKE: Yes, sir.

9 THE COURT: They say that they don't have anything? Or I  
10 know they've had several objections to it. I don't know if  
11 the -- Defense said that they don't --

12 MR. KAESKE: Well, they said that they gave the file to  
13 Mr. Klett, which they did. And so but then the other thing  
14 that he did, that Mr. Munson did, is he sought not Mr. Klett's  
15 deposition, but he sought the deposition of a lawyer named  
16 Victoria Elsinger or Eslinger who didn't give any of the  
17 advice of counsel and was identified as someone who gave any  
18 of the advice of counsel.

19 The termination -- sorry, the advice of counsel letter is  
20 copied to her, but she's copied because she was Mr. Klett's  
21 divorce lawyer and she was the firm's client contact. And so  
22 when Mr. Klett wrote the advice of counsel letter as a  
23 courtesy to his partner, who is the client contact in being  
24 the divorce lawyer, he sent a copy of the letter to her, but  
25 she didn't give any advice of counsel. And CRI hasn't alleged

1 that they're relying on any advice from her.

2 And so as far as the procedural issue is concerned, I  
3 mean, there -- one, we've complied. Two, he hasn't sought to  
4 take the discovery of Mr. Klett. Three, I think it's  
5 inappropriate, and burdensome, and unnecessary for her -- him  
6 to be seeking the exact same information from Nexsen Pruet  
7 that he's already gotten from us without any allegation that  
8 we haven't provided all the information.

9 And then, fourth, on the actual substance -- I guess to  
10 the extent there is any -- of the issue of advice of counsel,  
11 Mr. Bennett (phonetic) -- this all goes to the issue of good  
12 faith and whether there's good faith or bad faith. And of  
13 course, because it's an issue that raises the specter of  
14 punitive damages -- and I do believe that that's exactly why  
15 this claim was filed -- they -- it is plaintiff's burden to  
16 show bad faith, not our burden to show good faith.

17 Mr. Bennett in his affidavit that's been cited on this  
18 issue of good and bad faith said that he relied in good faith  
19 on the language of the agreement. That was the affidavit that  
20 we -- that defendants filed when this motion was filed in  
21 September, before the advice -- before I got involved in the  
22 case and before the advice of counsel was raised.

23 And that's important for this reason. As I described to  
24 the Court when we were here last, Mr. Bennett had an  
25 independent belief prior to getting any advice from Mr. Klett

1 that he did not have an obligation to continue to make the  
2 commission payments because the account was gone and the  
3 project was over. He believed that based on reading the  
4 language of the contract himself which is the contract that he  
5 signed. And that's what he said in the affidavit. I did this  
6 in good faith based on the language of the agreement.

7 Now, Mr. Munson is saying now you've raised the issue of  
8 advice of counsel. And Mr. Bennett said back then that he was  
9 doing it based on the advice of counsel. That's not what Mr.  
10 Bennett said. Mr. Bennett said that he did it based on what  
11 the language of the agreement said.

12 And so even if we were to take the advice of counsel  
13 issue completely out of this, we'd go back to September when  
14 we filed this motion, and we'd presume that we never raised  
15 the issue of advice of counsel, Mr. Bennett gets to testify  
16 about why he believed he was entitled under the agreement. If  
17 they raise an issue of bad faith, he gets to testify about why  
18 he believes under the agreement he wasn't obligated to make  
19 the commission payments.

20 Now, he may be wrong. You may decide, Your Honor, that  
21 he was wrong. Mr. Munson will certainly argue that he's --  
22 that he was wrong. But if he's got a good faith belief based  
23 on the contract that he signed that he can read whether he's  
24 relying on advice of counsel or not, whether he ever got  
25 advice of counsel or not, that goes to the issue of bad faith.

1           And so I think Mr. Munson's raising this issue of advice  
2 of counsel as some sort of procedural delay for having this  
3 motion heard is inappropriate. And I think to the extent that  
4 Mr. Munson feels like he hasn't gotten what he's entitled to  
5 get, he has. And if he has more discovery to do about it in  
6 terms of taking deposition, he should take that. Thank you.

7           THE COURT: Yes, sir.

8           MR. MUNSON: Thank you, Your Honor. I'll address the  
9 discovery issues first, and say this is a motion for summary  
10 judgment. And so factual issues -- that Mr. Bennett might be  
11 able to create a factual issue based on his own belief  
12 separate and apart from the advice of counsel might defeat me  
13 in seeking summary judgment here. But this is not my summary  
14 judgment motion; it's their summary judgment motion.

15           So the fact that Mr. Bennett has a factual issue on a  
16 particular point, the punitive damage aspect of the conversion  
17 claim, does nothing to suffice the burden on them to get  
18 summary judgment. With regard to what I did or didn't agree  
19 to, what I agreed to was that I would not get their  
20 supplementing agreement -- supplementing the answer to raise  
21 the affirmative defense if they provided me supplemental  
22 discovery. And sending me a letter that says supplemental  
23 discovery, here's the thing I want you to see is not providing  
24 supplemental discovery.

25           We asked in our discovery for all the information that

1 relates to any defense or claim in this case. They had this  
2 defense. And all I get from them is what they want me to see.  
3 And they say -- well, I then -- not even -- I didn't wait. I  
4 sent them discovery, and I sent Nexsen Pruet discovery. And I  
5 send Nexsen Pruet discovery because they identified Nexsen  
6 Pruet as their counsel.

7       When they responded to my discovery, they said -- let me  
8 find it here. The defendant has -- they gave what -- I'm  
9 sorry. I'd like (indiscernible) speaker. They gave me the  
10 letter that Mr. Klett wrote, and then they gave me the post  
11 termination justification second opinion that Mr. Manus  
12 (phonetic) wrote. They didn't give me any other information  
13 about that, about the efforts that went into those opinions.  
14 And they said that all they're obligated to give -- when a  
15 defendant relies on communications with or advice from counsel  
16 as grounds for defending against the claim, the defendant has  
17 only waived the attorney-client privilege as to those  
18 communications and that advice.

19       So they limited their supplementation to what they wanted  
20 to give me. The -- and that's just not the law. The law is  
21 that I'm entitled to laws that they have to provide their  
22 counsel, all the information necessary to provide a full and  
23 complete advice.

24       So that means that information is relevant to their  
25 advice of counsel. And I'm entitled to all the documents that

1 are relevant to their advice of counsel. That means I'm  
2 entitled to all the documents they sent to Mr. Klett and said,  
3 Mr. Klett, here's a full understanding of this situation.  
4 Please give me your advice.

5         So for example, just a single poignant example. There's  
6 this email that we've talked about -- and it's been attached a  
7 lot of places in this case -- between Mr. Cedrone and Jonathan  
8 Bennett, and Lisa Bennett (phonetic) on June the 5th, 2005  
9 that talks about the final -- no, excuse me. The final number  
10 on the raw materials that need to be put into the contract and  
11 the fact that the -- that there's no limit on the Gravagate  
12 (phonetic) and tourniquet commissions which gets put into the  
13 contract as the perpetual commissions which the Court's  
14 already entered an order about.

15         That this would be a very significant document. If I'm  
16 giving my lawyer all the information he needs in order to  
17 provide an opinion to me, this would be a very significant  
18 document to get. I did not get this document from Mr. Klett  
19 saying this was in his file of the full information that was  
20 provided to him in order to generate the opinion. The reason  
21 I didn't give it is because I didn't get any information that  
22 was provided to Mr. Klett for the purpose of giving his  
23 advice. And the advice, they can't rely on the advice unless  
24 they gave him all the information necessary to have a full  
25 understanding of the situation to give the advice.

1           So that's relevant. I'm entitled to it. They didn't  
2 give it to me in supplementation. I sent them specific  
3 discovery requests for it. They refused to give it because  
4 they claimed they only had to give me what they want to give  
5 me. And Nexsen Pruet, their first response is they don't have  
6 permission from their client. I don't know why they don't  
7 have permission from their client to give it. They're the  
8 ones who asked to add the advice of counsel. I think the  
9 Court should direct them to give Nexsen Pruet the permission.

10           They did say they gave -- they did say Mr. Klett left  
11 with the file or Mr. Klett left soon after this, and he took  
12 the file. They did not say they don't have any information.  
13 They didn't retain any information. They didn't make copies  
14 of information and keep an archive. They certainly would have  
15 part of the details of any bills that were -- the narratives  
16 of any bills that were sent so you could see who worked on it,  
17 who didn't work on it, what -- were there calls? Were there  
18 calls where some of this information was shared that don't --  
19 isn't reflected in the documents but would be reflected in  
20 call memos? The -- with -- we have a right for Nexsen -- to  
21 require Nexsen Pruet to produce that stuff since they named  
22 them as the counsel underlying this.

23           I will say I added the one lawyer who was copied on the  
24 letter because she was copied on the letter, which I  
25 understood she had some participation in it. I accept their

1 representation that that was somebody's divorce counsel and it  
2 was a courtesy to send it to them. So I -- I'm not going to  
3 take her deposition. I don't -- those done by -- yes, based  
4 on that representation, I don't care to have any of her  
5 documentation.

6 THE COURT: Okay.

7 MR. MUNSON: But I -- they did not give me the  
8 information required. I tried to spoon feed it to Nexsen  
9 Pruet. I gave them all the information about what the  
10 requirement is on an advice of counsel. I provided them case  
11 law so that they could see what the scope of it was. And  
12 based on that case law and the elements that they need to  
13 prove, per advice of counsel, defense -- you know, and it has  
14 to be -- they had to give him the information necessary to  
15 give an informed opinion. And then he had to reasonably rely  
16 on it.

17 So without knowing -- they're the ones who waived the  
18 attorney-client privilege as to this, Your Honor. And in  
19 South Carolina, yeah, it's a subject matter waiver, and this  
20 is all related to the same subject manner. I'll stop there.  
21 That's my position on the -- both the Nexsen Pruet part of it,  
22 and their supplementation, and the response to discovery,  
23 which I didn't get until I already jumped in the (audio  
24 interference).

25 But as to the conversion plan, first, again, this is a

1 motion for summary judgment. So if there's any -- if there's  
2 a scintilla of factual issue involved, it should be denied.  
3 And you know, the issue comes down to this. They can't have  
4 it both ways. They can't earmark my client's commission for  
5 the purposes of giving him a haircut and then say there was no  
6 earmark of my client's commission for the purposes of the fact  
7 that they took my client's money when North American Rescue  
8 came to deposit resources and said we got to give a break to  
9 the Department of Defense, a \$2.50 tourniquet.

10 We're going to -- North American Rescue said, we'll split  
11 that with you. We'll do \$1.25. You do \$1.25. The testimony  
12 in this case for Mr. Bennett is it was my responsibility for a  
13 dollar -- my responsibility of the 2.50 was \$1.25. He then  
14 goes -- and admitted this in his deposition -- to Mr. Cedrone  
15 and says my \$1.25 responsibility I'm going to force you to  
16 split with me 62 cents apiece. Yours is going to be 62 cents.  
17 Mine is going to be 62 cents.

18 So he took the \$1.25 that North American Rescue said  
19 we'll pay you a \$1.25 of this 2.50 communication on each of  
20 these tourniquets. He took that 1.25 that North America  
21 Rescue's giving Composite Resources, and he took half of that.  
22 He recouped half of that by taking 62 and a half cents from my  
23 client on every tourniquet.

24 And so they're the ones that earmarked it. And they  
25 can't have it both ways. They can't earmark it to Poly-Tech

1 to say we're giving you this haircut, and I know you disagree,  
2 but we're giving it to you anyway and then say, gee, it can't  
3 be identified. It's in some great, big pool. This is just a  
4 wager's case. It's a debtor situation. It's not. They  
5 earmarked this money. It's really identifiable. That they  
6 cite case law of cases where the ball gets hit down the  
7 fairway and its right down the middle doesn't mean my ball's  
8 not on the fairway. My ball's on the fairway.

9       It may not be down the middle like some of the cases they  
10 referred to. But the law in the South Carolina is from the  
11 Mullins case, and even the Owens case, and the -- I forget the  
12 name of it, but the car case. It shows it doesn't have to be  
13 an account marked Keith Munson account due and payable that I  
14 just never pay to him. It just has to be a determinate amount  
15 that's identifiable for which my client has a right to. Being  
16 earmarked is one way to do it. It was earmarked by them.  
17 They can't go back on that now.

18       And we think on that basis the facts that are in the  
19 record that we cited and attached to our motion, the case law  
20 that we've raised a scintilla of evidence to get past summary  
21 judgment on the conversion claim. And as to the punitive  
22 damage aspects of conversion, that just goes back to we  
23 haven't been able to get the information on the advice of  
24 counsel part of it. That's all I have, Your Honor.

25       THE COURT: Question.

1 MR. MUNSON: Yes, Your Honor.

2 THE COURT: With the other causes of actions that you  
3 have alleged, where does this conversion action help your  
4 case?

5 MR. MUNSON: I'm entitled to punitive damages for  
6 conversion.

7 THE COURT: You've got other cause of action that give  
8 you punitive -- I mean, that give you a right to seek punitive  
9 damage?

10 MR. MUNSON: I do, but he just indicate -- well, we're  
11 going to talk about two more today. And he's going to attack  
12 the last one.

13 THE COURT: Yeah. Let me tell you both about --

14 MR. MUNSON: -- (indiscernible) --

15 THE COURT: -- this argument over the Nexsen Pruet stuff  
16 and your request wanting to delay me making rulings based upon  
17 their being a procedural issue dealing with the issue of  
18 punitive damages. I ain't buying it today. We're ready to go  
19 forward with the substantive issues in these claims. I'm not  
20 being asked today to throw out the issue of punitive damages.  
21 They have raised it, this defense of good faith reliance upon  
22 their attorney. So it's part of the case until I'm asked to  
23 rule whether it's not.

24 So you're entitled to the discovery. I'm not being asked  
25 at part of this motion to rule on that, but I'm not buying

1 that as being a defense to say I can't grant their motion for  
2 summary judgment on the issue of conversion. I'm looking at  
3 the substance of the conversion.

4 MR. MUNSON: And Your Honor, I would say on the substance  
5 of the (indiscernible) Park Avenue fund that the punitive  
6 aspect damage of it doesn't matter and it can be thrown out.  
7 Yes.

8 THE COURT: Okay. Yes, sir. Anything in reply?

9 MR. KAESKE: Do you mind, Your Honor?

10 THE COURT: Don't mind, no.

11 MR. KAESKE: Thank you very much.

12 THE COURT: Yes, sir.

13 MR. KAESKE: Mr. Munson's argument, while may be  
14 creative, it isn't the way -- like, with respect to the \$1.25,  
15 that's not (audio interference). But North American Rescue  
16 didn't say we're going to give you \$1.25. That's not the way  
17 that went. What North American Rescue said and CRI said  
18 together was we agree that the price of this tourniquet to the  
19 United States government needs to be reduced by \$2.50. That  
20 was the decision that was made. That was the discussion that  
21 was had.

22 And then North American Rescue said we will reduce our  
23 price to the government by \$1.25, and you will reduce your  
24 price to us \$1.25. Not we're going to give you \$1.25. They  
25 actually gave him \$1.25 less. That's exactly what happened.

1 CRI got \$1.25 less from the North American Rescue. They  
2 weren't given \$1.25.

3 THE COURT: Question. That might be what happens.

4 MR. KAESKE: Yes, sir.

5 THE COURT: Yeah, the way you just explained to me. But  
6 does that create a question of fact that prevents me from  
7 ruling in your favor on this motion?

8 MR. KAESKE: No. I don't think he's created a question  
9 of fact that I (indiscernible) --

10 THE COURT: Explain to me why not because he would say he  
11 has.

12 MR. KAESKE: Well, because he hasn't -- because the key  
13 is he has to have a possessor interest in the money. It can't  
14 just be a breached contract case. As far as I know -- and  
15 I've got two wicked smart people who've been looking at it for  
16 a while -- we haven't found a single case where you have both  
17 a breach of contract and conversion at the same time. Where  
18 it lies -- what Mr. Munson said -- what Mr. Munson is  
19 suggesting would make it so that every breach of contract case  
20 could be a contract case when, in fact, what the Supreme Court  
21 of South Carolina said -- has said is that if it's a breach of  
22 contract case, it's not a conversion case. You have to have  
23 converted somebody else's property to be your own.

24 And so the number one question to Mr. Munson and the  
25 plaintiff is what scintilla of evidence do you have that would

1 show that Mr. Cedrone or Poly-Tech have ownership interest in  
2 that money, not just a contractual right to it, but an  
3 ownership interest in it that the money belonged to them.

4 And you know, look, I'll just read to you from the  
5 testimony of North American Rescue. The question is, well, do  
6 you know the name Dan Cedrone or Poly-Tech Industries or  
7 Industrial? And he said, I've heard it in relation to this  
8 lawsuit. I'm trying to recall if I heard before the lawsuit.  
9 I have no specific recollection of having heard the name,  
10 either name before I became aware of this lawsuit.

11 So how could the money that NAR is given to CRI be Poly-  
12 Tech's money when NAR didn't even know that Poly-Tech existed?  
13 The only right he has to the money is the contractual  
14 obligation that CRI had. He has no separate possessory or  
15 ownership interest in that money. And without being able to  
16 prove that, the South Carolina Supreme Court and other courts  
17 are very clear you do not have a conversion.

18 And so there's where the (audio interference) to produce  
19 a scintilla of evidence that he had an ownership interest in  
20 it, as opposed to a contractual interest in it. Thank you.

21 MR. MUNSON: Your Honor, (audio interference) two  
22 seconds.

23 THE COURT: Two seconds.

24 MR. MUNSON: (Audio interference) the doctor who had 10  
25 percent of her money withheld is a contractual case and a

1 conversion case. It's hard to see the difference here when  
2 Mr. Bennett goes to Mr. Cedrone, says, I'm going to keep 62  
3 and a half cents of your commission on each of these. And I  
4 think that makes it (audio interference) unpredictable in this  
5 case.

6 THE COURT: Okay. Any -- you want -- you have anything  
7 response to that? Because you're the moving party.

8 MR. KAESKE: No.

9 THE COURT: Okay. Give me just a second. All right.  
10 Then as I dig through my stack, why don't we move to the  
11 defendant's motion for summary judgment as plaintiff's third  
12 and fourths calls of action. Give me one second. You can  
13 argue them together. The fourth and fifth together?

14 MR. MUNSON: I can't -- third and fourth, Your Honor.

15 THE COURT: Third and fourth?

16 MR. KAESKE: I think that there is a meaningful  
17 distinction between the two of them, and maybe I'll talk about  
18 that when we do it. But --

19 THE COURT: If you would point out that meaningful  
20 distinction. I noticed that they were written differently,  
21 but I was struggling to figure out where the difference was  
22 other than possible -- the belief of punitive damages.

23 MR. KAESKE: The possible relief?

24 THE COURT: Right.

25 MR. KAESKE: Well, let me jump ahead for a second. I

1 think that the difference is the timing. So remember that  
2 this statute, the purpose of the statute is to protect  
3 commissioned employees during the notice period after their  
4 termination. That's what the purpose of the statute is. So  
5 if I sell something for Your Honor on a commission, I sell  
6 1,000 of them while -- after you've terminated me. But the  
7 money isn't going to come in until after the termination is  
8 effective. This statute is meant to make sure that I get paid  
9 even post termination. That's what the statute is supposed to  
10 do. It is -- and that's actually the title. The title of it  
11 is actually payment of post termination claims to sales  
12 representatives.

13 And so part of the reason that it's significant is  
14 because to the extent that there was a termination of the  
15 sales representative arrangement after August 31st of 2018,  
16 the act can't apply at all because their post-termination  
17 commissions that were not approved prior to the termination  
18 during the notice period. But let's get into it and talk  
19 about it, and we'll come back.

20 So if we look at the Chapter 65 payment of post  
21 termination plans to a sales representative, the definitions  
22 are where we have to start because this is another situation  
23 of in order to try to get punitive damages, we're trying to  
24 fit a square peg into a round hole. And the round hole  
25 requires a contract with a principal to solicit wholesale

1 orders.

2 That's what the contract has to be for. You have to be  
3 an employee or an independent contractor who's getting paid  
4 for soliciting wholesale orders. The word soliciting (audio  
5 interference) because the word "soliciting" doesn't exist  
6 anywhere in the summons and complaint. There's no allegation  
7 that Mr. Cedrone or Poly-Tech ever solicited any sales or had  
8 any obligation (audio interference) that they had the  
9 obligation to solicit sales. Remember, it says a sales  
10 representative means a person who contracts with a principal  
11 to solicit wholesale orders.

12 Okay. What was the contract between CRI and Poly-Tech?  
13 It was not a contract that required Mr. Cedrone or Poly-Tech  
14 to solicit orders. The commissions were paid on tourniquet  
15 sales, but not for soliciting orders. They were being paid  
16 for convincing Phil Durango to use CRI to assemble and mass  
17 produce the tourniquet. And that phrase you'll recall that I  
18 keep repeating is judicial admission in their pleadings that  
19 they've made repeatedly. That's why Poly-Tech was being paid,  
20 for convincing Phil Durango to do a CRI. They were not  
21 getting (audio interference) pursuant to the orders.

22 And this is something that has been made extremely clear  
23 in Mr. Cedrone's own testimony. I'm sorry, Your Honor. One  
24 second.

25 THE COURT: Uh-huh.

1 MR. KAESKE: So I took Mr. Cedrone's deposition on  
2 November 4th of last year. I asked him, you didn't have to do  
3 anything to earn commissions on the sale of the  
4 (indiscernible)? He said what was my machine. He didn't have  
5 to do anything. He didn't have to solicit any sales. When he  
6 was first taken, his deposition was first taken, his 30(b)(6)  
7 representative Poly-Tech who was asked, when is the last time  
8 you sent a new order of C-A-T tourniquets to composite that  
9 was in excess of 500 tourniquets? And his answer was, well,  
10 it wasn't my responsibility to send orders to NAR or to C-A-T.

11 And the question was then, what was your responsibility  
12 under the sales? (Audio interference) was to bring business  
13 to Composite Resources. That's what he did. He brought Phil  
14 Durango. And how did you go about doing that with regard to  
15 the C-A-T specifically? Not only did I bring Mark Esposito  
16 (phonetic) to meet Jonathan in the beginning, throughout the  
17 years I attended trade shows, visited other countries'  
18 demonstrations, offered to distribute to the civilian world.  
19 I asked Jonathan directly, and he said, no, I don't want you  
20 to do that. I want you to stay in Huntersville and just  
21 collect a check. He was not under contract to solicit orders,  
22 and in fact, he never did solicit orders.

23 Recall from what I just said a few minutes ago that the  
24 orders came from distributors. The orders came from  
25 distributors. Most significantly, North American Rescue.

1 They can't point to a single order of tourniquets from North  
2 American Rescue that Mr. Cedrone or Poly-Tech had anything to  
3 do with. As a matter of fact, as I've already read to you  
4 from the North American Rescue 30(b)(6) depositions, they  
5 didn't even know who the guy was.

6 As a matter of fact, in 2015 there was a big dust up  
7 because Mr. Cedrone wanted to march on down to North American  
8 Rescue and tell North American Rescue not to continue to try  
9 to lower the price of the tourniquet. And Mr. Bennett said I  
10 don't recommend you do that. They don't know who you are. If  
11 you go down there and they find out about your commission  
12 obligation or your commission relationship, that's the first  
13 place they're going to try to get money out of us.

14 And so Mr. Cedrone had nothing to do with soliciting  
15 orders. As a matter of fact, I asked him in any event it was  
16 not your obligation to sell the tourniquet, correct? And he  
17 said correct. Now, Mr. Munson would like Your Honor to decide  
18 that Mr. Cedrone's general promotion of the tourniquet --  
19 going to a trade show, saying, hey, look at this great  
20 tourniquet. He sent three tourniquets for free to the police  
21 officers in Parris so they might get interested in the  
22 tourniquet. (Indiscernible) equals soliciting orders. That's  
23 not what's meant.

24 This sales -- this act is meant -- commissions that are  
25 earned through solicited sales. And in order to get any

1 damages, they have to be able to prove that any of the  
2 commissions that they are seeking are as a direct result of  
3 the solicitation of orders that they solicited, and they  
4 haven't done that.

5 The cases that I think is -- look at together for a  
6 minute. Mr. Munson has gone to Michigan to find a case that  
7 he thinks helps on this issue of soliciting of orders. And  
8 I'd like to read to you, if you have his motion or his  
9 response -- 6 of his response.

10 THE COURT: (Indiscernible).

11 MR. KAESKE: Yes, sir.

12 THE COURT: I have received -- I appreciate  
13 (indiscernible).

14 MR. KAESKE: Sorry.

15 THE COURT: So I do not have (indiscernible).

16 MR. KAESKE: I'm sorry. Let me go back and do that.

17 THE COURT: (Indiscernible).

18 MR. KAESKE: Well --

19 THE COURT: (Indiscernible).

20 MR. KAESKE: It is page 6 of his response. And while  
21 you're getting that out, Your Honor, if you don't mind, I will  
22 tell you where those quotes came from. Or should I wait?

23 THE COURT: (Indiscernible).

24 (Pause.)

25 MR. KAESKE: Yes, sir. Okay. So if we look at page 6,

1 do you see, Your Honor, under big B, about halfway through  
2 that paragraph to the right of the page it starts with saying  
3 "this man"? Okay. So now before I read you what's written  
4 there, I'll tell you here's the set up for the Michigan case.  
5 The Michigan case is a situation where a sales representative  
6 who is being paid a commission had procured a customer and  
7 wasn't being paid all the commissions for parts that were sold  
8 to that customer.

9       There's was a contract, and there was an additional oral  
10 agreement. And then there was another thing and two million  
11 dollars. And I don't think Your Honor needs to worry about  
12 all that, but what was important in the case was that the  
13 customer had been procured by the sales rep. Okay?

14       Now, remember, our customer is North American Rescue.  
15 The way that this whole situation was set up was that when  
16 Mark Esposito, Phil Durango showed up with the tourniquet, he  
17 also showed up with a distributor, North American Rescue.  
18 2004 until 2007, during that time period (audio interference)  
19 customer of CRI was actually Phil Durango. The sales Phil  
20 Durango paid (audio interference) Phil Durango sold to North  
21 American Rescue. And so the customer of North American Rescue  
22 was procured by Phil Durano, not by Dan Cedrone.

23       And then in 2007 what happened was Phil Durango said I  
24 don't want to be involved in the distribution part of it. And  
25 Mr. Bennett said I'll be happy to handle the distribution for

1 you. And so at that point Mr. Bennett dealt directly with  
2 North American Rescue. Mr. Cedrone never dealt with North  
3 American Rescue.

4 Now, in his complaint in paragraph 44 he says he was the  
5 sales representative for the North American Rescue account.  
6 But as I've read you from the testimony of North American  
7 Rescue, they didn't know who he was. He was not the sales  
8 representative for the North American Rescue account, and he  
9 didn't bring the North American Rescue account to CRI.

10 So now let's turn to what Mr. Munson said. What Mr.  
11 Munson said on page 6 is -- he says this meant that even after  
12 defendant terminated its relationship with plaintiff,  
13 defendant would be obligated to pay commissions to plaintiff  
14 on the sales of parts that plaintiff had originally procured.  
15 Period. Full stop.

16 And so I think this is important. It's a bit insidious.  
17 That's not what the court said. What the court said was even  
18 after IRI terminated its relationship with MSI, it would be  
19 obligated to pay commissions to MSI on the sales of parts to  
20 customers whose business as to those parts MSI had originally  
21 procured. He left that part out of a complete sentence  
22 because Poly-Tech and Dan Cedrone didn't originally procure  
23 NAR. That's not their customer. That was never their  
24 customer.

25 And that's an example -- I mean, I think it's an

1 inappropriate use of case law to support a position, but it's  
2 also an example of this idea that we're trying to stuff a  
3 square peg into a round hole. He has to -- Poly-Tech has to  
4 have been making sales to NAR, soliciting sales to NAR. They  
5 have to have been contracted for that purpose -- which they  
6 were not -- and they have to have been making sales -- which  
7 they were not -- and they have to be able to point to sales  
8 that they solicited in order to get those commissions if  
9 that's the purpose of the statutes.

10 So if you don't mind, I'll just quickly go back for Your  
11 Honor. I read to Your Honor quote where Mr. -- where I asked  
12 Mr. Cedrone, well, in any event, it wasn't your obligation to  
13 sell the tourniquet? And he said yes. That was Exhibit 5.

14 THE COURT: (Indiscernible).

15 MR. KAESKE: To our supplement. It's in my supplement,  
16 yes, sir. And for your reference, it was page -- sorry. And  
17 then (audio interference) and that was so you can see -- what  
18 page of the deposition was that? They're not obligated to do  
19 anything to get the amount of money that you get for the sales  
20 of C-A-T tourniquets, correct? Correct? That was page 169 of  
21 his deposition, and that was Exhibit 6. Yes, sir, in Exhibit  
22 6 --

23 UNIDENTIFIED SPEAKER: To our --

24 MR. KAESKE: -- to our supplement. Then I also read to  
25 you, when is the last time you sent a new order of C-A-T

1    tourniquets deposit that was in excess of (audio  
2    interference)? Mr. Cedrone's answer, well, it wasn't my  
3    responsibility to send orders to NAR or C-A-T. And that is  
4    page 120 of his 30(b)(6) deposition that was filed as Exhibit  
5    C PDF page 49 of the plaintiff's response. So that's their  
6    evidence to the motion for summary judgment.

7           THE COURT: I (indiscernible).

8           MR. KAESKE: Yes, sir. If you don't mind me continuing.  
9    So the issue is, what is the evidence? Because there isn't  
10   any because it wasn't his obligation. What is the evidence  
11   that he was a sales representative who contracted with a  
12   principal to solicit wholesale orders?

13           Well, we cited in our motion to their answer to  
14   interrogatory number 9. And the question was, describe in  
15   detail all actions taken by Poly-Tech since November 6th of  
16   2014 in its role as the sales representative responsible for  
17   the NAR account, NAR account, as alleged in paragraph 44 of  
18   complaint. We ask this question -- yes, sir.

19           THE COURT: (Indiscernible).

20           MR. KAESKE: We ask this question, of course, because in  
21   paragraph 44 of their complaint, they said that they were the  
22   sales representative responsible for the NAR account. NAR  
23   doesn't even know who they are, and we've already established  
24   that they didn't solicit any orders from them and didn't  
25   (audio interference) CRI.

1           And so we -- on page 10 of our motion, we put the entire  
2 answer. Says, plaintiffs were at all times ready, willing,  
3 and able, and did engage with NAR in a deep and ongoing basis,  
4 including but not limited to -- listen to these things:  
5 quality control, product development and improvement,  
6 marketing, customer services, and military coordination. No  
7 soliciting of sales.

8           After Composite Resources expressly directed plaintiffs  
9 to disengage with NAR and discontinued providing information  
10 to plaintiffs regarding NAR efforts, plaintiffs continued to  
11 stay abreast of the business relationship, the product market,  
12 and continued to interact with third parties on the above  
13 issues in ways beneficial to NAR and Composite Resources and  
14 continued to be ready, willing, and able to provide support to  
15 NAR at its request or the request of composite resources.  
16 Nothing about soliciting sales. That was not what the  
17 contract required of him or of Poly-Tech. And that's been  
18 said and admitted to repeatedly.

19           Now, Mr. Munson in his response said Composite's  
20 suggestion that plaintiffs admitted they have not solicited  
21 any sales since 2014 in their interrogatory number 9 is easily  
22 belied by the simple reading the actual extensive answer  
23 composite attached to the motion as Exhibit K. Well, that is  
24 the complete reading. He accused us of not giving the  
25 complete answer, and that's the complete answer. And it says

1 nothing about soliciting.

2           So when we're looking at the record, his obligation to  
3 come forward with some evidence, there is no evidence that he  
4 has. As a matter of fact, Mr. Munson's response to our motion  
5 helpfully labels his exhibits. And one of the exhibits is  
6 Exhibit C. Plaintiffs -- pages from Plaintiff's depositions  
7 regarding soliciting orders. And there's about six different  
8 pages. And if you read these questions and answers, there is  
9 not a single question or answer where Mr. Cedrone says that he  
10 was responsible for soliciting any orders.

11           For example, he was asked this question, and then you  
12 would get paid -- may recall this from last hearing. I asked,  
13 if Composite Resources and that company were able to come to  
14 an arrangement whereby the product would get made, then that  
15 company would be an account of Composite Resources? He said  
16 yes. And then Composite Resources would manufacture products  
17 on behalf of the company, correct?

18           And then you would get paid a commission for not actually  
19 selling the product, but for Composite Resources manufacturing  
20 the product on behalf of the customer account, correct? And  
21 he said I not only sold their manufacturing and design  
22 capability, but I also participated in the sale of their  
23 products at times, but not the C-A-T -- other products. And  
24 they can't point to any instance of any orders to NAR or any  
25 of the other distributors for the C-A-T that Mr. Cedrone

1 solicited.

2           As a matter of fact -- sorry, Your Honor. What was your  
3 responsibility under the sales agreement? To bring business  
4 to Composite Resources, not to sell products. And how did you  
5 go about doing that with regard to the C-A-T specifically?  
6 This is page 120 of the 30(b)(6) deposition. Again, it's  
7 Exhibit C, Mr. Munson's evidence. Not only did I bring Mark  
8 Esposito to meet Jonathan in the beginning. Throughout the  
9 years, I attended trade shows, visited other countries'  
10 demonstration, offered to distribute to the civilian world. I  
11 asked Jonathan directly, and he said I don't want you to do  
12 that. I want you to stay in Huntersville and just collect a  
13 check.

14           So to conclude that argument, the argument being that in  
15 order to -- for this statute to apply, there needs to be a  
16 contract for the solicitation of wholesale orders. This  
17 contract was not for the solicitation of wholesale orders.  
18 This contract was for convincing Phil Durango to use CRI to  
19 assemble and mass produce the tourniquet. That's what he was  
20 being paid for, not for soliciting orders. So the act doesn't  
21 apply.

22           Now, there's another primary argument for why the act  
23 doesn't apply, and that relates to the issue of termination.  
24 And this is what we talked about a little bit at the  
25 beginning. When we read now out of the definitions and into

1 the actual language of the act itself, Section 39-65-20,  
2 principal to pay commissions, the first language says this:  
3 When a contract between a sales representative and a principal  
4 is terminated for any reason, okay, the principal shall pay  
5 the sales representative all commissions that have or will  
6 accrue under the contract to the sales representative  
7 according to the terms of the contract.

8 But it starts by saying when a contract between a sales  
9 representative and a principal is terminated for any reason.  
10 The position of the plaintiff is that this is an interminable  
11 contact. That's what they've said, that this commission  
12 obligation may not be terminated except if CRI ceases  
13 manufacturing the tourniquet. And I think that's what Your  
14 Honor ordered, that the termination letter that was sent did  
15 not terminate the commission obligation for the tourniquets.

16 And so the sales representative relationship may have  
17 been terminated, but the commission obligation was not  
18 terminated by the termination letter. Well, then the act  
19 doesn't apply, because in order for the act to apply, it has  
20 to be when a contract between a sales representative and a  
21 principal is terminated for any reason. And they've already  
22 said it hasn't been terminated.

23 Now this gets us to the issue of what's the difference  
24 between the third and fourth claim. So the third claims are  
25 the claims for the haircut; he calls it haircut. Now, set

1 aside the fact, Your Honor, that Poly-Tech agreed to the  
2 reduction. The 62 and a half cents, Poly-Tech agreed to that.  
3 There's a letter. Says I'll accept this as a temporary  
4 accommodations -- as a temporary accommodation to current  
5 market (audio interference).

6 Then for 17 months without further objection, he accepted  
7 the commissions at the lowered rate. That's undisputed. That  
8 happened. And so but set that aside. His contract to the  
9 extent anybody even tried to terminate it, the termination  
10 didn't happen until June of 2018. Under 3 -- under claim 3  
11 they're asking for money from 2000 -- from March of 2017 until  
12 April -- sorry, let me start over. Under claim 3, they're  
13 asking for two million dollars which represents the haircut as  
14 they call it from March 7th of 2017 until August 31st of 2018.

15 Well, there was no attempt at a termination until June of  
16 2018. So that entire time period from March of 2017 until  
17 June of 2018 there was no terminated contract. Not to mention  
18 the fact that we just discussed, which is that it's already  
19 been decided that termination didn't terminate this commission  
20 obligation.

21 And so under this statute which is meant to protect  
22 people after their contract has been terminated, or the things  
23 that happened during the notice period but don't come due  
24 until after termination's affected, this is a square peg.

25 And fourth claim. Now, there's a box. The box is this.

1 Either the contract was terminated -- in which case none of  
2 the sales after August 31st of 2018 could've possible been  
3 solicited by Mr. Cedrone or Poly-Tech. They weren't. He had  
4 nothing to do with CRI after August 31st of 2018. Or the  
5 obligation isn't terminated, in which case the act doesn't  
6 apply.

7 And so there's no possibility that any future  
8 commissions, future commissions from today they're asking to  
9 apply under this act for sales that haven't even happened yet  
10 they're saying should apply to -- under this act. So either  
11 the commission obligation still exists, in which case the  
12 contract wasn't terminated and this act doesn't apply, or the  
13 contract was terminated and he wasn't responsible for any of  
14 those sales because those sales happened after August 31st of  
15 2018, when it's undisputed that the notice period was over.

16 And so it's just further example of how the act does not  
17 reply. His remedy is breach of contract. He's got that  
18 point. The only reason that this claim is being made is  
19 because it says punitive damages. And it -- and it's the  
20 wrong claim for this case. Thank you, Your Honor.

21 MR. MUNSON: I have to qualify if a sales rep under the  
22 statute, I can pay my commissions past due and what will  
23 accrue in the future under the contract, according to the  
24 terms of the contract. That's the basic misunderstanding by  
25 defense counsel. Qualifying under the statute, pay under the

1 contract. We see the statute in (audio interference), it's  
2 clear my client is planning to pursue for the commission --  
3 unpaid commission by (audio interference). That I could not  
4 get summary judgement on this claim, does not mean they get  
5 summary judgement. There is plenty of factual dispute in past  
6 the entitlement to bring and maintain and prove these claims.  
7 The plaintiff's counsel talked about the purpose of this  
8 statute and we (audio interference) is --

9 (Audio blank from 1:34:00 to 1:46:28)

10 MR. KAESKE: (Audio begins mid-sentence) -- even get paid  
11 under the contract. But in order to qualify under the  
12 statute, you have to have a contract to solicit orders. And  
13 there's no contract for him to solicit orders for the C-A-T.  
14 As a matter of fact, debate that the contract is called the  
15 sale representative. We talked about this at the last hearing  
16 and we talked about it again today. And I read Mr. Cedrone's  
17 testimony. He sold the manufacturing capabilities of CRI,  
18 that's what he sold. Then he got paid a commission on the  
19 products that CRI sold on those various customer accounts.  
20 The customer account was Phil Durango. The customer account  
21 was not in error.

22 It was never his obligation nor did he ever solicit any  
23 orders from NAR. It will be -- I think frankly it's crazy to  
24 think that you've got a sales representative act that supposed  
25 to give you permissions for sales that you didn't solicit for

1 customers that you didn't solicit. That's not the purpose of  
2 this act, just like it wasn't the purpose of the Michigan Act,  
3 where's he stopped the patient at the part that says for  
4 customers that they procured. He didn't procure NAR as a  
5 customer and he didn't solicit order from the CAD. This idea  
6 that if I allege -- no we are no more specific, in this record  
7 that's in front of you. You have not one example of any  
8 solicitation, for any order of any product of CRI.

9 He says I also sold products -- this is the part that Mr.  
10 Munson just read to you. "I not only sold their manufacturing  
11 and design capability, but I also participated in the sales of  
12 their product", period. That's what he said. The answer goes  
13 on and says, at times -- we don't have any of the times.  
14 There's no proof of when those times were. There's no proof  
15 that those times were any time of the commissions that he's  
16 trying to get. So he would have -- it has to be the sale of  
17 the solicitation of the sales for which he's seeking  
18 compensation. It doesn't make any sense for you to say, well  
19 I was contracted to solicit commission sales of bananas and so  
20 I should also get commission sales for whatever other thing it  
21 is that I sell, C-A-T tourniquets. That's not the purpose of  
22 the statute.

23 The statute itself says that you have to have a  
24 principle, which is a person who contracts with a sales  
25 representative to solicit orders for the product, not for any

1 product, for the product that you're looking to get your  
2 commission for. That's what it says right here in B, 3B, of  
3 principle means an individual, corporation blah blah blah and  
4 a principle means a person who contracts with a sales  
5 representative to solicit orders for the product. And then a  
6 sales representative is someone who contracts with a principle  
7 to solicit wholesale orders. And then it says when a contract  
8 between a sales representative and a principle is terminated  
9 for any reason, the principle should pay the sales  
10 representative all commissions that have or will accrue under  
11 the contract for that product -- for the wholesale orders you  
12 solicited. That's obviously what this statute is meant to  
13 apply to.

14 When we filed our original motion, we filed this  
15 evidence, it's page 43 -- PDF page 43 of our filing.

16 MR. MUNSON: PDF?

17 MR. KAESKE: Sorry, it's -- now I don't -- it's page 206  
18 of his actual testimony. His 30-B6 deposition.

19 And so if we look at line 9, it says, "so if CRI did not  
20 request you to assist customer territory or to attempt to  
21 resolve financial issues and provide technical assistance or  
22 did not ask you to help maintain the relationship with the  
23 client, you didn't have to do anything to earn commissions on  
24 the sale of the C-A-T". And he said, that was my  
25 understanding.

1           So I've shown you with Exhibit 5, Exhibit 6, the other  
2 pieces of his testimony. Cedrone has repeatedly admitted that  
3 he didn't have to do anything. He had no obligations, he  
4 didn't have to sell anything in order to get the commission  
5 and so he doesn't qualify under the act as a person who's been  
6 contracted to solicit orders. Obviously meeting a random  
7 person at a trade show and saying, oh you like this product,  
8 you can go order it from the C-A-T. That's not soliciting the  
9 order. He can't show any order that that has resulted in. he  
10 has no idea -- I mean I'm sorry that I can't cite you the page  
11 and verse. I know that in our evidence or supplemental  
12 evidence, he was actually asked the question, can you point to  
13 a single order of any -- that was placed by anybody that you  
14 brought. And he said, I don't know what would happen because  
15 I just tell them to go to NAR. And I don't know if it ever  
16 resulted in a sale or not. That's not the solicitation of  
17 orders that's -- for commission. That's just promotion, it's  
18 just saying good things about the --

19           So he doesn't qualify, he doesn't qualify under the act  
20 and I think we've got to go back to this part, which is the  
21 commission obligation isn't terminated then the act doesn't  
22 apply. Thank you, Your Honor.

23           MR. MUNSON: Your Honor, I just want to point out one  
24 thing. I'll refer you to page 9 of the contract. It says,  
25 products covered by this agreement are all (audio

1 interference) --

2 MR. KAESKE: But okay, so what that doesn't show that he  
3 solicited orders for any C-A-T. It says right there in the  
4 act, you have to be a sales representative to solicit orders  
5 for the product. And there's nothing in that contract that  
6 says that he's (audio interference) in order to get the  
7 commissions for the -- he'd already done what he did. That  
8 is, he brought Phil Durango to CRI. And he didn't ever  
9 solicit any orders from NAR or any of the other distributors.  
10 Thank you.

11 THE COURT: All right. Let's take a brief break.

12 MR. KAESKE: Thank you, sir.

13 (Recess.)

14 THE COURT: All right. It's not going as fast as what I  
15 had anticipated. I have some questions that I want to ask you  
16 all about -- to the conversion thing again. We also have on  
17 our agenda today to try to do the errata sheet and the motion  
18 to compel. You did not file a response to the motion to  
19 compel, because I read those as being joined together. So  
20 that's why I was going to, like, just take those and let you  
21 argue them together.

22 But that being said, it's 12 o'clock. I'd like to get my  
23 questions on the conversion -- to go ahead and at least get  
24 that done. And then let's see where we stand or how you all's  
25 schedules are to see if we can do the errata sheets and

1 discovery issues after lunch or whether you all need to take a  
2 break. I also have to check with the staff, because they did  
3 not plan for this afternoon either. So keep that in your  
4 mind. I'm not trying to just say, you all got to come back.  
5 But talk among yourselves and get your schedules right. But I  
6 would like to go back and revisit the conversion issue at  
7 least. Is that okay?

8 MR. KAESKE: Of course, Your Honor.

9 THE COURT: Okay. On the conversion issue -- and I  
10 apologize if we're going back to square one on it. Educate  
11 me -- the Mullis issue -- that's the case that he brings up,  
12 okay? Are you familiar with that one?

13 MR. KAESKE: Yes. Yes, Your Honor.

14 THE COURT: Okay. Tell me why you believe that Mullis is  
15 not appropriate or is not applicable to this case. You argue  
16 that it's a square peg and round -- and it's not right. Tell  
17 me why you think Mullis is not right again.

18 MR. KAESKE: Because, Your Honor, with Mullis, there was  
19 no breach -- with Mullis, there wasn't a breach of contract.  
20 There wasn't an issue that there was a breach of contract.

21 THE COURT: My understanding of those facts -- and you  
22 might be right. I'm just saying where I read it. This  
23 associate doctor got stabbed in the -- well, for whatever  
24 reason, this associate doctor was decided that -- the firm  
25 decided not to hire him and then they had already taken ten

1 percent of what should have been hers to go to a -- my word's  
2 a partnership buy in.

3 MR. KAESKE: Yes, sir.

4 THE COURT: In advance of her becoming a partner. Then  
5 they decided to not be a partner, so they don't give her the  
6 money back. She wanted the 20,000 dollars. Now, how is  
7 that -- I know from the facts that we don't have a medical  
8 practice and stuff, but how is that -- but the courts seem to  
9 say when they did its analysis that he talked about money  
10 being -- can be an appropriate basis for -- he said, "Money,  
11 however, may be the subject of conversion if it is capable of  
12 being identified and there may be conversion of determinate  
13 sums even though the specific coin and bills are not  
14 identified." That's the in that last paragraphs -- or last  
15 page of that opinion. So what I'm reading in Mullis is that  
16 the associate doctor -- excuse me -- had a claim to that money  
17 that had been withheld by the partnership, and the partnership  
18 didn't want to give it to him. I know they had the excuse --  
19 the doctor also hadn't had a case -- well, you did it for  
20 somebody else and they said, well that's a special reason we  
21 did that. So I'm not really concerned about that special  
22 reason.

23 But tell me why you think Mullis does not apply.

24 MR. KAESKE: I don't think it doesn't apply. I think  
25 it's not on the issue that's really the dispositive issue on

1 the issue. That is the issue of whether Poly-Tech had an  
2 ownership interest, a possessory interest, in the money that  
3 was CRI's money that it received from NAR. Mr. Munson cites  
4 this case on the proposition that it's an identifiable sum.  
5 He set aside the issue of whether it's an identifiable sum.  
6 In the Mullis case, there is no question it was her money.  
7 She had earned those wages. I mean, this is a super short  
8 opinion. I think it's, like, a page and a half. There's no  
9 discussion at all about a breach of contract because you  
10 didn't pay me the amount of money I was owed. She was paid  
11 the amount of money that she was owed. They just took ten  
12 percent of it to go to this (indiscernible) that was supposed  
13 to be her buy in. In other words, there's no -- it's like I  
14 said in the very beginning, it's not a breach of contract.  
15 She's not saying that they're not saying, you didn't pay me  
16 what I was owed. You paid me what I was owed. It was all  
17 earmarked as my money. It went into your fund and then the  
18 court said, yeah, we need the -- it's okay (indiscernible)  
19 with other people's money. We couldn't identify how much  
20 money it was. And so that still gets to be yours, but it was  
21 always hers. Who was the opposing party? Trident Emergency.  
22 Trident Emergency didn't say, you're not entitled to that ten  
23 percent because you didn't earn it. They're not saying,  
24 you're not entitled to that ten percent because you breached  
25 your contract by competing with us or any of the different

1 arguments that are here. Or it wasn't your money. They don't  
2 say, you didn't earn it; it wasn't your money. And that's the  
3 issue here.

4 Here, we've got an issue where you can't have conversion  
5 unless it's yours. And there's a dispute as to whether it's  
6 his, Poly-Tech's, or not. And that's why it's a breach of  
7 contract and not a conversion case. Let's just say for  
8 example, NAR had said, CRI, on every tourniquet that you sold  
9 to us, we're going to give you 12 dollars to you for the  
10 tourniquet and then we're going to give you \$3.50. That's the  
11 money that's supposed to go to Dan Cedrone or Poly-Tech for  
12 their connection and their materials. That would be some  
13 evidence. There is no such evidence. That would be some  
14 evidence that he had that that might have earmarked for Poly-  
15 Tech or that that money belonged to Poly-Tech or that that  
16 money must be meant to go to Poly-Tech. But there's nothing  
17 like that. CRI established a price for the tourniquet. They  
18 charged that price for the tourniquet to NAR. Nar didn't even  
19 know that Cedrone existed. By the way, the deposition that we  
20 referred to, it wasn't (audio interference) witness of NAR.  
21 And there were two of them. And they were both (audio  
22 interference) close.

23 In any event, the 20,000 dollars in Mullis was earmarked  
24 for her buy in; that the outset of that relationship. We  
25 don't have an analogous situation here. NAR did not earmark

1 any of the money that it was giving to CRI, and CRI didn't  
2 earmark any of that money to go to Cedrone or Poly-Tech. CRI  
3 charged a price for a tourniquet and NAR paid the price for  
4 the product. All that money was CRI's money. It went into  
5 CRI's account and then CRI had a contractual obligation to  
6 give some of that money to Cedrone. And now, we're debating  
7 whether the haircut, as they call it, was part of the money  
8 that was supposed to go -- that CRI had agreed to give to  
9 Cedrone or not. And there's a debate. CRI says Cedrone  
10 agreed to take a reduction and then he lived by that agreement  
11 until he changed his mind. They say he didn't, that it wasn't  
12 (indiscernible) his money, it was CRI's money. And that's a  
13 difference (indiscernible).

14 THE COURT: Okay.

15 MR. KAESKE: Thank you.

16 THE COURT: Same question. Now tell me why this Mullis  
17 case is so important to you.

18 MR. MUNSON: Thank you, Your Honor.

19 THE COURT: Yes.

20 MR. MUNSON: First, Trident didn't say it wasn't her  
21 money. They said, we're deducting 150,000 dollars of your  
22 (audio interference) percent of (audio interference). They  
23 were collecting money that, essentially, she could take 90  
24 percent of that first year (indiscernible) the partnership.  
25 And then it would mean quitting the partnership, and she would

1 get that (audio interference) without leaving the partnership  
2 as a salary thereafter. (audio interference) it was her  
3 money. So the context between (audio interference) exist in  
4 the (audio interference) today. Trident was her employer, so  
5 (audio interference) Trident in our example is -- it's a  
6 strong (audio interference). And CRI that has Trident (audio  
7 interference). Trident earmarked the money, and they have  
8 identifiable (audio interference). Even CRI (audio  
9 interference). They got (audio interference) that are half of  
10 this thing that I had testified to with my responses.

11 So that's where this case fell upon three or four lines  
12 (audio interference) tourniquet. But now the -- yeah. (Audio  
13 interference) that 50 percent of them (audio interference)  
14 tourniquet, there is (audio interference) to pay Poly-Tech  
15 their commission, put it in a separate account. That would be  
16 right down the middle of (audio interference) conversion. But  
17 then (audio interference) this case is (audio interference).  
18 So I'm sorry. I just got (audio interference).

19 THE COURT: Congratulations.

20 MR. MUNSON: So I think (audio interference).

21 MR. KAESKE: May I?

22 THE COURT: Yes, sir.

23 MR. KAESKE: So I'm reading this very short opinion.

24 There is nothing in here where it says they contended it

25 wasn't her money or that they didn't owe it to her. That's

1 not what their position was at all. As a matter of fact, the  
2 only statement in this entire opinion about what Trident's  
3 position was on the money is Trident acknowledged the money as  
4 a buy in. It was her money. She used it as a buy in. But  
5 refused to refund the money reliant on the partnership  
6 agreement and claiming there was no stipulations for refunding  
7 the buy in. So they didn't say it wasn't her money. They  
8 didn't say they didn't owe it to her when they gave it to her  
9 and then took it as a (indiscernible) issue and comingled it  
10 with the rest of the money. They didn't say you can return it  
11 or we don't have to -- or we never had to give it you from the  
12 beginning, which is what we're saying. You're not  
13 (indiscernible) agreed to not take that part of the  
14 commission. Or for future commissions, by the way. They're  
15 trying to say that we've got conversion on sales that haven't  
16 even happened yet. That somehow that's his money. There's no  
17 claim for that.

18 This says that the reason that they refused to return the  
19 money was because they had a partnership agreement that didn't  
20 say, in the event we decide not to make you partner, you get  
21 that 20,000 dollars that was yours back. And as a matter of  
22 fact, if you go to headnotes 2, 3, 4, and 5, it says right in  
23 here. He (audio interference) Mullis (audio interference)  
24 specifically identified (audio interference). That's the  
25 issue in this case is who owns it. Then it cites exactly what

1 I'm saying. Conversion is defined as the unauthorized  
2 assumption and exercise of her rights of ownership over goods  
3 or personal chattels belonging to another, to the alteration  
4 of the condition, or the exclusion of the rights of the owner.  
5 That's what I'm saying we don't have here. Then it goes on to  
6 say there can be no conversion of money unless there's an  
7 obligation on the defendant to deliver the specific  
8 identifiable fund. And then their holding is, it was a  
9 specific identifiable fund. They don't comment about -- there  
10 was never a problem with the ownership. They got past the  
11 first fund. It was hers. And they got to start a second  
12 fund. It's not identifiable. And they said, just because  
13 it's comingled with other money, it can still be identifiable.  
14 And so back to my example. If it had been indisputably  
15 Cedrone's money from the beginning or Poly-Tech's money from  
16 the beginning or it had gotten comingled in the CRI funds,  
17 according to this case, that wouldn't be enough. We can  
18 identify what the number is. And even though you put it in  
19 your funds, that's not going to save you, CRI. But it  
20 wouldn't secure his money. It was Poly-Tech's money. It was  
21 CRI's money (audio interference). And now they have a  
22 contractual dispute as to whether or not some of that money  
23 was owed to Poly-Tech.

24 THE COURT: Okay. Thank you all for the clarity. All  
25 right. Thank you all for showing up. I was hoping I wouldn't

1 even see you all today, but you all walked in. So I said,  
2 well, they didn't get the case resolved yesterday. So my game  
3 plan is that I am now preparing for a trial. And the trial is  
4 going to be in a relatively short order. I've waited to get a  
5 specific date to see how yesterday went and then maybe get a  
6 better feel as to how much more work you all need to do before  
7 I nail you all to a date.

8       So my intent -- what I've done is I've worked on your  
9 case. I've did motions back, what, January. I'm ready to  
10 make announcements on those. I've studied these issues.  
11 Thank you for the arguments. I'm ready to rule on these  
12 today. I can do it right now and then let you all -- then we  
13 come back after lunch or let you all pick another date. But  
14 we've got to get this case ready for a trial. What do you all  
15 prefer?

16       MR. KAESKE: We're prepared to receive your rulings, Your  
17 Honor. I think we should move forward if Your Honor's  
18 willing.

19       THE COURT: Okay.

20       MR. MUNSON: I think we should finish the agenda for --  
21 maybe we can do (indiscernible).

22       THE COURT: Well, I go to take a break for lunch, because  
23 I got staff in here.

24       MR. MUNSON: Yeah. Yeah.

25       THE COURT: So --

1 MR. MUNSON: I mean, I would submit to strike on the  
2 paper.

3 THE COURT: Oh, I've got too many questions on that one.

4 MR. MUNSON: I mean, it's novel and interesting.

5 THE COURT: It is novel and interesting. It's a very  
6 academic -- pursued and exploration of all the rules and  
7 things. And yeah, anyway.

8 Okay. Let me do this. Let me tell you where I am with  
9 these rulings. Now with these rulings, I'm expecting -- given  
10 the elephant -- one of the elephants in the room with this  
11 case is the monetary amounts that are in dispute. So I  
12 understand that when monetary amounts are -- that as I  
13 understand the money amounts -- the likelihood that whatever  
14 decisions I make may get revisited by another court or judges  
15 later. So I would expect some type of written order on these,  
16 similar to what Mr. Munson has done with the motion for  
17 partial summary judgment that we did before. Okay.

18 I think the Defendant is correct on the motion on the  
19 issue of conversion. So I'm going to grant to motion for  
20 summary judgment as to the issue of conversion. Let me tell  
21 you what I'm looking at. I read these cases. I needed the  
22 clarification on Mullis to be sure I wasn't missing something.  
23 My view is that if it's going to be a -- if a contract case is  
24 going to then morph itself into a conversion case, then the  
25 sums that are going to be claimed there needs to be -- there

1 is a requirement that there be -- I want to say there is a  
2 requirement of separation. But in this case, what defeats the  
3 conversion claim is that there is a separation of where the  
4 money is coming from. Here, we'd got North American Rescue.  
5 North American Rescue was paying the money to the Defendant.  
6 It was not paying the money to the Plaintiff. And so I think  
7 that it is a very distinguishable fact in this case that I've  
8 heard nobody dispute. So I'm going to grant the motion on the  
9 issue -- the motion of summary judgment as to the issue of  
10 conversion. I'll ask Defendant, in their spare time getting  
11 ready for trial, to do me a short summary judgment granting of  
12 that summary judgment motion.

13 Now, on the issue of the other counterclaims. For the  
14 most part, Defendant is correct. For the most part. Let me  
15 tell why the most part is added to that. Throughout this  
16 case, everybody, from both sides, has presented to me that  
17 this case involves the tourniquets. And the arguments today  
18 didn't seem to deviate from that; that the tourniquet is the  
19 product that led to the successful relationship that both of  
20 these parties shared. And the tourniquet, I've seen  
21 deposition, testimony, responses to discovery that I read as  
22 taking the tourniquet payments out -- and the Plaintiff  
23 (indiscernible) with the tourniquet payments -- out of the  
24 parameters that the statute require -- or the statute says  
25 this is what we need to protect. And that here comes -- for

1 the most (audio interference) qualified. We're not yet to the  
2 trial. I'm going to grant the motion at this time. But I  
3 think there is enough room in the record for purposes of  
4 summary judgment that Mr. Munson -- I'm not telling him what  
5 to do, but he may come back and say, well, Judge, I've got  
6 other things in the record, because I have made -- Judge, I  
7 have to be focused on the tourniquet. And so there might be  
8 other things in the record that if he comes back and files a  
9 motion of reconsideration shows me other things, then my  
10 ruling may be modified to allow those issues to go forward.  
11 But as far as the issue of the tourniquet, I think it's --  
12 based on what I've been -- you all have argued me, the sales  
13 related to the tourniquet do not apply. The statute does not  
14 apply to those things. I'm not sure I'm making much sense,  
15 but that's my ruling. If you all need clarity, we can talk  
16 about it later on those.

17       Okay. On the motion -- and now don't tell me I've left  
18 my notes in the back. Hang on one second. On the motion that  
19 I need to decide -- there was a motion filed by the Plaintiff  
20 in regards to the -- let me just verbalize my  
21 characterizations of the claims that was addressed, because in  
22 the -- you all have presented to me documents that call for  
23 the claims and the causes of accident at counterclaims and  
24 then you all clarified in an email. Well I don't  
25 (indiscernible) writings and things, and I was getting -- I

1 had lack of clarity as to what I was calling these things. So  
2 in regards to the Plaintiff's motion for summary judgment as  
3 to the Defendant's claim or counterclaim that spoke to the  
4 issue where Plaintiff was arguing that the agreement was being  
5 transformed into a noncompete agreement, I think the argument  
6 is well received from Plaintiff. There are indications in the  
7 answer as well as discovery responses that would indicate  
8 that, to some degree and maybe even a large degree if it gets  
9 to trial, that Defendant is resting its position that the  
10 implied covenant with good faith and fair dealing stems from  
11 that agreement. If that is the basis once we get to a trial  
12 where the argument that the implied covenant of good faith and  
13 fair dealing, I think the Plaintiff may very well proceed on  
14 that, be successful on that. And watch out for direct verdict  
15 motion. You might need be prepared for that. But at this  
16 stage, I'm going to deny the motion, because I'm reading the  
17 document and the position asserted by the Defendant being  
18 they're asserting the common law basis for the implied  
19 covenant of good faith and fair dealing. And that I've viewed  
20 their position as being one based not on particular terms in  
21 the agreement, but on the fact that they had the agreement  
22 with each other as a whole. So that's my view right now. I'm  
23 going to deny that motion at this time.

24 On the matter of the conspiracy, this is a summary  
25 judgment ruling. I've got to bottle facts, view them in a

1 light most favored to the Defendant. I'm going to deny the  
2 motion at this time. As a matter of -- I saw that as being  
3 very redundant of a lot of the other things that has been  
4 raised in the pleadings. For a trial strategy, I would  
5 encourage Defendants to think about what they're going to be  
6 arguing to a jury, because the conspiracy gets to be  
7 confusing. It got confusing to me in trying to do the  
8 appropriate analysis of it. But given the allegations that  
9 the Defendant has raised as to these other two individuals  
10 that they claim created a competing tourniquet or a competing  
11 product -- yeah, I think I've got to deny it at this time.  
12 I'm getting into the wisdom or the trial strategy. Just be  
13 aware that I find that that type of cause of action is  
14 confusing. All right?

15 To the motion for reconsideration of partial summary  
16 judgment, I think I articulated last time. I'm not going to  
17 grant the motion. I still view the original motion as being  
18 a -- I view the original motion and the responses that were  
19 made to the original motions and the arguments that were  
20 presented to me as setting some type of guardrails for what I  
21 was to do an analysis of. And I feel that my analysis based  
22 upon what was presented to me at the time was proper in  
23 granting the partial summary judgment as to the issue of  
24 ambiguity, because that's what the lawyers wanted to be done.  
25 That's what I stressed. That's what I focused on, and I

1 believe that's what the lawyers focused on. Since that time,  
2 I was bombarded with information that I feel like pushed those  
3 guardrails and pushed those parameters of what the lawyers  
4 originally argued to me way into another direction. I'm not  
5 ignoring that information, but I still believe that my prior  
6 ruling is correct.

7       For clarity purpose -- I think I said this last time --  
8 I'm going to -- I'm not going to stay. That's not a very  
9 legal word. I'm going to stay. I'm going to affirm my prior  
10 ruling in regards to this definition of the payments. I think  
11 that my ruling was still proper in regards to the definition  
12 of perpetuity. Even though you all have used that term today,  
13 I still don't view this as being a perpetual payment. I think  
14 the payments were conditioned upon the continued selling of  
15 the product. But I am going to -- I do think that while the  
16 argument was made, I've heard enough, and it's going to be  
17 presented to the jury as to how you calculate the payments so  
18 that some paragraphs that were founds on page 18 and 19 that  
19 talk about obligating to pay the \$1.75 for the tourniquets and  
20 then also the second paragraph that talks about the other  
21 eight applex (phonetic) 500 materials, that paragraph, there  
22 isn't going to be -- those are no longer a part of my ruling.  
23 But my ruling stands as far the sale of the tourniquets  
24 continued beyond the date of determination of the contract as  
25 well as that issue of the perpetuity. I think those were --

1 and I did take a look at my prior email that I sent out. So  
2 thank you for bringing that to my attention. I think that was  
3 what the Court intended.

4 Now, anything else that you all want me to address before  
5 we break for lunch?

6 MR. KAESKE: One second, Your Honor. May I confer? I  
7 just want to make sure that I -- thank you, Your Honor.

8 THE COURT: All right. When can we get back together?

9 MR. KAESKE: Your Honor, we have a flight at 4:20.  
10 Until --

11 THE COURT: Where are you leaving from?

12 MR. KAESKE: From here. From Greenville-Spartanburg.

13 And so I would say until about 3 o'clock, we're yours.

14 THE COURT: I'm not going to force anybody to do  
15 anything, because I -- well, I told you all we would finish  
16 about now.

17 MR. MUNSON: I'm fine to stay.

18 THE COURT: Okay.

19 MR. MUNSON: I was in trial mode for two weeks.

20 THE COURT: I understand.

21 MR. MUNSON: We have meetings, and they got to fly back  
22 to Charleston and I (audio interference)). But as long as  
23 (audio interference).

24 THE COURT: I noticed your tie.

25 All right. Let's take a break. It's 12:30 by that

1 clock. Let's take a break. Let's take a break until about  
2 ten minutes until 2:00. Take a break until about ten minute  
3 until 2:00. We'll come back and maybe do about an hour. If  
4 we take that long. Okay?

5 MR. MUNSON: Thank you, Your Honor.

6 THE COURT: And if we need more time, we'll get back  
7 together. I think we're on the 21st. Okay.

8 MR. KAESKE: Yes sir, thank you.

9 THE COURT: All right.

10 (Recess.)

11 THE COURT: Like I mentioned at the lunchbreak, that we  
12 weren't on the record, I do believe that Mr. Munson is  
13 entitled to receive their discovery that he's been asking for  
14 related to the issue that you all have raised in regards to  
15 the attorney -- relies upon the attorney.

16 So I'm not -- I don't have any specific motions as I  
17 recall, Mr. Munson; is that correct?

18 MR. MUNSON: No, Your Honor.

19 THE COURT: You all just made the arguments. Okay. So  
20 give me -- you all talk. Give me suggestions on what I might  
21 could do to assist. Reason I bring that up is because we  
22 are -- in talking discussions on having a trial sooner than  
23 later, I don't want -- I'm going to do my best not to have  
24 something just laying around. Than have one of you say well,  
25 we're not ready yet or we got more discovery. Because that

1 argument on an appellate level, they -- I frequently read that  
2 that's a basis for them saying, they're right. It's got to go  
3 back down. So I'm trying to do what I can to make a proper  
4 record.

5 Okay. So with that, I will be more than happy to hear  
6 you on your motions on the errata sheet on your motion to  
7 compel.

8 MR. KAESKE: Thank you, sir. And just say for the  
9 record, I've heard Your Honor and we're on it, and we'll take  
10 care of any discovery.

11 THE COURT: Okay.

12 MR. KAESKE: As Your Honor knows, I'm licensed to  
13 practice law in the State of Texas, and I guess that folks  
14 from the State of Texas that are lawyers come with reputations  
15 of some sort, because when I first got involved in this case  
16 and I was getting ready to go to a deposition of Mr. Cedrone,  
17 I had three separate law firms all independently send me Rule  
18 30 to tell me that South Carolina had the most strict  
19 deposition behavior rules in the country, and that that was a  
20 source of pride for the South Carolina Bar.

21 That it wasn't to make speak with objections that I --  
22 that in deposition you cannot instruct a witness in any way.  
23 You can't -- when a lawyer asks a question to your witness,  
24 you can't say, if you know. You can't do it. Any of these  
25 kinds of things. And you can't even talk to your client on a

1 break. That during the deposition, as I think the case law  
2 says, once the deposition starts, the preparation ends.

3 And that South Carolina took that so seriously. I was  
4 provided this case to remain anonymous, which I read where  
5 South Carolina adopted the Hall case, the Hall approach to  
6 this discovery and deposition conduct. That the South  
7 Carolina courts took this so seriously that the revenues for  
8 deposition behavior abuse could be that facts are needing to  
9 be true or admitted, pleadings could be struck, cases could be  
10 dismissed, default entries, default judgments could be  
11 entered.

12 And so I went to the deposition of Mr. Cedrone. I took  
13 Mr. Cedrone's deposition. At times, Mr. Cedrone made very  
14 damaging -- what I believe are very damaging admissions to his  
15 case. And when the deposition was over, he filed  
16 interrogatories and a motion for reconsideration of Your  
17 Honor's ruling, and we attached significant portions of Mr.  
18 Cedrone's deposition where a bunch of those admissions were  
19 made. Admissions about the relationship between the parties  
20 and what count and project met. Admissions about Mr.  
21 Cedrone's conflicts of interests, breach of confidentiality,  
22 all that kind of stuff. And that information was filed for  
23 Your Honor.

24 What the Plaintiff's have done is they took that  
25 submission that we made. They sat down with that submission

1 and then took an errata sheet. Now, I had to file that motion  
2 within a certain number of days of Your Honor's ruling. I  
3 can't recall what it was, ten or whatever the days was. And  
4 so that overlapped in such a way that I had to get that motion  
5 online before the errata sheet was due and the reading signed  
6 time had passed from Mr. Cedrone's deposition.

7 So I filed the motion when I had to. And then the  
8 Plaintiff's took that motion and went to school on it. And  
9 almost all -- I haven't sat down to actually figure out how  
10 many might have been excluded, but it certainly seems as  
11 though all of the things that I highlighted for the Court then  
12 became the subject of an errata issue. And those answered had  
13 been changed.

14 Now, this is something that was totally new to me.  
15 I've -- I don't recall, frankly, ever having made changes to  
16 an errata sheet on any deposition that I've been involved in,  
17 a guesstimate. When I say that out loud, it sounds kind of  
18 significant or maybe even unbelievable. But I don't recall  
19 ever having done it. I mean, my thought about errata sheet is  
20 that it depicts errors.

21 And I understand that the rule says that it's to fix  
22 errors of form or substance, but what I understood that to  
23 mean was that an error of form would be like what happened  
24 with the transcript from the hearing that we had with Your  
25 Honor, which is that the transcription says Mr. Martin every

1 time I'm speaking. That was an error of form. It was  
2 actually me that was speaking. So if I wanted to change that  
3 transcript with an errata, we would have changed it to say Mr.  
4 Kaeske.

5 Under a change in error of substance, I understood it to  
6 be I said yes and the transcriber or the stenographer put down  
7 no. Not that I wanted -- I said no, and I wanted to change my  
8 answer to a yes. That's not what I understood, what I've ever  
9 understood. So besides South Carolina, I've never understood  
10 that that's what the purpose of an errata sheet is.

11 None of us have ever seen anything like this six-page  
12 single-spaced errata sheet that attempts to substantively  
13 change a number of answers. And they're not just changing the  
14 answers in form. I mean, it's a -- it goes from a yes to a  
15 no. It goes from I got that yeah to I got that yeah the  
16 appointment included the terms and conditions set forth in the  
17 2005 contract as to whether those conditions are like  
18 prerequisites, I already testified that I don't know what it  
19 means for a position of a -- provision of a contract to be a  
20 condition of representation. And those are not the kinds of  
21 changes that I've ever expected to be part of an errata sheet.

22 So, of course, we started to do a bunch of analysis'.  
23 First, we went to the rule, and the rules says that an errata  
24 sheet is for the purposes of the witness. The witness make  
25 any changes in the form or substance which the witness desires

1 to make, shall be entered upon the deposition by the officer  
2 with the statement of the reasons given by the witness for  
3 making them.

4 And so, as I've always understood, this was a process for  
5 the witness to read and sign, not cooperative effort between  
6 the witness and the lawyer, and certainly not an effort for  
7 the rule. As a matter of fact, when we started looking at the  
8 case law on this, what you see, and many cases, is they talk  
9 about the fact that the deposition is not -- the deposition is  
10 for the witness and the preparations over when deposition  
11 starts. And the errata sheet is not meant to be a table of  
12 exam for the lawyer.

13 Now -- but I recognize having had Mr. Martin as well as  
14 researched this and, frankly, Mr. Jones from Mr. White's  
15 office, researched this issue extensively for us. I  
16 understand that there are different approaches in the country,  
17 across the jurisdictions, that allow it to be dealt with. And  
18 there's an authority rule and there's a modern approach.

19 And while the modern approach may be the minority, it's  
20 growing (audio interference). And South Carolina, of course,  
21 is the number one, as we discussed, as I (audio interference)  
22 remember, it's the number one state to be the most certain.

23 And so, when you look the -- not just correct testimony,  
24 but then the reasons for corrections, which are, of course,  
25 must be the witnesses reasons (audio interference). It's

1 absolutely obvious without any discovery that these were  
2 written by a lawyer. They weren't written by Mr. Cedrone. I  
3 sat with Mr. Cedrone for hours. He doesn't talk like that.

4 And that's one of the things, by the way, that the cases  
5 look at is whether -- for example, within the phrasing of the  
6 clarification does not reflect Plaintiff's own voice or words  
7 compared to the deposition testimony. And these reasons for  
8 correction are expeditious. And they involve lethal  
9 injections and discussion of lethal injections and the form of  
10 the question.

11 When in fact, at the deposition no objection was levied.  
12 And so clearly to what's happened here, although we've  
13 requested discovery because that's what Rule 30 talks about.  
14 Clearly, what's happened here is somewhere, sat down with the  
15 deposition and found the things that they thought needed  
16 changed, depicted (audio interference) of the case and made  
17 some changes and I know that's troubling.

18 Of course, there's been multiple opportunities -- (audio  
19 interference) and none of those opportunities have been taken.  
20 And since when we were here last time, (audio interference) I  
21 asked Mr. Munson, so I haven't -- I (audio interference) for  
22 anything. I said okay, if you're not going to use it, let us  
23 know that you're not going to use it. And then we don't have  
24 to worry about it.

25 Instead you responded with an email that said, if I do

1 something that later, I won't object to your -- for your  
2 untimely failure to confirm -- me to confirm with me (audio  
3 interference), and that's not what I mean. If it's not what  
4 you're wanting, and I think, frankly, it does -- the  
5 deposition conduct was unquestionably sanction.

6 And so, there's questions to whether the errata conduct  
7 is the sanction. I just need to get to the bottom of what  
8 happened and how to go. And Rule 30(j) allows for the -- that  
9 discovery. And so he asked if I was able to argue them both  
10 at the same time, I certainly can. I don't think that there's  
11 anything to say except that we've sent discovery because  
12 discovery is allowed and contemplated under 30(j) when a  
13 lawyer is involved in the coaching of a witness. And I think  
14 that it's obvious from what we've been provided that that took  
15 place. I sent discovery and got no response.

16 And so, all -- the Hall Case, which of course was  
17 overwhelming, the minorities issue on contrary in deposition  
18 of conduct says that when this conduct thing happens, there is  
19 no privilege. (Audio interference).

20 And of course, we iterate anonymous case since it's a  
21 Supreme Court case that adopts the whole approach to dealing  
22 with this kind of conduct. And so really what we do now --  
23 with now, is just -- this somewhat philosophical maybe  
24 partially academic question for Your Honor, which is not --  
25 unfortunately not answered by any South Carolina State Court

1 published opinions and that is -- other than indirect  
2 anonymous is what we do when lawyers are involved in the  
3 errata process.

4 Well, it would be seem -- it would seem completely in  
5 opposite to the (audio interference) on this case and the  
6 adoption of the Hall opinion for Your Honor or likely South  
7 Carolina Courts to say, you know what, once the lawyers leave  
8 the room that's fair game. The lawyer can coach the witness  
9 and tell the witness to change the answer and right the  
10 answers for the witness. And can give the reasons for the  
11 witness changing the answer. Anything's allowed but you can't  
12 put that in. It does not make sense. It would make more  
13 sense to allow it in the room and not allow it outside the  
14 room, because nothing happens after the deposition's over, if  
15 it's done.

16 And Mr. Munson sent his errata sheet to the court  
17 reporter, and said make it part of the record. And it is now  
18 part of the deposition. And so that means that this(audio  
19 interference). This errata sheet is now the additional --  
20 whatever testimony of the witness. And so, I think here in  
21 South Carolina, it's better to be consistent about how they  
22 feel on it or just (audio interference).

23 And -- look the -- if your witness really made an error  
24 in the deposition or, frankly, even if you move that your  
25 witness made an apparent or missing or something like that in

1 deposition. The remedy is to do a redirect. Any redirect  
2 could have been done if Mr. Munson believed in the deposition  
3 that Mr. Cedrone was confused, which he wasn't, in an object  
4 frame of questions.

5 I know you know this, Your Honor, at the beginning of the  
6 deposition, I'm required as the examining lawyer to instruct  
7 the witness that if he's got any problems with the questions,  
8 he's to direct those questions to me. I mean, that's how hard  
9 this 30 -- Rule 30 stuff goes. I am -- it's my approach to  
10 instruct him, if you've got any questions about what I'm  
11 asking you, you need to ask them to me. And if you don't  
12 understand a question, or whatever, let me know. And that  
13 didn't happen.

14 Do we expect that it did happen and we didn't have an  
15 agreement about the question, those questions got re-asked.  
16 In the rules under South Carolina, I'll need to ask questions  
17 multiple times and so it's not like as alleged in this -- the  
18 one that I pointed out to you here (audio interference).

19 But the second one on the errata sheet is this one -- and  
20 I'm just pointing out to you where I asked Mr. Cedrone this  
21 question. I said, "that means that the terms and conditions  
22 that are set before, here, and after, those are like  
23 prerequisites to the contract, right"? And he said, "okay".  
24 And I said, "do you agree"? And he said, "I got that, yeah".

25 So -- and then it gets rewritten to say, I got that,

1 yeah, the appointment including the terms and conditions set  
2 forth in the -- by contract. That's the way that those  
3 conditions are like prerequisites. I already testified that I  
4 don't know what it means for a provision of a contract to be a  
5 condition of representation.

6 I wasn't asking him what it meant for it to be a  
7 condition of representation. I was asking him whether it was  
8 a prerequisite or not. And so, when you get this reason for  
9 correction, this compound question asks about the wording in  
10 the 2005 contract and asserts a hypothetical legal contusion  
11 like prerequisites.

12 The singular answer to that could be misconstrued as a  
13 self-asserting counsel legal conclusion, which would be  
14 incorrect in the light of the earlier testimony than earlier  
15 testimony was given that doesn't (audio interference). Do you  
16 know that something -- what something means, what it means for  
17 a provision of a contract to be a condition of representation.  
18 I don't -- I guess I don't. So anyway.

19 This is precarious position to be in. I've never been in  
20 this position or I -- obviously, I care about the integrity of  
21 the transcript and what I get to do with it and how it's going  
22 to go from the jury if I try to use any of it for cross-  
23 examination or whatever.

24 Like I said, I've offered multiple opportunities for the  
25 errata sheet to be withdrawn. It hasn't been. I don't

1 believe that -- I don't believe that given the enter anonymous  
2 grant and then the Rule 30. The adoption of the Hall that  
3 South Carolina Supreme Court if it heard this very issues  
4 would decide that we're going to not let the conduct happen  
5 during the deposition, but then we're going to turn it into a  
6 take home exam. But I guess that's the issue that Your Honor  
7 needs to decide.

8       There are only two cases that were about the errata  
9 sheets in South Carolina. One is from Judge Gergel, and Judge  
10 Gergel says it exactly -- as strictly as it can be that you  
11 can make changes of substance but substance means you said yes  
12 when she wrote down no. That's not what this is.

13       Now, there is a different case. The case that Mr. Munson  
14 cites where something different was held by a district court.  
15 Not a state court but a district court, not a state court, but  
16 a district court in South Carolina. And I'll just -- and Mr.  
17 Munson would really talk about that case.

18       I'll just point out that in that case, there was some  
19 conflating factors. That is that the party, who the  
20 deposition -- who took the deposition and subject to the  
21 errata sheet made. Wait until discovery was over to file an  
22 objection to the errata sheet. And ultimately, settlement  
23 judgment was granted in that case.

24       Anyway, and I think that the -- I'd known that this  
25 wasn't the state of reason but obviously there were other

1 things that the Court was worried about with respect to the  
2 complaint about the errata sheet. Two months or something  
3 like that had passed after the deposition. We had a discovery  
4 before any objection was made. We were needing it objected.  
5 And I think that Your Honor should take that into  
6 consideration. Thank you.

7 THE COURT: Okay. Let me ask you this.

8 MR. KAESKE: Yes, sir.

9 THE COURT: So what do you want me to do? I mean, we're  
10 having this here so what do you want me to do today? If I  
11 agree with you as to the position of the law in South Carolina  
12 that changes to a deposition through an errata sheet shouldn't  
13 done this way. What are you asking me to do today?

14 MR. KAESKE: Just strike it. I'd ask you to strike it,  
15 and then Your Honor can decide whether it's appropriate (audio  
16 interference). If Your Honor doesn't strike it then I think  
17 (audio interference) need a discovery. And then I think that  
18 the witness's that -- what -- see what happens from there.

19 But I'd just be happy to not have to deal with the errata  
20 sheet, and for the deposition to be as it was. And if Mr.  
21 Cedrone wants to try to explain his answer a way when I've got  
22 him on the stand and I'm impeaching him on his testimony or  
23 whatever then we'll deal with that then.

24 But I think the errata sheet's inappropriate. It should  
25 be struck. And the issue should be over unless Your Honor

1 thinks it needs to go further.

2 THE COURT: It's my decision that it needs to go further?

3 MR. KAESKE: No, sir. But I think that -- I'm not asking  
4 for sanctions.

5 THE COURT: Okay.

6 MR. KAESKE: But I do think it's sanctionable conduct.

7 And I think, as I understand it, courts can take that up on  
8 their own if they want to. I'm not asking for that now.

9 THE COURT: All right. I've got some more questions, but  
10 I want to hear from Mr. Munson.

11 MR. KAESKE: Yes, sir.

12 MR. MUNSON: Thank you, Your Honor. I think that it's  
13 (audio interference) Mr. Cedrone's deposition before the  
14 errata sheet (audio interference). And cherry picking things  
15 like I want that yeah and bring whatever clause they wanted to  
16 on it, they're fine with it. If we hadn't provided an errata  
17 sheet for that, we wouldn't have (audio interference).

18 We challenged that. We put this in the brief. And they  
19 never corrected it. They don't sign for an errata sheet.  
20 They thought we were cherry picking and putting the gloss on  
21 their stuff. They -- it would have shown it in the errata  
22 sheet. And now we're going to argue that they somehow -- I  
23 scream that into the record before the errata sheet deadline.  
24 We essentially gave a (indiscernible). I mean, it was a lose,  
25 lose either way. We do an errata sheet, we get (audio

1 interference). If we don't do an errata sheet, we get --  
2 well, you read the definition of an errata sheet.

3 (Indiscernible) and you didn't, therefore, you obviously  
4 confirm argue. You didn't agree with (indiscernible). We did  
5 an errata sheet. (Audio interference) I did the errata sheet.

6 (Indiscernible) in the error. I appreciate that defense  
7 counsel believes that it only relates to (indiscernible). And  
8 maybe it -- and Texas has a whole process where they change  
9 their process (audio interference) South Carolina. So the  
10 Georgia rule and the South Carolina rule is any change in form  
11 or substance, which the witness denies can be put into the  
12 errata sheet.

13 That's the -- that's what the errata sheet entails. It  
14 was -- it had all requirements. It was done in time, there  
15 were changes to form and substances he wanted to make, and  
16 they were signed by the witness. So the -- there may be  
17 state's that say you can only do substance. It has to be  
18 error. It can't be just what you desire. It has to be  
19 something else. Other state's -- and I outline some of the  
20 other state's where they (audio interference) some of this  
21 stuff, on this academic equation.

22 They altered the rules, and cite cases from other states  
23 as to the rule or Supreme Court throughout the interrupt of  
24 those rules. But that's not South Carolina. South Carolina  
25 has this rule -- any changes or substances decide.

1           So the errata sheet meets the rule with regard to -- the  
2 one point he makes on the start for (audio interference), and  
3 you'll have to make some decision here. I don't -- there's no  
4 making a decision here. The errata sheet does not come up,  
5 subject to the way this case(audio interference). It's been  
6 submitted, but we haven't referenced it.

7           It mostly relates to (indiscernible) evidence that's  
8 irrelevant based on your order (indiscernible)  
9 reconsideration. There's no reason for this, really, to ever  
10 come up in this case. None.

11           Having said that, on the other issue, the attorney-client  
12 privilege is sat, per se. And in South Carolina that is  
13 observed. And there are limitations to it, and in my  
14 anonymous case or the Hall case, some rapprochement into the  
15 sacred nature of the attorney-client privilege is allowed.  
16 But because it's rapprochement of a sacred policy, the  
17 rapprochement needs to be strictly construed. And the  
18 rapprochement that has been allowed in this area is during a  
19 deposition, during a deposition.

20           And the deposition -- none of this happens until after  
21 the deposition were done. And the state's been followed --  
22 the any changes you can make, and most state's put the errata  
23 sheet after the close of the deposition. And it didn't -- you  
24 create this code of silence that exists for as many days after  
25 the deposition it takes to do a transcript plus 30. If it

1 takes 30 days to transcript, another 30 days for the errata  
2 sheet spot to come. You put 60 days, code of silence, where I  
3 can't talk to my client about his deposition because the  
4 deposition's not over until the errata sheet deadline.

5       And if that's not the case, if deposition does not remain  
6 open until the errata sheet deadline has gone, then rules can  
7 impact conduct during the deposition obviously don't fly  
8 (audio interference). Either depositions last another 90 days  
9 after their -- after they end, or this -- things that happen  
10 in the errata sheet, happen after the deposition.

11       And it creates a trap for every lawyer who has any  
12 conversation with their client after the deposition, and then  
13 gets to an errata sheet issue. Suddenly, there's any errata  
14 issue, any errata issue under their -- when they weren't here  
15 to (indiscernible) on it.

16       Anytime the errata sheet gets sent, you get discovery  
17 against the attorney for the witness. I'm sure if they get  
18 discovery the next thing they're going to do is take the  
19 deposition of the attorney who participated in the errata  
20 sheet. That will be the standard or be available anytime  
21 there's an errata issue. Because with that code of silence  
22 then you've extended the deposition -- during the deposition  
23 of the last forever or until the errata sheet deadline.

24       In the errata sheet means they're going to be a  
25 conversation about whatever was put on that errata sheet with

1 counsel entitling the attorneys who participated in the  
2 deposition to dwell into what statement (audio interference)  
3 made by counsels in that period of time. I don't think that's  
4 a can of worms that the Supreme Court wants us to have.

5       You know, there are -- the Hall case itself made -- I  
6 think it was during deposition case (indiscernible) to deal in  
7 that. But this case was adopted in South Carolina or  
8 referenced in the adoption of the during conduct standard of  
9 South Carolina. It deliberately did not include beyond the  
10 deposition aspect.

11       So if they're aspect in Hall that one deposition, the  
12 Supreme Court decision did not include that when they only  
13 talked about during. If it only relates to during, then  
14 Hall's not very informative on this issue of after the  
15 deposition.

16       There is -- the case that's recently (audio interference)  
17 you can cross-examine on the changes made to the deposition  
18 for impeachment purposes you could say it seems like -- it  
19 seems like your errata sheet testimony is monitored (audio  
20 interference) from what your deposition testimony is and that  
21 seems -- to me, it seems suspicious. And you (audio  
22 interference). That's going to be for invoking the right in  
23 the rule to make change for more substance that the attorney  
24 would except the witness desires to make and turns --  
25 approaches the attorney privilege not during the deposition.

1 There's just no basis for that, Your Honor. (Indiscernible)  
2 fall into this modern view. We follow the majority view.  
3 Thank you.

4 THE COURT: Any reply?

5 MR. KAESKE: Yes, please. First off, that last point,  
6 we're not a statement following the modern view of the  
7 statement followed the minority view. There's absolutely no  
8 support. There isn't any South Carolina case on point.  
9 There's only two district court cases and one (audio  
10 interference) away. And so -- and then to remain anonymous  
11 says exactly the opposite. The entire (audio interference) to  
12 the majority approach.

13 I'd like to say first that this idea that Mr. Munson is  
14 throwing out, that this doesn't matter because Cedrone got the  
15 motion for reconsideration that he denied. Well, let's get  
16 into the impact of what your -- of what the order is. A bunch  
17 of these answers have changed about whether Mr. Cedrone  
18 replied to the contract himself. That motion, his motion was  
19 denied to that.

20 This barely answers that I read to you, I got that yeah.  
21 The question was whether the terms and conditions of the  
22 contract are prerequisites to the contract. That's an issue  
23 not of reconsideration of Your Honor's order. That's an issue  
24 of whether Mr. Cedrone complied with the contract, which is  
25 clearly, squarely in the midst of this trial. And there are

1 multiple answers like that.

2 The changes, for example, like on page 217, 2020, and  
3 2012, and 203, and 198, 198, and 103. All of these pages.  
4 171. All of this stuff. The last three pages of his errata,  
5 it's all about Mr. Cedrone's conduct. It's not about the  
6 contract provision or the contract interpretation parts of the  
7 testimony. So they're very much at play.

8 Mr. Munson mentioned several times that these are meant  
9 to be changes that the witness desired to make. We can just  
10 look at what's written here, and we know that these are  
11 changes that the witness desires to make by himself. There's  
12 no way the witness would know to make these changes for these  
13 reasons without being consulted with a lawyer.

14 And so, by his own reading of the very rule, the changes  
15 the witness desires to make. Not the changes that the lawyer  
16 instructs the witness that he should desire to make. And this  
17 idea that I would've argued that they should have changed it  
18 in the errata sheet is preposterous.

19 The testimony is what the testimony is. Remember, there  
20 is conflicting testimony within Mr. Cedrone's deposition. And  
21 he pointed several out. He didn't -- in various of the  
22 motions that have filed. And so it was -- it's completely  
23 unfair for him to speculate as to what I would have done. It  
24 would have never occurred to me to say that if that testimony  
25 isn't right then you should have (audio interference).

1 Because that's what -- I do not believe that that's the  
2 purpose of an errata.

3 And then this parade of rules that Mr. Munson suggests  
4 that there's some agreed code of silence. That's -- I mean,  
5 (audio interference). You have 30 days to reconcile; you  
6 don't have to take 30 days to reconcile. But the witness can  
7 get the transcript and sit down with it right away and give  
8 their answers. And if Mr. Munson would say, you know what Mr.  
9 Cedrone, you need to get with (indiscernible) I need to talk  
10 to you about your deposition. Go take care of your errata  
11 sheet. Resign your deposition. Maybe he would go by himself  
12 and then he submitted it and it would be a day or two days or  
13 ten days or whatever, but there's no code of silence. That's  
14 foolishness.

15 The -- and it's not the case, and I'm not arguing that  
16 it's the case that anytime any errata sheet is filed that this  
17 discovery. It's only when you've got an errata sheet like  
18 this one. I've never seen. I -- Mr. White's never seen it.  
19 The mediator we were with yesterday has never seen it. I  
20 suspect Your Honor's never seen anything like this. It's only  
21 when we've got something that's quite obviously prepared by a  
22 lawyer that there would be grounds. I mean, if you're on the  
23 right now said you know what Mr. Kaeske, I've looked at these  
24 questions and I've looked at the reasons for the correction,  
25 and I think that there's every possibility that Mr. Cedrone

1 made those himself. And maybe he wouldn't allow any discovery  
2 into it.

3 Or frankly, if Mr. Munson had stood up to Your Honor  
4 having been given an abundant opportunity to do so, and said I  
5 didn't coach him. These were his answers. He came up with  
6 these by himself. Then maybe there wouldn't need to be any  
7 discovery. As an officer of the Court, maybe you'll decide  
8 that you took Mr. Munson's word from that. But that's not  
9 what we've got. It's now abundantly clear that the lawyers  
10 did make these changes. And it was the lawyer's ideas for  
11 these changes.

12 And I don't believe that the Supreme Court of South  
13 Carolina -- I'm not South Carolina board, I guess it's for  
14 Your Honor to decide whether South Carolina law would prefer  
15 to have it be or it's not a (audio interference).

16 The last thing I'll say is that in rae anonymous when the  
17 Hall decision was documented, errata sheet wasn't -- I know  
18 the errata sheet wasn't -- it wasn't addressed because it  
19 wasn't the issue. The issue in the case was the behavior of  
20 the conduct while everybody was together for the purposes of  
21 the deposition.

22 But for Mr. Munson to suggest that the deposition's over,  
23 that the deposition is concluded before the errata sheet is  
24 turned in, I don't think makes any sense. Because he just  
25 said that the testimony has changed and they both exist. And

1 so the deposition isn't over. The only one that's over, is  
2 the part that I'm in. The deposition as far as Mr. Cedrone  
3 and Mr. Munson is concerned was ongoing until they got their  
4 errata sheet in. And then he made their changes and then  
5 depositions.

6 So I think it needs to be struck. I shouldn't have to  
7 deal with it. I shouldn't have to figure out how I can  
8 examine (indiscernible). That a juror shouldn't have to hear  
9 about answers that the lawyers came up with for the witness.  
10 I shouldn't have to cross-examine them with his deposition.  
11 And if Mr. Cedrone wants to try to memorize the errata sheet  
12 so that he can do it again on the fly and say and change his  
13 answers that's another (audio interference). This should not  
14 be part of the deposition.

15 MR. MUNSON: Just one thing, Your Honor. I mean, (audio  
16 interference) my client would never (indiscernible) I would  
17 have to ask questions. I wouldn't be able to read his  
18 deposition. But on the (audio interference) evidence. I  
19 could shorten it. Instead of (audio interference). If I want  
20 to talk to my client about the case what I can do is say,  
21 hurry up and do your errata sheet so I can talk to you about  
22 your case.

23 So he acknowledges that the exhibition creates  
24 (indiscernible) deposition for as long as it takes for the  
25 court reporter to get the deposition out and then as long as

1 it took the errata sheet to be done. The last 30 days have  
2 been short because (Indiscernible) my client through it in a  
3 short period of time. But it's still a code of silence in  
4 terms of -- as he said, I will talk to my client, tell him to  
5 get his homework done so I can talk to him.

6 And I don't think -- again, this and the attorney-client  
7 privilege that's being (audio interference) and it's not  
8 something that should be done. One, there's no need to, and  
9 two, likely and frankly, I'm glad (indiscernible) that's  
10 terminating the attorney-client privilege. Thank you, Your  
11 Honor.

12 MR. KAESKE: I'll just say what (audio interference).  
13 There's no you can't talk to your client. But we can't do is  
14 you can't talk to your client about his questions and answers  
15 in the deposition. It's that simple. You can talk to your  
16 client about whatever you want. But you can't say, hey, let's  
17 discuss these questions and answers. Why you said them and  
18 how they need to be changed.

19 THE COURT: Okay. Thank you very much for the argument.  
20 What a day. It is novel ground in South Carolina. It is  
21 novel to this Court to have seen an errata sheet that would  
22 make those types of -- to make the changes that I read. I  
23 will tell you the first reaction by this Court was that wow,  
24 he is alerting the other side as to what his position is.

25 I also saw -- and one of my initial reactions was wow, he

1 is now giving them an answer that destroys the question that  
2 was asked. Destroys the benefit that the questioner had asked  
3 the -- had received. So my initial reaction, I --  
4 surprisingly, I saw it both ways. I had never reviewed that  
5 section of the rule under subsection (e) because my initial  
6 reaction -- being in practice for as long as I was and sitting  
7 through depositions, doing depositions was that I've never had  
8 this to happen. I've never done this.

9         And so I was -- I pulled the rule out and read the rule  
10 and read that sentence about both can make any changes in form  
11 or substance, which the witness desires to make, shall be  
12 entered upon the deposition by the officer with a statement of  
13 the reason given by the witness for making them. I was not  
14 familiar with that sentence.

15         I say that because we're at the stage in this litigation  
16 to where I think I'm going to be the only judge that's going  
17 to touch this. So I'm not going to make a ruling right now.  
18 I want you all to go ahead and continue to get prepared. I  
19 will take a look at it. I will -- you know what my ruling is.

20         I am -- my initial reaction is you got to deal with it.  
21 You got to get prepared for trial. I might make a ruling that  
22 is no favorable to you on this issue. You, by the same token,  
23 you got to deal with it. I might make a ruling that is not  
24 favorable for you. I don't want this issue -- I am not seeing  
25 that there is, as far as the Court is concerned, an emergency

1 and exigent circumstances that I need to make a ruling today.

2 And I understand that the novelty of the question that's  
3 being presented to the Court. So I want to be sure that I  
4 take a good look at it. Because all of the lawyers that are  
5 in this courtroom, I know two of you all have never been in  
6 front of me before except for this case. But your actions,  
7 your conduct, your preparations is consistent with what I --  
8 how I view Mr. Munson and Mr. White. These are some of the  
9 best lawyers in the state.

10 So it's a pleasure being with you all and before I start  
11 delving into lawyer conduct, I want to be sure that I'm doing  
12 the right thing. I'm going to take a look at it, but I don't  
13 want to let you all be distracted by this to say that we got  
14 to stop it and we can't do anything else until he makes a  
15 ruling. Don't wait on that.

16 Now, if it gets to be that we get back together on a  
17 motion and something comes up that's in this deposition that  
18 you feel like is contrary to what you want the deposition to  
19 show and the errata sheet that comes significant, be sure you  
20 point that out to me. Let me know about that. So that I  
21 don't miss it because this is a significant issue that I want  
22 to be sure that I've done my proper work in taking a look at  
23 it.

24 That's the best I can do at -- that's the best I can  
25 do --

1 MR. KAESKE: Thank you.

2 THE COURT: -- today. Thank you all. Can you make your  
3 flight?

4 MR. KAESKE: Yes, sir.

5 THE COURT: Good luck. Is there anything else that I can  
6 do for you all today?

7 MR. KAESKE: No, Judge.

8 MR. MUNSON: Yes.

9 THE COURT: Reach out to me before if you need me.

10 (End of Transcript of Record)

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

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

Plaintiffs,

vs.

Composite Resources, Inc.,

Defendant.

IN THE CIRCUIT COURT

Case No. 2018-CP-46-00051

**NOTICE TO STATE  
COURT OF REMOVAL**

To: The Honorable David Hamilton  
York County Clerk of Court  
Post Office Drawer 649  
York, South Carolina 29745

NOTICE is hereby given that this action has been removed to the United States District Court for the District of South Carolina, Rock Hill Division.

We have enclosed a copy of the Notice of Removal (**Exhibit "A"**), which has been filed with the United States District Court by the Defendants.

Respectfully submitted,

s/ William Y. Klett, III

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February 7, 2019

Columbia, South Carolina

*Attorneys for Defendant Composite Resources, Inc.*

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

) IN THE COURT OF COMMON PLEAS  
)  
) CASE NO.: 2019-CP-46-00051

Daniel P. Cedrone and Poly-Tech Industrial, Inc.,  
Plaintiffs,  
v.  
Composite Resources, Inc.,  
Defendant.

**NOTICE TO STATE COURT  
OF REMOVAL**

To: The Honorable David Hamilton  
York County Clerk of Court  
Post Office Drawer 649  
York, South Carolina 29745

NOTICE is hereby given that this action has been removed to the United States District Court for the District of South Carolina, Rock Hill Division.

We have enclosed a copy of the Notice of Removal (**Exhibit A**), which has been filed in the United States District Court by Defendant.

Respectfully submitted,

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Columbia, SC 29211  
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Attorneys for Defendant

January 29, 2021  
Columbia, South Carolina

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

Case No. 2019-CP-46-00051

**PLAINTIFFS DAN CEDRONE AND POLY-  
TECH INDUSTRIAL'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT AS TO  
UNAMBIGUOUS MATERIAL TERMS**

Daniel P. Cedrone (“**Cedrone**”) and Poly-Tech Industrial, Inc. (“**Poly-Tech**”) (collectively “**Plaintiffs**”), hereby move for final partial summary judgment pursuant to Rule 56, South Carolina Rules of Civil Procedure on the issue of Plaintiffs’ entitlement to have material unambiguous terms in the Contract with Defendant Composite Resources, Inc. (“**Composite**” or “**Defendant**”) determined as a matter of law and in support hereof states:

**INTRODUCTION**

The purpose of this motion for partial summary final judgment is to have the Court judicial recognize that certain material terms of the Sales Representative Agreement (“**Contract**”) at issue in this case are unambiguous and thereby to eliminate the need for discovery or testimony related to parole evidence as to their meaning. In Plaintiffs’ Complaint, the Contract is attached as Exhibit A. Paragraph 3 of Defendant’s Amended Answer, filed April 1, 2020, admits that “the contract attached to the Complaint appears to be a complete copy of the contract” and that “the contract speaks for itself.”

The admitted and unambiguous Contract provision at issue under the First Cause of Action simply provides for a “Commission rate of \$1.75 per tourniquet sold”, with the

Commission to continue “for as long as the project continues” even if the Contract terminated or if Cedrone were to pass away before the project ended. [See Ex. A to Complaint, p. 11 – a copy of which is attached hereto as **Exhibit A** as well]. The admitted evidence before the Court, by way of Composite’s pleadings and discovery responses referenced herein established beyond a doubt that the project (i.e., sale of tourniquets by Composite) continued up to and beyond the termination of the Contract on August 31, 2018.

**STATEMENT OF FACTS AND CASE**

The Complaint was filed on January 7, 2019, and significant written discovery has been exchanged between the parties.

Plaintiff Daniel P. Cedrone was instrumental in developing the manufacturing and marketing plan for 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 100% effective and has decreased the mortality rate due to extreme exsanguination by 85%. [See Amended Answer, Para. 2].

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. In June 2005, Cedrone, as president of Poly-Tech Industrial, Inc. executed an agreement with Defendant Composite Resources, Inc. establishing: (1) a sales representative relationship for all products manufactured by Composite, including the Phil Durango Combat Application Tourniquets (“**Combat Tourniquet**”); (2) a vendor relationship with the respect to certain raw materials; and (3) a profit-sharing program regardless of whether raw materials or

component pieces are purchased from Poly-Tech. [See Amended Answer, Para. 3 admitting to the Contract; see also Contract and Annexes A-C, Ex. A to Complaint/Ex. A, hereto, p. 11]. Poly-Tech was responsible for brokering over \$500,000,000 in sales to Composite throughout the relationship (from 2005 to August 31, 2018).

Cedrone had a pre-existing business relationship with Composite and introduced Composite to a Phil Durango L.L.C. (“**Durango**”), the company under which the Combat Tourniquet (sometimes referred to as the “CAT Tourniquet”) was developed. [See Amended Answer, Paras. 11-12]. Cedrone and Poly-Tech convinced Durango to use Composite to assemble and mass-produce the 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. These changes were included in the June 2005 new compensation relationship between Cedrone, Poly-Tech and Composite. [See Contract and Annexes A-C, Ex. A to Complaint; see also Complaint, para 15 and Amended Answer, para. 13].

The Combat Tourniquets were subject to the “special account” provisions found in Annex C, Section C of the Contract, page 11 of 11. Within the special account provision for the Durango Combat Tourniquet, Cedrone is identified by name with intended third-party beneficiary rights and remunerations. Specifically, the tourniquet special account provisions state, in relevant part, 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; and
- b. 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” as if it provided all the services and products related to the Combat Tourniquets.<sup>1</sup>

[See Ex. A, Contract, Annex C, Subsection C, page 11].

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 Composite continues to manufacture, sell, and/or distribute Combat Tourniquets.

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 North American Rescue (“**NAR**”), one of the major purchasers of Combat Tourniquets, by \$0.625/tourniquet. On June 26, 2018, Composite notified Poly-Tech of its intent to terminate pursuant to Section IX of the Contract, which allowed for termination of the continuing sales representative relationship (but not the post-termination Combat Tourniquet commissions), without cause upon sixty (60) days written notice. [See Amended Answer, Para. 23, admitting allegation so Complaint, para. 27, and the copy of the Termination Letter, attached hereto as **Exhibit B**]. In terminating the sales representative relationship, Composite’s president, Jonathan Bennett, acknowledged the parties’ co-partnership over decades by leveraging synergies and complementary capabilities that inured to their “mutual prosperity.” Mr. Bennett then noted he was forcing a “sunset” of this mutual prosperity, at Composite’s convenience because Composite “has created internal marketing and sales departments” and no longer has a need for Plaintiffs services.

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<sup>1</sup> Specifically, “\$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 by Composite.

Composite inappropriately used the termination of the future sales relationship to dishonor and repudiate Composite's obligation to pay post-termination commission/profit payments for ongoing Combat Tourniquet sales. Notably, the Termination Letter does not state that Plaintiffs have not earned the post-termination commissions. That is because executing the Contract was the only triggering event for this "special account" (an "exception" regular sales-representative portion of the Contract), and this post-termination commission "is to continue [even] if for any reason the regular contract is discontinued." Ex. A, p. 11. Composite, despite increasing sales, stopped making Combat Tourniquet commission payments to Poly-Tech as of August 31, 2018. [See Amended Answer, Para. 24].

Any effort to oppose this motion for partial summary judgment would merely be an attempt to delay the inevitable. For example, the unjustified nature of repudiating the post-termination Combat Tourniquet commission payments is clearly seen in the testimony of the Operations Director, who was the Composite 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, attached hereto as **Exhibit C**. Although Jonathan Bennett executed the Contract in this case, Lisa Bennett's authority to negotiate and enter into contracts on behalf of Composite is conceded by Composite. For example, in a corporate written consent, Jonathan Bennett, as the sole director of Defendant Composite Resources, "ratifies, approves and adopts said actions and agreements taken and executed on behalf of the Corporation by its Officers," expressly including Lisa Bennett.<sup>2</sup> Thus, even if the Composite can articulate a hypothetical ambiguity, summary judgment would still be appropriate because there still would be no material fact in dispute and Plaintiffs' would be entitled to this partial summary judgment as a matter of law. *see, e.g., Sprint Nextel Corp. v. Wireless Buybacks Holdings, LLC*, 938 F.3d 113 (4th Cir. 2019). In *Sprint Nextel*, the Fourth Circuit held that summary judgment is appropriate where an alleged ambiguity can be resolved by extrinsic evidence, stating, "[e]ven where a court ... determines as a matter of law that the contract is ambiguous, it may yet examine evidence extrinsic to the contract that is included in the summary judgment materials, and, if the evidence is, as a matter of law, dispositive of the interpretative issue, grant summary judgment on that basis" *Id.* at 131.

Finally, Composite continued, and continues, to sell/distribute Combat Tourniquets after the termination of the sales representation portions of the Contract and substantially increased its sales of Combat Tourniquets since it stopped paying Plaintiffs their commissions. [See Amended Answer, Para. 25, admitting allegations of Complaint, para. 29].

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<sup>2</sup> See, Composite Resources, Inc. Written Consent to Informal Action of the Sole Director, attached hereto as **Exhibit D**.

### LEGAL STANDARD

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). 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 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) (emphasis added). As noted by the South Carolina Supreme Court in 2018:

Under Rule 56(c) of the South Carolina Rules of Civil Procedure, summary judgment is proper when “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” The questions before us in this appeal are questions of law. *See S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001) (“It is a question of law for the court whether the language of a contract is ambiguous.”).

*Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018); *see also Beaufort Cty. Sch. Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 709 S.E.2d 85, 90 (2011) (“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”).

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. Generally, a principal rationale of partial summary judgment is to narrow the number of issues presented to the jury. *Rodriguez v. City of New York*, 31 N.Y.3d 312, 323–24, 101 N.E.3d

366, 373 (2018); *see also 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). This is consistent with the broader purpose of summary judgment, as succinctly outlined in 6B Carmody-Wait 2d New York Practice, § 39:2. Nature and Purpose Of Motion for Summary Judgment, where it observes that “[t]he remedy of summary judgment is essentially one in the interests of justice ...[and] a partial summary judgment can serve a practical purpose, as a principal rationale of partial summary judgment is to narrow the number of issues presented to the jury.”

For example, courts routinely dispose of affirmative defenses on summary judgment even though such disposition does not resolve any claim in the case. *see Popov by & through Delgado v. QBE Ins. Corp.*, No. 2:20-CV-00739-RMG, 2021 WL 5043128, at \*4 (D.S.C. Oct. 28, 2021) (noting that “[a] court may dispose of affirmative defenses by summary judgment”); *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”); *Reynolds v. Wyndham Vacation Resorts, Inc.*, No. 4:14-CV-2261-PMD, 2016 WL 362620, at \*7 (D.S.C. Jan. 29, 2016) (granting plaintiff’s motion for summary judgment as to mitigation defense in FLSA lawsuit). Similarly, a court may grant summary judgment as to a theory of shared liability. *see Atanassova v. Gen. Motors LLC*, No. 2:20-CV-01728-RMG, 2021 WL 1946504, at \*1 (D.S.C. Mar. 3, 2021)(granting summary judgment and ordering that “Defendant may not invoke § 15-85-15 to request that the jury apportion fault to non-parties). 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); *Doe v. Spartanburg Cty. Sch. Dist. Three, No. CV 7:15-02764-HMH*, 2015 WL 13763039, at \*3 (D.S.C. Aug. 19, 2015) (“the court grants the District's partial motion for summary judgment and dismisses the request for punitive damages.”)

The case of *Southern Recycling, LLC v. Gibbs Int'l, Inc.*, No. 7:13-CV-3125-BHH, 2016 WL 1258402 (D.S.C. Mar. 31, 2016) is instructive. In *Southern Recycling*, plaintiff contracted with defendant for purchase of scrap copper wire with a delivery term stating: “F.O.B., loaded in bulk into Buyer’s 20’ sea container at Port of Manila, Philippines.” *Id.*, at \*1. When the container arrived from the Philippines in Dallas Texas, they were filled with debris such as cement blocks and slag. *Id.* Plaintiff filed a motion for partial summary judgment regarding a term of the contract. The District Court granted the motion, explaining:

Plaintiffs seek partial summary judgment on a discreet legal issue in this case. Specifically, Plaintiffs request that the Court find as a matter of law that, pursuant to the terms of the purchase agreement, Gibbs was obligated to deliver the copper wire in containers to the Port of Manila, Philippines and, if Gibbs failed to satisfy this obligation, Gibbs bore the risk of loss. ... As set forth fully below, the Court agrees with Plaintiffs' position and grants summary judgment on this narrow legal issue.

The Court would first state some general principles regarding contract interpretation under South Carolina law... [a]n action to construe a contract is an action at law. *McGill v. Moore*, 672 S.E.2d 571, 574 (S.C. 2009) ... The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. *McGill*, 672 S.E.2d at 574... The construction of a clear and unambiguous contract presents a question of law for the court. *S.C. Dep't of Transp. v. M&T Enters. of Mt. Pleasant, LLC*, 667 S.E.2d 7, 13 (S.C. Ct. App. 2008); see also *Pruitt [v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n.]*, 540 S.E.2d 843, 845 (S.C. 2001)]. Courts must enforce, not write, contracts, and their language must be given its plain, ordinary and popular meaning. *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 762 S.E.2d 705, 709-10 (S.C. 2014).

*Id.* at \*2. Defendant argued that other language in the purchase agreement that required buyer’s representative to be at the pre-port delivery loading of the container and sign off on the loading at that time could support an interpretation that the “delivery” occurred before the containers were placed in the hands of the shipping carrier at the port. *Id.*, at \*5. In dismissing defendant’s effort to re-write the term to meet the needs of its argument, and in granting the motion, the District Court found, “as a matter of law, that pursuant to the terms of the purchase contract, Gibbs was obligated to deliver the copper wire in containers to the Port of Manila, Philippines and, if Gibbs failed to satisfy this obligation, Gibbs bore the risk of loss.” *Id.* at \*11.

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.”) (emphasis added); *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); *Seventeen S., LLC v. D.R. Horton, Inc.*, No. CV 4:13-03119-BHH, 2016 WL 2610075, at \*3 (D.S.C. May 6, 2016) (holding that “[i]f the court finds the provisions to be unambiguous, it should resolve the matter on summary judgment.”); *Cent. Louisiana Elect. Co. v. Dolet Hills Mining Venture*, 116 F. Supp. 2d 710, 720 (W.D. La. 1999) (Finding “Section 24.2 of the LMA is unambiguous” and holding that “motion for partial summary judgment relating to the interpretation of Section 24.2 is GRANTED.”).

Because the relief sought in this Motion for Partial Summary Judgment is compelled by the Contract and the plain reading of Defendant’s 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.

### **LAW AND ARGUMENT**

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. Defendants have admitted the Contract was executed and “speaks for itself;” the contract and the obligations imposed on Composite thereof are not in dispute. [Answer, Para. 3]. Composite also admits it stopped making sales commission payments; therefore, Defendant admits it has not met its contractual obligations to make required payments. [Answer, Para. 24] Plaintiffs are entitled to summary judgment; especially when Defendant’s discovery responses consist of little more than objections, narrow conclusions about relevance, and claims that no other information exists on these points.

On June 28, 2019, Composite responded to Requests for Admission and admitted the following facts, to which it is conclusively bound:

- 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.;*
- 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; and*
- c. *Exhibit A, is a genuine copy of the June 1, 2005 Sales Representative Agreement.*

Composite’s Answers to Poly-Tech’s First Set of Requests Admit are attached hereto as **Exhibit E**.

Composite’s President, Jonathan Bennett, verified Composite’s Responses to Plaintiff’s

First Request for Production of Documents, making the responses appropriate for consideration by the Court on the issue of summary judgment. See, Responses to First Set of Requests for Production experts, attached as **Exhibit F**. The following points from Composite's Responses support the mandatory entry of partial summary judgment on Plaintiffs' entitlement to payments (i.e., Defendant's liability) under the First Cause of Action for Breach of Contract related to commissions owing before the termination of the Contract.

- a. In response to a request for all documents relied on or referred to by Composite in answering Poly-Tech's First Set of Interrogatories, Composite identified only the Contract and therefore should be barred from seeking to interject other documents in an attempt to avoid this motion for partial summary judgment [See Ex. F, Response to RFP #6 & #7 at page 3];
- b. In response to a request to provide documents showing payments of commissions for Combat Tourniquet sales other than Plaintiffs from 2004 forward, Composite responded it had no responsive documents, thereby confirming a windfall to Composite in withholding payments to Plaintiffs. [See Ex. F, Response to RFP #15 at page 6]; and
- c. In response a request all documents, etc., "related to Poly-Tech's rights and obligations under the Sales Representative Agreement" (i.e., the Contract), Composite stated that "it is the Sales Representative Agreement [i.e., the Contract] that sets forth Poly-Tech's rights and obligations." [See Ex. F, Response to RFP #24 & #34 at page 10 & 14-15] and therefore Composite should be barred from seeking to interject other documents in an attempt to avoid this motion for partial summary judgment.

Finally, on July 28, 2019, Composite answered Poly-Tech's First Set of Interrogatories [See **Exhibit G**, attached hereto]. These answers included the following:

- a. When asked to "[i]dentify 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", Composite answered that the Contract "sets forth 'the nature and operational terms'" [See Ex. G, Interrogatory Answer #10 at page 4]. Therefore, Composite should be barred from attempting to state other facts to try and create a false factual issue to avoid partial summary judgment; and

- b. When asked to “identify the marketing, customer relation, business, and sales responsibilities, and the sources for each, including contract page, section, and language, if applicable, that Composite contends Poly-Tech and/or Cedrone were contractually obligated to fulfill with regard to any special accounts or CAT tourniquets, and state in detail all the factual grounds on which Composite contends that Poly-Tech and/or Cedrone failed to fulfill each responsibility”, Composite simply referred to “Section II and Annex C of the 2005 Sales Representative Agreement” (i.e. the Contract). [See Ex. G, Interrogatory Answer #19 at page 7].

Therefore, Composite should be barred from attempting to rely on any other source or factual ground to try and avoid the partial summary judgment requested in this motion.

As made clear above, neither party contends the Contract provisions in Annex C related to Plaintiffs’ rights are ambiguous. As a clear and unambiguous contract, its construction is “a matter of law” for the Court. *Watts v. Monarch Builders Inc.*, 272 S.C. 517, 252 S.E.2d 889 (1979). Over time, this principle has become even better defined in South Carolina. For example, “[w]hen 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.”).

In this case and for the purposes of the Motion for Partial Summary Judgment, the relevant Contract provision simply provides for “A Commission rate of \$1.75 per tourniquet sold.” In addition, this Commission was to continue “for as long as the project continues” even if Cedrone passes away before Composite ends the project. The admitted evidence before the Court, by way of Composite’s pleadings and discovery responses, clearly establishes that the

project (i.e., sale of tourniquets by Composite) continued up to and beyond the termination of the Contract on August 31, 2018. Hence, Plaintiffs are entitled to entry of partial summary judgment finding that Composite is liable to Plaintiffs for payment of the \$1.75 Commission on each tourniquet sold by Composite.

**CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order granting their Motion for Partial Summary Judgment and such other and further relief as this Court deems just and proper. Specifically, the Court should enter an order finding that:

As a matter of law, pursuant to the terms of the Contract, Composite was and is obligated to pay Plaintiffs “\$1.75 per [combat] tourniquet sold,” or which is sold in the future, by Composite Resources, including any affiliated companies, and 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, or which it does purchase after the date of this Order, for the manufacturing of combat tourniquets.<sup>3</sup>

This the 18th day of March 2022.

Respectfully submitted,

/s/ Keith D. Munson  
Keith D. Munson, Esq. (SC # 13400)  
RIMÓN LAW  
220 North Main Street, Suite 500  
Greenville, SC 29601  
Telephone: (864) 249-7111  
keith.munson@rimonlaw.com

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

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<sup>3</sup> In *Southern Recycling, supra*, (D.S.C. Mar. 31, 2016), District Judge Hendricks, entered a summary judgment order in similar term. Specifically, “[t]hus, the Court finds, as a matter of law, that pursuant to the terms of the purchase contract, [Defendant] was obligated to deliver the copper wire in containers to the Port of Manila, Philippines and, if [Defendant] failed to satisfy this obligation, [Defendant] bore the risk of loss.”

EXHIBIT A

# EXHIBIT “A”

## Sales Representative Agreement

Representative: Poly-Tech Industrial

COMPOSITERESOURCES

01 June 2005

An Agreement, effective June 1<sup>st</sup>, 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

COMPOSITERESOURCES

01 June 2005

**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

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Poly-Tech Industrial

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01 June 2005

COMPOSITE RESOURCES

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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

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COMPOSITE RESOURCES

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

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01 June 2005

COMPOSITE RESOURCES

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

01 June 2005

# COMPOSITE RESOURCES

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.

ROA 536  
18 LAKEHORE PARKWAY  
ROCK HILL, SC 29730

803 366-9700  
803 366-9710

Poly-Tech Industrial

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01 June 2005

COMPOSITE RESOURCES

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ELECTRONICALLY FILED - 2022 Mar 18 5:37 PM - YORK - COMMON PLEAS - CASE#2019CP4600051

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 537

Poly-Tech Industrial

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01 June 2005

COMPOSITE RESOURCES

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**ANNEX A**

**TERRITORY**

The Territory covered by this Agreement is described as follows:

- A. The entire states of: USA

ROA 538  
48 LAKESHORE PARKWAY  
ROCK HILL, SC 29730

803 366-9700  
803 366-9710

Poly-Tech Industrial

Page 9 of 11

01 June 2005

COMPOSITERESOURCES

**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

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01 June 2005

COMPOSITE RESOURCES

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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)

Poly-Tech Industrial

Page 11 of 11

01 June 2005

COMPOSITERESOURCES

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.



June 26, 2018

VIA CERTIFIED MAIL

Daniel P. Cedrone, President  
Poly-Tech Industrial, Inc.  
13728 Statesville Road  
Huntersville, North Carolina 28078

Dear Dan,

Our companies have enjoyed mutual prosperity over the past two decades.

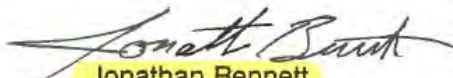
In the early years, your sales expertise complemented Composite Resources' manufacturing abilities and both of our companies grew as a result.

With each passing year, our companies have matured and mastered new capabilities in their respective businesses. Poly-Tech has grown and developed in-house manufacturing capabilities while Composite Resources has created internal marketing and sales departments.

As companies grow and transform, their needs change. While we are appreciative of the early synergy between Poly-Tech and Composite Resources, the time has come to sunset and conclude the contractual relationship between our companies. Accordingly, I am providing you with written notice of termination of the June 1, 2005 Sales Representative Agreement between Composite Resources and Poly-Tech.

On August 31, 2018, Composite Resources will conclude payments to Poly-Tech Industrial, and Poly-Tech will thereafter no longer be its Sales Representative. An accounting of any amounts due Poly-Tech will be provided at that time. I anticipate you will have no problem returning any Composite Resources records, products, or other property Poly-Tech may have.

We wish you and Poly-Tech the best and trust the past two decades of mutual success will propel both of our companies to further heights.

  
Jonathan Bennett  
President

SOLUTIONS DRIVEN ENGINEERING + MANUFACTURING

485 Lakeshore Parkway  
Rock Hill, SC 29730  
P | 803.366.9700  
F | 803.366.9710  
COMPOSITE RESOURCES

CRI-PT 012794

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STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF YORK

DANIEL P. CEDRONE AND

POLY-TECH INDUSTRIAL, INC.

Plaintiffs,

vs.

CASE NO. 2019-CP-46-00051

COMPOSITE RESOURCES, INC.

Defendant.

DEPOSITION OF: LISA BENNETT

DATE: January 26, 2021

TIME: 12:08 p.m.

LOCATION: Womble Bond Dickinson  
301 South College Street  
Charlotte, NC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: SOLANGE RUIZ-URIBE, Court Reporter  
Via VTC

\_\_\_\_\_

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1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR THE PLAINTIFFS

3 DANIEL P. CEDRONE AND POLY-TECH INDUSTRIAL,  
4 INC.:

5 WOMBLE BOND DICKINSON, LLP

6 BY: KEITH D. MUNSON

7 VIA VIDEOTELECONFERENCE

8 550 South Main Street, Suite 400

9 Greenville, SC 29601

10 (864) 255-5412

11 Keith.Munson@wbd-us.com

12 AND

13 WOMBLE BOND DICKINSON, LLP

14 BY: MICHAEL MONTECALVO

15 VIA VIDEOTELECONFERENCE

16 One W 4th Street

17 Winston-Salem, NC

18 (336) 721-3770

19 Michael.Montecalvo@wbd-us.com

20 ATTORNEYS FOR THE DEFENDANT

21 COMPOSITE RESOURCES, INC.:

22 BURR & FORMAN, LLP

23 BY: PAUL D. HARRILL

24 VIA VIDEOTELECONFERENCE

25 1221 Main Street, Suite 1800

Columbia, SC 29201

(803) 799-9800

pharrill@burr.com

AND

BURR & FORMAN, LLP

BY: WILLIAM Y. KLETT, III

VIA VIDEOTELECONFERENCE

1221 Main Street, Suite 1800

Columbia, SC 29201

(803) 799-9800

wklett@burr.com

(appearances continued)

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1 a forever thing?

2 A. I don't know the answer to that.

3 Q. You never heard him refer to it that way?

4 A. No.

5 Q. How did you -- did you refer to it as a --  
6 did you consider it a forever thing? Let me ask  
7 that again.

8 Did you consider it a forever thing?

9 A. I considered it to be as long as the  
10 tourniquets were in production.

11 Q. Okay. As long as Composite Resources is  
12 making tourniquets Poly-Tech would get the  
13 commission?

14 A. Yes.

15 Q. And negotiating and finalizing the 2005  
16 agreement was that your intent?

17 A. Yes.

18 Q. And was that Composite's intent?

19 MR. HARRILL: Object to form.

20 THE WITNESS: I believe it was Composite's  
21 intent.

22 BY MR. MUNSON:

23 Q. Okay. And you were the operation director  
24 at the time?

25 A. Yes.

1 Q. And you had -- did you have authority on  
2 behalf of Composite to negotiate that agreement?

3 A. Yes.

4 Q. Did -- before executing the agreement did  
5 Mr. Bennett ever suggest a different interpretation?

6 A. No.

7 Q. I want to refer back to Exhibit No. 20,  
8 that contract manufacturing and master distribution  
9 agreement. Under this agreement there was no limit  
10 in time to -- to the length of time that Composite  
11 could manufacture Poly-Tech goods and sell them,  
12 right?

13 MR. HARRILL: Object to form.

14 THE WITNESS: Correct.

15 BY MR. MUNSON:

16 Q. It's essentially a perpetual agreement, to  
17 stop it you'd have to modify the agreement?

18 A. Yes.

19 Q. And Mr. Cedrone or Poly-Tech would get the  
20 10 percent commission on any of those sales, right?

21 A. Correct.

22 Q. And under this agreement there is no way  
23 for Composite to sell Poly-Tech's products and not  
24 pay Poly-Tech the commission, right?

25 A. Correct.

**COMPOSITE RESOURCES, INC.  
WRITTEN CONSENT TO INFORMAL ACTION  
OF THE SOLE DIRECTOR**

The undersigned, being the sole Director of Composite Resources, Inc., a South Carolina corporation, (hereinafter referred to as the "Corporation") pursuant to applicable sections of the South Carolina Business Corporation Act of 1988, as amended, (the "Act") and the applicable provisions of the Corporation's bylaws, does hereby waive any and all notices and other requirements for the holding of a meeting or meetings of the Director of the Corporation and does hereby take the following actions and adopts the following preambles and resolutions by signing his written consent hereto:

1. Election of Officers.

**WHEREAS**, the Corporation requires Officers to manage its affairs.

**RESOLVED**, that the following persons be, and they hereby are, elected to the offices set forth opposite their respective names below, each to serve, subject to the provisions of the Bylaws of the Corporation until the next annual meeting of the Director of the Corporation, or until their respective successors are duly elected and qualified:

Jonathan Bennett	President/Treasurer
Lisa Bennett	Vice President/Secretary

2. Ratification of Actions.

**WHEREAS**, the Officers of the Corporation have taken various actions and entered into various agreements on behalf of the Corporation without first obtaining prior formal approval from the Director; and

**WHEREAS**, the Director believes such actions and agreements to be in the best interest of the Corporation and desires to formally evidence his approval of the same.

**RESOLVED**, that the Director hereby ratifies, approves and adopts said actions and agreements taken and executed on behalf of the Corporation by its Officers.

This action to be effective as of the 15<sup>th</sup> day of March, 2011.

**DIRECTOR:**

  
Jonathan Bennett (SEAL)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	C.A. NO. 2019-CP-46-00051
	)	
Daniel P. Cedrone and Poly-Tech	)	
Industrial, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Composite Resources, Inc.,	)	
	)	
Defendant.	)	
_____	)	

**COMPOSITE RESOURCES, INC.’S ANSWERS TO POLY-TECH INDUSTRIAL, INC.’S FIRST SET OF REQUESTS TO ADMIT OF DOCUMENTS (1-12) AND REQUESTS TO ADMIT GENUINNESS OF DOCUMENTS (1-12)**

Pursuant to Rules 26 and 36 of the South Carolina Rules of Civil Procedure, Defendant Composite Resources, Inc. (CRI) responds to Plaintiffs’ First Set of Request to Admit (1-12) as follows:

**REQUEST TO ADMIT NO. 1**

Admit that 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.

**ANSWER:** Admitted.

**REQUEST TO ADMIT NO. 2**

Admit that the opportunity to participate in the sale or distribution of Combat Application

Tourniquets based on the design of Mark Esposito was first presented to Composite Resources or its representatives by Dan Cedrone of Poly-Tech.

ANSWER: Denied.

**REQUEST TO ADMIT NO. 3**

Admit that as of December 8, 2015, Jonathan Bennett, on behalf of Composite, as its President, informed Dan Cedrone of Poly-Tech that: (1) North American Rescue ("NAR") was Composite's number one distributor of both military and civilian tourniquet sales; (2) working with competing distributors would "challenge our relationship with NAR"; (3) Bennett did not want Cedrone participating in CAT cost discussions with NAR; and (4) "it is wise for you to remain in the background" with regard to discussions with NAR about CAT pricing.

ANSWER: Denied.

**REQUEST TO ADMIT NO. 4**

Admit that the "Rep accounts" listed under "COMMISSIONS" subsections A and B of ANNEX C of the June 1, 2005 Sales Representative Agreement are not "special accounts" as defined in subsection C of ANNEX C.

ANSWER: Admitted.

**REQUEST TO ADMIT NO. 5**

Admit that 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.

ANSWER: Admitted.

**REQUEST TO ADMIT NO. 6**

Admit that all payments made to Plaintiffs before January 2014 with regard to Combat Application Tourniquets were made based on the "special accounts" provisions of subsections C of ANNEX C of the June 1, 2005 Sales Representative Agreement.

**ANSWER:** Admitted.

**REQUEST TO ADMIT NO. 7:**

Admit that all payments made to Plaintiffs after January 2014 with regard to Combat Application Tourniquets were made based on the "special accounts" provisions of subsections C of ANNEX C of the June 1, 2005 Sales Representative Agreement.

**ANSWER:** Denied.

**REQUEST TO ADMIT NO. 8:**

Admit that all payments made to Plaintiffs after January 2014 with regard to Combat Application Tourniquets were not based on any commission rate provision other than the "special accounts" provisions of subsections C of ANNEX C of the June 1, 2005 Sales Representative Agreement.

**ANSWER:** Denied.

**REQUEST TO ADMIT NO. 9:**

Admit that Composite Resources, through its president Jonathan Bennett, acknowledge in 2015 that the CAT payments to Poly-Tech under subsection C of ANNEX C of the June 1, 2005 Sales Representative Agreement were a "forever thing".

**ANSWER:** Denied.

**REQUEST TO ADMIT NO. 10:**

Admit that Composite Resources' sales of Combat Application Tourniquets exceeded 15 million units before the end of 2015.

**ANSWER:** Defendant CRI objects to this Request on the basis that it seeks disclosure of proprietary business information. Upon entry of an appropriate Protective Order, CRI will provide a substantive response.

**REQUEST TO ADMIT NO. 11:**

Admit that North American Rescue did not pressure Composite Resources to reduce the pricing on Combat Application Tourniquets before Composite Resources reduced Poly-Tech's per unit remuneration rate in 2017.

**ANSWER:** Denied.

**REQUEST TO ADMIT NO. 12:**

Admit that Composite Resources has received payment on completed and shipped sales in excess of 1,800,000 units of Combat Application Tourniquets based on the Mark Esposito design from September 1, 2018 through March 30, 2019.

**ANSWER:** Defendant CRI objects to this Request on the basis that it seeks disclosure of proprietary business information. Upon entry of an appropriate Protective Order, CRI will provide a substantive response.

**REQUEST TO ADMIT NO. 13:**

With regard to alleged unearned payments to Poly-Tech after November 6, 2014, admit that Composite Resource never sought to recover any reimbursement or to exact any offset related to such payments with reference to Section IV of the June 1, 2005 Sales Representative

Agreement.

ANSWER: Denied.

### REQUEST TO ADMIT GENUINENESS OF DOCUMENTS

Admit that the following identified documents, attached hereto as exhibits, are genuine:

1. Ex. A: June 1, 2005 Sales Representative Agreement.

Defendant CRI admits that Exhibit A is a “genuine” copy of the June 1, 2005 Sales Agreement.

2. Ex. B: December 8, 2015 email from Jonathan Bennett in response to the December 3, 2015, email from Dan Cedrone.

Defendant CRI admits that Exhibit B is a “genuine” copy of a December 8, 2015 email.

Such response does not admit that the document is relevant or admissible, or that the contents of the document are true, correct or accurate.

3. Ex. C: January 2, 2019 Affidavit of Robert Castellani.

Defendant CRI admits that Exhibit C is a “genuine” copy of a January 2, 2019 Affidavit.

Such response does not admit that the document is relevant or admissible, or that the contents of the document are true, correct or accurate.

4. Ex. D: January 2, 2019 Letter from Bernie Ellis, Esq. RE: Subpoena to NAR.

Defendant CRI admits that Exhibit D is a “genuine” copy of a January 2, 2019 Letter. Such response does not admit that the document is relevant or admissible, or that the contents of the document are true, correct or accurate.

5. Ex. E: 2005 Assignment of intellectual property from Mark Esposito to Phil Durango LLC.

Defendant CRI admits that Exhibit E contains a “genuine” copy of an assignment of intellectual property from Mark Esposito to Phil Durango, LLC. Such response does not admit that the document is relevant or admissible, or that the contents of the document are true, correct or accurate.

6. Ex. F: Esposito Information Disclosure Statement regarding tourniquet invention.

Defendant CRI denies that Exhibit F is an Information Disclosure Statement.

7. Ex. G: Esposito Declaration for Patent Application under Rule 63 – 2004.

Defendant CRI admits that Exhibit G is a “genuine” copy of a Declaration for Patent Application under Rule 63 (37 CFR 1.63). Such response does not admit that the document is relevant or admissible, or that the contents of the document are true, correct or accurate

8. Ex. H: Original Patent Application Summary of Invention for Esposito Tourniquet and Method of Use related to Provisional Application 60-521630 2004.

Defendant CRI denies that Exhibit F is an “Original Patent Application Summary of Invention for Esposito Tourniquet and Method of Use related to Provisional Application 60-521630 2004.”

9. Ex. I: Approved US Patent No 7842067 to Esposito Filed in June 2005.

Defendant CRI admits that Exhibit I is a “genuine” copy of U.S. Patent No. 7,842,067 issued November 30,2010. Such response does not admit that the document is relevant or admissible.

10. Ex. J: October 2018 Declaration of Matt Cupelli in USDC NEV Case with Exhibits.

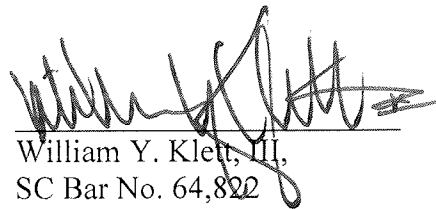
Defendant CRI admits that Exhibit J contains a “genuine” copy of October 2018 Declaration of Matt Cupelli. Such response does not admit that the document is relevant or admissible.

11. Ex. K: CAT Gen. 6 tourniquet photo.

Defendant CRI admits that Exhibit K is a “genuine” copy of a CAT Gen. 6 tourniquet photo. Such response does not admit that the document is relevant or admissible.

12. Ex. L: CAT Gen. 7 tourniquet photo.

Defendant CRI admits that Exhibit L is a “genuine” copy of a CAT Gen. 7 tourniquet photo. Such response does not admit that the document is relevant or admissible.



William Y. Klett, III,  
SC Bar No. 64,822  
Burr & Forman, LLP  
1221 Main Street, Suite 1800  
Columbia, South Carolina 29201  
PHONE: 803.753.3221  
FACSIMILE: 803.933.1470  
[wklett@burr.com](mailto:wklett@burr.com)  
Attorneys for Defendant  
Composite Resources, Inc.

June 28, 2019

CERTIFICATE OF SERVICE

The following people were served electronically and via U.S. Mail this 28<sup>th</sup> day of June, 2019:

Keith D. Munson, Esquire  
Keith.munson@wbd-us.com  
WOMBLE BOND DICKINSON (US) LLP  
550 South Main Street, Suite 400  
Greenville, South Carolina 29601

  
Burr & Forman, LLP

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	C.A. NO. 2019-CP-46-00051
	)	
Daniel P. Cedrone and Poly-Tech	)	
Industrial, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Composite Resources, Inc.,	)	
	)	
Defendant.	)	
_____	)	

**VERIFICATION**

1. My name is Jonathan Bennett.
2. I am the President of Composite Resources, Inc. with the authority to verify Composite Resources Inc.'s Requests for Admission responses.
3. I have reviewed Composite Resources Inc.'s Answers to Plaintiff's First Set of Requests for Admission (1-12) directed to Plaintiff Composite Resources, Inc.
4. The factual information contained in the Answers are true and accurate to the best of my own personal knowledge.



Jonathan Bennett  
Date: June 26, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	C.A. NO. 2019-CP-46-00051
	)	
Daniel P. Cedrone and Poly-Tech Industrial, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Composite Resources, Inc.,	)	
	)	
Defendant.	)	
_____	)	

**DEFENDANT COMPOSITE RESOURCES, INC.’S RESPONSES TO  
POLY-TECH INDUSTRIAL, INC.’S FIRST SET (1-70) OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, the Defendant Composite Resources, Inc. (“Defendant”) hereby submits its Objections and Responses to Plaintiff Poly-Tech Industrial, Inc.’s (“Poly-Tech”) First Requests for Production of Documents and Things as follows:

Defendant Composite Resources, Inc. (“CRI”) expressly objects to Definition 15, as it mischaracterizes the relationship between CRI and Phil Durango, LLC.

**REQUEST FOR PRODUCTION NO. 1:**

Please produce any and all drafts, notes, modifications, draft modifications, correspondence, analysis, interpretations, documents and executed copies related to the June 1, 2005 Sales Representative Agreement between Poly-Tech and Composite Resources, including ANNEX A, B and C, attached to the Complaint ("**Sales Representative Agreement**" or "**Agreement**").

**REQUEST FOR PRODUCTION NO. 4:**

Please produce any and all drafts, notes, modifications, draft modifications, correspondence, analysis, interpretations, documents and executed copies related to any and all agreements between Daniel Cedrone and Composite Resources or Jonathan Bennett.

**RESPONSE:**

See Response to Request No. 4.

**REQUEST FOR PRODUCTION NO. 5:**

Please produce all documents identified in Composite's answers to any and all interrogatories propounded by Poly-Tech in this case.

**RESPONSE:**

CRI does not identify any documents in its answers to Interrogatories.

**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. 7:**

Please produce all documents referred to by Composite in answering any interrogatory propounded by Poly-Tech in this case.

**RESPONSE:**

See Response to Request No. 5.

**REQUEST FOR PRODUCTION NO. 8:**

Please produce all documents related to any statement, oral or written, obtain from any

in compliance with the SC Rules of Civil Procedure and any governing scheduling order.

**REQUEST FOR PRODUCTION NO. 15:**

Please produce all documents showing payment of commissions to persons or entities other than Poly-Tech with regard to sales of Combat Application Tourniquets from January 1, 2004 forward in time.

**RESPONSE:**

CRI objects to this Request to the extent it seeks documents dating back to January 1, 2004. Such documents predate any applicable statute of limitations. Subject to this objection, CRI states that it has no responsive documents.

**REQUEST FOR PRODUCTION NO. 16:**

Please produce a copy of Composite's balance sheet, profit and loss statement, statement of retained earnings, statement of revenues and details of revenues generated from sales of Combat Application Tourniquets for each quarter and year from January 1, 2004 forward in time.

**RESPONSE:**

CRI objects to this Request to the extent it seeks documents dating back to January 1, 2004. Such documents predate any applicable statute of limitations. Further, Plaintiffs are in possession of all relevant, responsive information provided during the pendency of the 2005 Sales Representative Agreement between Poly-Tech and Composite Resources. Subject to these objections and upon entry of an appropriate Protective Order, CRI will provide responsive documents for the period September 1, 2018 to present.

**REQUEST FOR PRODUCTION NO. 17:**

Please produce Composite's financial and accounting working papers and general ledger

reconciliations, special account handling, raw material orders, raw material issues and/or communications, 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:**

For purposes of this Request, CRI assumes that the “Sales Representative Agreement” refers to the 2005 Sales Representative Agreement. CRI responds that it is this 2005 Sales Representative Agreement that sets forth Poly-Tech's rights and obligations. CRI objects to this Request on this basis that use of the phrase “related to” these rights and obligations is vague and ambiguous.

**REQUEST FOR PRODUCTION NO. 25:**

Please produce any and all correspondence, notes, documents, letters, emails, proposals, memoranda, instructions, complaints, invoices, orders, commission payments, commission reconciliations, special account handling, raw material orders, raw material issues and/or communications, including all attachments to each or documents referenced within each between Poly-Tech/Cedrone and Composite Resources related to Aplix materials used in the production of tourniquets sold by Composite Resources.

**RESPONSE:**

CRI objects to this request on the basis that it is overly broad and unduly burdensome, and contains no temporal limits. Taken on its face, this Request would encompass every single invoice, purchase order, and communication of any kind related to Aplix materials. Further, because CRI purchases Aplix materials from and through Poly-Tech, Plaintiffs is already in possession of all responsive documents.

CRI objects to this Request to the extent it is not limited in time. Potentially responsive documents predate any applicable statute of limitations. Further, Plaintiffs are in possession of all relevant, responsive information between Poly-Tech/Cedrone and Bennett. Subject to these objections and upon entry of an appropriate Protective Order, CRI will provide responsive documents for the period September 1, 2018 to present.

**REQUEST FOR PRODUCTION NO. 33:**

Please produce any and all correspondence, notes, documents, letters, emails, proposals, memoranda, instructions, complaints, invoices, orders, commission payments, commission reconciliations, special account handling, raw material orders, raw material issues and/or communications, including all attachments to each or documents referenced within each between Poly-Tech/Cedrone and Jonathan Bennett related to GraviGate Products.

**RESPONSE:**

See Response to Request No. 23.

**REQUEST FOR PRODUCTION NO. 34:**

Please produce any and all correspondence, notes, documents, letters, emails, proposals, memoranda, instructions, complaints, invoices, orders, commission payments, commission reconciliations, special account handling, raw material orders, raw material issues and/or communications, 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:**

For purposes of this Request, CRI assumes that the “Sales Representative Agreement” refers to the 2005 Sales Representative Agreement. CRI responds that it is this 2005 Sales

Representative Agreement that sets forth Poly-Tech's rights and obligations. CRI objects to this Request on this basis that use of the phrase “related to” these rights and obligations is vague and ambiguous.

**REQUEST FOR PRODUCTION NO. 35:**

Please produce any and all correspondence, notes, documents, letters, emails, proposals, memoranda, instructions, complaints, invoices, orders, commission payments, commission reconciliations, special account handling, raw material orders, raw material issues and/or communications, including all attachments to each or documents referenced within each between Poly-Tech/Cedrone and Jonathan Bennett related to Aplix materials used in the production of tourniquets sold by Composite Resources.

**RESPONSE:**

CRI objects to this request on the basis that it is overly broad and unduly burdensome, and contains no temporal limits. Further, because CRI purchase Aplix materials from and through Poly-Tech, Plaintiffs is already in possession of all responsive documents. See response to Request No. 25.

**REQUEST FOR PRODUCTION NO. 36:**

Please produce any and all correspondence, notes, documents, letters, emails, proposals, memoranda, instructions, complaints, invoices, orders, commission payments, commission reconciliations, special account handling, raw material orders, raw material issues and/or communications, including all attachments to each or documents referenced within each between Poly-Tech/Cedrone and Jonathan Bennett related to vendors of material or services in the production of combat application tourniquets sold by Composite Resources.

**RESPONSE:**

RESPONSE:

CRI objects to this Request on the basis that it seeks information not relevant to the instant dispute.

Respectfully submitted,



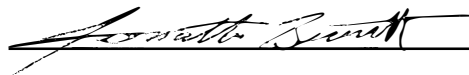
William Y. Klett, III  
wklett@burr.com  
BURR & FORMAN LLP  
P.O. BOX 11390  
Columbia, South Carolina 29211  
Tel: (803) 799-9800

Dated: June 28, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	C.A. NO. 2019-CP-46-00051
	)	
Daniel P. Cedrone and Poly-Tech	)	
Industrial, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Composite Resources, Inc.,	)	
	)	
Defendant.	)	
_____	)	

**VERIFICATION**

1. My name is Jonathan Bennett.
2. I am the President of Composite Resources, Inc. with the authority to verify Composite Resources Inc.'s Requests for Production responses.
3. I have reviewed Composite Resources Inc.'s Answers to Plaintiff's First Set of Requests for Production (1-70) directed to Plaintiff Composite Resources, Inc.
4. The factual information contained in the Answers are true and accurate to the best of my own personal knowledge.



Jonathan Bennett  
Dated: June 26, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	C.A. NO. 2019-CP-46-00051
	)	
Daniel P. Cedrone and Poly-Tech	)	
Industrial, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Composite Resources, Inc.,	)	
	)	
Defendant.	)	
_____	)	

**COMPOSITE RESOURCES, INC.’S ANSWERS TO POLY-TECH INDUSTRIAL, INC.’S FIRST SET OF INTERROGATORIES (1-22)**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, the Defendant responds to Plaintiff’s First Set of Interrogatories as follows:

Defendant Composite Resources, Inc. (“CRI”) expressly objects to Definition 15, as it mischaracterizes the relationship between CRI and Phil Durango, LLC.

**INTERROGATORIES**

**STANDARD INTERROGATORY NO. 1:**

Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

**ANSWER:** Daniel P. Cedrone – no statement  
Jonathan Bennett – no statement  
Derek Thompson- no statement

the nature of the benefits, and the monetary value in terms of sales related to the opportunity, product, or business relationship.

**ANSWER:** CRI objects to this interrogatory on the basis that it seeks information not relevant to the instant dispute.

**INTERROGATORY NO. 9:**

Describe in detail the evolution of Composite's gross revenues from the year 2000 forward in time with regard to opportunities, products, and customers that Cedrone had a role in identifying, developing and/or expanding, including describing Cedrone's role and its impact.

**ANSWER:** CRI objects to this interrogatory on the basis that it seeks information not relevant to the instant dispute.

**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.

**INTERROGATORY NO. 11:**

Identify the individuals who participated in the initial development and any subsequent modification of the manufacturing and/or assembly process for the CAT tourniquets distributed by

500, Aplix Hook 800, Aplix Loop 800, Aplix Hook & Loop products, other Hook and Loop or Mix products.

**ANSWER:** CRI objects to this interrogatory on the basis that it seeks information that is not relevant to the issues in this dispute. Further, CRI objects to this interrogatory on the basis that it seeks information beyond all applicable statutes of limitation.

**INTERROGATORY NO. 18:**

Identify by name and state the operative terms of each and every other Sales Representative Agreement to which Composite, C-A-T Resources, LLC or Phil Durango L.L.C. is a party and which contains provisions for special accounts that are exceptions to the general commission rates stated in those agreements with regard to non-special accounts.

**ANSWER:** CRI objects to this interrogatory on the basis that it seeks information that is not relevant to the issues in this dispute. CRI further objects to this interrogatory on the basis that Phil Durango, LLC is not a party to this action, and is a separate, unrelated company to CRI or C-A-T Resources, LLC.

**INTERROGATORY NO. 19:**

Identify the marketing, customer relation, business, and sales responsibilities, and the sources for each, including contract page, section, and language, if applicable, that Composite contends Poly-Tech and/or Cedrone were contractually obligated to fulfill with regard to any special accounts or CAT tourniquets, and state in detail all the factual grounds on which Composite contends that Poly-Tech and/or Cedrone failed to fulfill each responsibility.

**ANSWER:** CRI contends that Plaintiff Poly-Tech failed to provide a reliable source of raw materials from Aplix, and did not keep a sufficient quantity of such materials in stock, as required under Section II and Annex C of the 2005 Sales Representative Agreement.

No. 8 – Payments made to Poly-Tech after November, 2014 were erroneous.

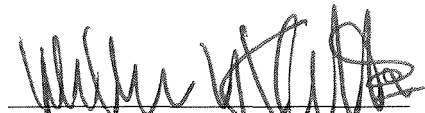
No. 9 – There are no facts to support admission of this request.

No. 11 – As CRI’s distributor, North American Rescue is always seeking to reduce the pricing on Combat Application Tourniquets in an effort to increase its sales.

No. 13 – CRI has filed counterclaims in the instant action in an effort to recover erroneous commission payments.

Document 6 – This is not an information disclosure statement.

Document 8 – Exhibit H is not the document described.



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Attorneys for Defendant  
Composite Resources, Inc.

June 28, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	C.A. NO. 2019-CP-46-00051
	)	
Daniel P. Cedrone and Poly-Tech	)	
Industrial, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Composite Resources, Inc.,	)	
	)	
Defendant.	)	
_____	)	

**VERIFICATION**

1. My name is Jonathan Bennett.
2. I am the President of Composite Resources, Inc. with the authority to verify Composite Resources Inc.'s Interrogatory responses.
3. I have reviewed Composite Resources Inc.'s Answers to Plaintiff's First Set of Interrogatories (1-22) directed to Plaintiff Composite Resources, Inc.
4. The factual information contained in the Answers are true and accurate to the best of my own personal knowledge.



Jonathan Bennett  
Dated: June 26, 2019

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
 COUNTY OF YORK ) SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

Composite Resources, Inc.,

Defendant.

CIVIL ACTION NO: 2019-CP-46-00051

DEFENDANT'S MEMORANDUM IN  
 OPPOSITION TO PLAINTIFFS' MOTION  
 FOR PARTIAL SUMMARY JUDGMENT  
 AS TO ALLEGED "UNAMBIGUOUS"  
 TERMS

The Defendant Composite Resources, Inc. ("CRI") respectfully submits this memorandum in opposition to Plaintiffs Daniel Cedrone and Poly-Tech Industrial's Motion for Partial Summary Judgment as to Unambiguous Material Terms filed on March 18, 2022 (the "Motion").

**INTRODUCTION**

Plaintiffs Daniel Cedrone and Poly-Tech Industrial, Inc. ("Plaintiffs") filed this breach of contract action<sup>1</sup> and attached to the Complaint the written Sales Representative Agreement between CRI and Poly-Tech dated June 1, 2005. CRI's Amended Answer and Counterclaims asserts defenses and counterclaims against Plaintiffs arising from the same Sales Representative Agreement. Plaintiffs' Motion asks this Court to construe only a few "material terms" in the Agreement that Plaintiffs allege are "unambiguous." Plaintiffs do not ask the court to construe the Agreement as a whole or to construe material terms that expressly contradict Plaintiffs' proposed construction of the alleged "unambiguous" terms.

<sup>1</sup> Plaintiffs' assert as their first cause of action "Breach of Contract as to Sales Commissions," claiming that CRI did not pay certain commissions that Plaintiffs claim are due under the operative Agreement. In a "shotgun" approach to pleading, Plaintiffs also assert an additional seven causes of action ranging from breach of contract accompanied by a fraudulent act, alleged statutory violations, conversion, unjust enrichment, accounting and declaratory judgment.

Plaintiffs' Motion should be denied for the following reasons:

1. In construing the Agreement the Court must consider the Agreement as a whole by looking to the "four corners" of the document, and Plaintiffs cannot pick and choose a few terms that they want the Court to (mis)construe in isolation.
2. The Agreement contains other provisions, including a termination clause, that are contrary to the Plaintiffs' unreasonable construction that the Agreement is perpetual in nature and can never be terminated.
3. Plaintiffs' reliance on extrinsic evidence in their effort to establish that certain terms of the Agreement are "unambiguous" demonstrates that those terms are not clear and unambiguous.
4. If the Agreement was not terminable as a matter of law pursuant to the Termination provision (Article IX of the Agreement), then the Agreement is, at best, ambiguous as to the terms for which Plaintiffs seek construction.

#### **SUMMARY JUDGMENT STANDARD**

It is well established that Summary Judgment is appropriate only when it is clear that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. SCRCivP 56(c). All inferences from the facts in the record must be viewed in the light most favorable to the party opposing the summary judgment motion. *Wright v. School District of Fairfield*, 452 S.E.2d 352, 354 (S.C. Ct. App. 1994). Summary Judgment can only be granted in those cases where plain, palpable and indisputable facts exist on which reasonable minds cannot differ. *Williams v. Chesterfield Lumber Company*, 230 S.E.2d 447, 448(1976).

When interpreting a contract, a court must ascertain and give effect to the intention of the parties. *Wallace v. Day*, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct. App. 2010). To determine the

intention of the parties, the court “must first look at the language of the contract . . .” *Id.* (quoting *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988)).

It is a question of law for the court whether the language of a contract is ambiguous. Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then a question of fact. On the other hand, the construction of a clear and unambiguous [contract] is a question of law for the court.

*S.C. Dep't of Natural Res. v. Town of McClellanville*, 354 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001).

If the Court determines that the Agreement is not ambiguous, only then may the Court interpret the contract as a matter of law according to the four corners of the Agreement. *See Wallace v. Day*, 390 S.C. 69, 75, 700 S.E.2d 446, 450 (Ct. App. 2010).

Summary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the instrument. . . . The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed. . . . Construction of an ambiguous contract is a question of fact to be decided by the trier of fact.

*Id.*, (internal citations omitted).

### **UNDISPUTED FACTS**

The sole basis of Plaintiffs' complaint is their allegation that CRI owes Plaintiffs commissions relating to sales of CRI's Combat Application Tourniquet® (the “CAT®” or “CAT® Tourniquet”). The following are undisputed facts in this case:

1. CRI and Poly-Tech entered into a Sales Representative Agreement dated June 1, 2005 (the “Agreement”), whereby Poly-Tech was to become a *nonexclusive* sales “Representative” of CRI for the sale of CRI products. CRI's products included the CAT® Tourniquet, which CRI manufactured for its customer Phil Durango, LLC. Phil Durango, LLC

held the patents for the CAT® Tourniquet in 2005 when CRI and Poly-Tech entered into the Agreement. Poly-Tech would receive commissions based upon sales as set forth in the Agreement. The Agreement is attached to the Complaint filed herein and is attached to Plaintiffs’ Motion as Exhibit A.

2. The Agreement between the CRI and Poly-Tech provides in pertinent parts as follows:

**I: Appointment of Nonexclusive Sales Representative.**

Representative [Poly-Tech] is hereby appointed by the Company [CRI] as a nonexclusive sales representative within the geographic area defined in Annex A (hereinafter call “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.

\*\*\*\*\*

**IX: Termination.**

At any time either party may terminate this agreement without cause by giving 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 party 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

\*\*\*\*\*

Any termination notice may be served either personally or by certified mail. Upon termination of this Agreement the Company [CRI] 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. . . .

\*\*\*\*\*

**ANNEX A**

**TERRITORY**

The Territory covered by this Agreement is described as follows:

- A. The entire states of: USA

**ANNEX B****PRODUCTS**

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

**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.
- B. Rep accounts are commissioned accounts and are compliant with this agreement. These accounts . . . are listed below. . . .

Ametek Aerospace  
C.E.M.  
CommScope  
DuPont-Vespel  
Gates Rubber Company  
Solectron Technology  
Strongwell  
Timken – excluding spare parts  
Tri\*Star

- 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 and Gravi-T Products sold.

\*\*\*\*\*

2. Phil Durango, L.L.C.

A Commission of \$1.75 per tourniquet sold.

\*\*\*\*\*

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 the project continues.

*See* Agreement, attached to Motion as Exhibit A.

3. In November 2014, CRI purchased the CAT® Tourniquet patents from Phil Durango, LLC and Phil Durango, LLC ceased to be a customer account at CRI. *See* Affidavit of Derek Thompson, para. 5, previously filed in this action and attached hereto as **Exhibit 1**.

4. Despite the fact that the Agreement called for Plaintiff Poly-Tech to be paid commissions on the Phil Durango, LLC “special account” and Phil Durango, LLC was no longer a CRI customer account, CRI erroneously continued paying Poly-Tech from August 2014 to August 2018. *See* Thompson Aff., para. 6.

5. In March 2017, CRI reduced its payments to Poly-Tech by \$.625 per CAT Tourniquet sold. CRI continued to make the erroneous payments to Poly-Tech from March 2017 until August 2018. With each payment to Poly-Tech, CRI included a statement that reflected the calculations for determining the amount of the payment, including the amount paid per CAT Tourniquet sold. Poly-Tech accepted each monthly payment from March 2017 until August 2018 at the reduced price. Poly-Tech never requested an accounting from CRI or questioned CRI about the amount of the monthly payments from March 2017 to August 2018. Poly-Tech made claim to additional payments from March 2017 to August 2018 after CRI notified Poly-Tech that it was terminating the Contract pursuant to Article IX of the Contract. *See* Affidavit of Derek Thompson, paras. 7 – 11.

6. Pursuant to the Agreement, Poly-Tech also agreed that it would not compete with

CRI while acting as sales representative as follows:

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* [CRI], *may result in a conflict of interest* or would otherwise adversely affect the proper discharge of the duties of the Representative [Poly-Tech] hereunder, *including, but not limited to the solicitation or orders for, or representing, or dealing in, any goods competing with any core products handled by the Company* [CRI].

See Agreement, p.1, Section II (*emphasis added*).

7. Cedrone is the founder, sole owner, and President of Poly-Tech. See Cedrone's responses to requests for admission dated May 29, 2020, attached hereto as **Exhibit 2**, Nos. 3-5.

8. Prior to March 7, 2018, Cedrone collaborated with two other gentlemen to develop, invent, improve or design a self-applied combat application tourniquet that was subsequently granted a patent. *Id.*, No. 8.

9. On March 7, 2018, Dr. Carson, William Crossingham Cannon, and Cedrone applied for a United States Patent for a "Tourniquet with Lever Tensioning Mechanism." See United States Patent No. 10,194,917 B1 that is attached hereto as **Exhibit 3**.

10. Cedrone was an inventor and applicant for United States Patent No. 10,194,917 (the "'917 Patent"). See '917 Patent (Exhibit 3).

11. The tourniquet that is the subject of the '917 Patent, the HALO Tourniquet, is a competing product to the CAT® Tourniquet. See Deposition Transcript of Poly-Tech (**Exhibit 4** hereto), p. 171-72.

12. Plaintiffs continued receiving and accepting commissions on sales of the CAT® Tourniquet from CRI until the end of August 2018.

13. CRI terminated the Agreement without cause effective August 31, 2018, by

written notice to Poly-Tech dated June 26, 2018. *See* Complaint, para. 27 and Termination Letter attached to Motion as Exhibit B. This termination was consistent with Section IX of the Agreement.

14. With full knowledge that they had competed with CRI in breach of the Agreement, Poly-Tech and Cedrone filed this suit claiming an entitlement to “perpetual commissions and profits according to [the Agreement] for as long as the [CAT®] Tourniquets are manufactured and/or distributed.” *See, e.g.*, Complaint, para. 48.

15. After learning of the improper competition, CRI amended its pleadings on April 1, 2020, to add a counterclaim for breach of contract due to the competition.

16. The tourniquet co-invented by Cedrone and the subject of the ‘917 Patent is being manufactured and marketed by Poly-Tech as the HALO Tourniquet. *See* Poly-Tech Dep., p. 171-72. *See* halotact.com.

### ARGUMENT

**1. The Court must construe the Agreement as a whole by looking to the “four corners” of the document, and cannot pick and choose a few terms Plaintiffs want the Court to construe in isolation.**

“A contract must be read as a whole document so that one party may not create ambiguity by pointing out a single sentence or clause.” *N. Am. Rescue Prods. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 240-241 (2015) (citing *S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003)). Similarly, Plaintiffs cannot point out “certain material terms” and ask the Court to construe them in a vacuum without reference to the whole document. And yet, that is precisely what Plaintiffs have done in their Motion.

Plaintiffs’ Motion requests the Court recognize that “certain material terms” of the Agreement are “unambiguous.” Plaintiffs’ request the Court to review their selected “certain material terms” without reference to the whole document. That is improper because the Court

must construe the contract as a whole by looking at the “four corners” of the Agreement to determine the intent of the parties. *See Id.*; *Wallace v. Day*, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct. App. 2010).

By simply looking at other provisions of the Agreement the Court can readily determine that Plaintiffs’ proposed construction is unreasonable. For example, as set forth above there is an express termination provision at Section IX of the Agreement that allows either party to terminate the Agreement without cause with 60 days’ notice. Such a termination provision is inconsistent with Plaintiffs’ unreasonable construction that the parties intended to create a “perpetual” commission obligation that could never be terminated.

The Agreement also provides that the commissions due Poly-Tech on sales of the CAT® Tourniquet were only for CRI’s “special account” with its former customer Phil Durango, LLC.<sup>2</sup> That special account terminated in 2014, and CRI could have terminated the commissions at that time, but erroneously continued to pay Poly-Tech until CRI terminated the Agreement in August 2018. These provisions are also inconsistent with Plaintiffs’ strained construction that the Agreement created a perpetual commission that could never be terminated.

Plaintiffs are attempting to improperly assume the role of the Court in declaring “certain material terms” of the Agreement “unambiguous” without referring to the rest of the Agreement. As set forth in *McClellanville*, the court must first determine whether the contract is ambiguous. *Id.* If it is not ambiguous, only then may the court interpret the contract as a matter of law according to the four corners of the contract. *See Wallace v. Day*, 390 S.C. 69, 75, 700 S.E.2d 446, 450 (S.C. Ct. App. 2010). Plaintiffs offer only their own unreasonable interpretation of the certain material terms in the Agreement. In attempting to urge that certain terms are

---

<sup>2</sup> Indeed, this “special account” provision appears *only* in Annex C- an attached schedule setting forth commission *rates* to be used for the Agreement.

unambiguous, Plaintiffs paraphrase those same terms in the “fact” section of the Motion, rather than quoting the actual terms in the Agreement. *See, e.g.*, Motion, pp. 3-4 Plaintiffs must rely on this sleight of hand, because otherwise, Plaintiffs cannot prevail on their partial summary judgment motion.

The actual terms that Plaintiffs are asking the Court to find unambiguous and prematurely enforce as a matter of law make are found in the very last sentence of the Agreement. Those terms, which make little or no sense, state as follows:

“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 the project continues.” *See* Agreement, p. 11.

This section is not clear and unambiguous, and is inconsistent with a number of the other provisions discussed. The “account” to which the section refers is clearly the Phil Durango, LLC customer account with CRI that has been discussed previously. Because the Phil Durango “account” no longer exists, the “commissions for this account” should have also ceased to have been paid. It is unclear what the “regular contract” means. The Sales Representative Agreement is referred to as the “Agreement” throughout the rest of the Agreement. It is equally unclear what the section means when it refers to if the regular contract is discontinued and paid to the “Estate of Daniel P. Cedrone.” These terms seem to be, at best, ambiguous, especially since Plaintiffs’ proposed construction is inconsistent with other provisions in the Agreement.

Further, Plaintiffs arbitrarily assign definition to the undefined term “project” to mean all “sales of tourniquets by Composite.” Plaintiffs’ Motion at 13-14. This position is simply wrong. The plain language of the Agreement expressly ties the “project” to the Phil Durango “special account.” The “project” no longer existed once Phil Durango ceased to be a customer account.

For the reasons set forth above, Plaintiffs' Motion requesting this Court to construe only certain terms of the Agreement, without considering the whole Agreement, must be denied.

**2. The Agreement contains provisions, including an express termination provision, that are contrary to the Plaintiffs' unreasonable construction the Agreement is perpetual in nature and can never be terminated.**

The express termination provision at Section IX of the Agreement allows either party to terminate the Agreement without cause with 60 days' notice. The termination provision provides that CRI will continue to pay commissions only on orders accepted before and during the 60 day Notice Period. The "without cause" termination provision is inconsistent with Plaintiffs' unreasonable construction that the parties intended to create a "perpetual" commission obligation that could never be terminated.

The termination provision of Section IX also provides for immediate termination for cause "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." The Agreement could have been terminated for cause based upon Plaintiffs' improper competition in breach of Section II of the Agreement while Poly-Tech was still acting as Personal Representative for CRI and still receiving commission payments. However, by the time CRI learned of Plaintiffs' improper competition in breach of the Agreement, CRI had already terminated the Agreement without cause. The "with cause" termination provision of the Agreement is also inconsistent with Plaintiffs' unreasonable construction that the parties intended to create a "perpetual" commission obligation that could never be terminated.

Moreover, perpetual contracts are disfavored in South Carolina and rarely will be enforced. *See Childs v. Columbia*, 87 S.C. 566, 572, 70 S.E. 296, 298 (1911) (where parties to a contract express no period for its duration, and no definite time can be implied from the nature of

the contract it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually); *Carolina Cable Network v. Alert Cable Tv*, 316 S.C. 98, 101, 447 S.E.2d 199, 201 (1994) (perpetual contracts are not favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract); *Dobyns v. South Carolina Dep't of Parks, Recreation & Tourism*, 325 S.C. 97, 100, 480 S.E.2d 81, 83 (1997) (perpetual contracts are not favored).

Annex C, Section A of the Contract states that Plaintiff Poly-Tech was entitled to a 7% commission for all sales where Poly-Tech was “instrumental in making the sale.” Pursuant to Annex C, Section C, there were two “special accounts” that were “exceptions to the above stated commission rate.” Plaintiffs’ entire suit relates to commissions they claim to be owed on one of those two special accounts: “Phil Durango, L.L.C.”

Phil Durango, L.L.C. is no longer in business, and there is no longer a Phil Durango, L.L.C. customer account at CRI. *See* Thompson Aff., para. 4 – 5. Based upon any reasonable interpretation of the Agreement, Poly-Tech did not earn any commissions on the “Phil Durango, LLC” account after November 2014 because the Phil Durango “special account” ceased to exist after that time. CRI could have stopped paying Plaintiffs any commissions after November 2014, but erroneously continued to pay commissions to Poly-Tech. CRI officially terminated the Agreement pursuant to section IX effective August 31, 2018, and stopped paying commissions to Poly-Tech at that time. The “special account” and “account” provisions of the Agreement also are not consistent with Plaintiffs’ strained construction that the Agreement created a disfavored perpetual commission that could never be terminated. At minimum, for the purposes of this Motion, Plaintiffs’ “certain material terms” are ambiguous. Therefore, Plaintiffs are not entitled to construction of any terms of the Agreement at this time and are not entitled to summary

judgment.

**3. Plaintiffs' reliance on *extrinsic* evidence in their effort to establish that certain terms of the Agreement are "unambiguous" demonstrates that those terms are not clear and unambiguous.**

Plaintiffs cite to and rely extensively on extrinsic evidence in their argument that "certain material terms" of the Agreement are "unambiguous." This is an obvious flaw in Plaintiffs' argument. Plaintiffs cannot, on the one hand, argue that the terms for which they seeks construction are "unambiguous" and, on the other hand, introduce extrinsic evidence to explain the intent of the parties as to those same terms. Plaintiffs' Motion seeks enforcement of certain provisions of the Agreement as a matter of law because Plaintiffs assert those provisions are "unambiguous." However, the parties can only introduce evidence to show the intent of the parties once the court has determined as a matter of law that the contract is *ambiguous*.

Most notably, Plaintiffs argue on page 5 of the Motion that "any effort to oppose this motion . . . would merely be an attempt to delay the inevitable." Plaintiffs then cite to the deposition of CRI's President's ex-wife to demonstrate what the alleged "perpetual" commission provision means. *See* Motion, p. 5-6. The ex-wife, Lisa Bennett, testified that she considered the commissions "to be as long as the tourniquets were in production" and that she had "authority" to negotiate the Agreement in 2005. *See* Deposition of Lisa Bennett, pp. 94-5. This extrinsic evidence is not relevant and should not be considered for Plaintiffs' Motion for construction of select "unambiguous" terms. Moreover, Lisa Bennett did not sign the Agreement. *See* Agreement, p. 7.

In an abundance of caution, CRI will point out that Ms. Bennett's testimony was not consistent with Plaintiffs' position on the "certain material terms." She testified as follows:

Q. Do you think your interpretation or the words are more important in interpreting and understanding and enforcing this agreement?

A. The words of course.

Q. Do you think your interpretation or the interpretation of the parties that signed the agreement is more important?

A. The parties that signed the agreement.

*See* Deposition of Lisa Bennett, p. 139 (Attached hereto as **Exhibit 5**).

A. Yes, there is termination process.

Q. Okay. And what was your understanding of that termination clause?

A. I believe that was built in, in the event for catastrophic, just being able to have – have a chance to either renegotiate the contract or to cancel the contract if there was something significant with a breach of contract or a pricing reduction that was beyond what the profit margins of any of the products was and there needed to be renegotiation.

Q. So you think if its' below the profit margin – what if – what if the profit margin were reduced to a position where Poly-Tech's commission would be the entire profit?

A. I think that would be grounds for renegotiation and I think it's up to the parties as to whether or not to engage the termination part of the contract based on negotiation.

*Lisa Bennett Dep.*, p. 140

Q. And you believe that if Poly-Tech or Dan Cedrone developed a competing tourniquet that would be a breach of this agreement?

A. Yes.

*Lisa Bennett Dep.*, p. 143

Q. I think you've answered this but you don't think that this agreement was drafted in a sense that it could never be terminated by Composite Resources, right?

A. No.

Q. And you discussed some of the reasons that it could be terminated earlier?

A. Yes.

Lisa Bennett Dep., p. 146

Plaintiffs' own testimony similarly hurts their proposed interpretation of the Agreement. Dan Cedrone, testifying as the corporate representative for Poly-Tech in a deposition pursuant to Rule 30(b)(6), alleged that Poly-Tech's relationship with CRI was not as a commissioned sales representative (as set forth in the Agreement) but as a profit-sharing "partner." Mr. Cedrone could not testify where that "partnership" relationship was established in the Agreement. He testified that it was in the "spirit" of the Agreement:

Q. What does that section ten say that the relationship of Composite Resources and Poly-Tech is?

A. Independent Contractor.

Q. Okay. Does that section say anywhere that they are partners?

A. No, not there.

Q. All right. And where in this agreement does it say that they are partners?

A. It does not.

Q. Okay. But you said it's in the spirit of the agreement?

A. Yes, sir.

Q. All right. And is there someplace where this spirit emanates?

A. Through the 18 years that it was being used.

Q. Okay. So the partnership arrangement grew after the agreement was signed?

That's what you're saying?

A. No, the partnership arrangement was in place prior to the agreement. And Lisa, Jon and I wrote this agreement to insure the perpetuity of the partnership and the project of the tourniquets and the other side of the agreement, which is the basic sales rep side.

Q. But you can't show me anywhere in here that it references to a partnership?

A. Correct.

\*\*\*\*\*

Q. So when the – so when the agreement was terminated, the arrangement became one of a partnership?

A. The partnership was already there.

Q. And where is the partnership created?

A. In spirit.

Poly-Tech Dep., pp. 169-71.

Plaintiffs' own testimony shows that their intention is not found anywhere in the Agreement. This secret intention of Plaintiffs is not found in the plain language of the Agreement, and Plaintiffs' Motion for partial summary judgment on contract construction (the intent of the parties), therefore, must be denied.

**4. The terms for which Plaintiffs seek construction are, at best, ambiguous, and summary judgment is inappropriate.**

As set forth above, CRI believes the Agreement has but one reasonable interpretation – that it was properly terminated pursuant to Section IX in 2018, that it could have been terminated

in November 2014 when the Phil Durango “special account” ceased to exist, and that it could have been terminated in 2017 due to Plaintiffs’ breach by developing a competing tourniquet. Plaintiffs similarly assert that the contract is “unambiguous” but attempt to interpret the Agreement unreasonably to provide for commissions to Poly-Tech long after the account for “Phil Durango, LLC” was ended, after the Agreement was properly terminated without cause pursuant to its express terms, and after Plaintiffs breached the Agreement by developing a competing tourniquet. CRI asserts that it has established the only reasonable interpretation of the Agreement. Based upon CRI’s reasonable interpretation of the Agreement, Plaintiffs’ interpretation is clearly not reasonable and is, at best, ambiguous. Therefore, Plaintiffs’ Motion for partial summary judgment as to “unambiguous” terms should be denied.

### **CONCLUSION**

For the reasons set forth above, Plaintiffs’ motion for partial summary judgment should be denied. If there are no genuine issues of material fact, such facts support the position and contractual interpretation of Defendant CRI.

Respectfully submitted,

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May 3, 2022  
Columbia, South Carolina

Attorneys for Composite Resources, Inc.

**EXHIBIT 1**

STATE OF SOUTH CAROLINA

COUNTY OF YORK

DANIEL P. CEDRONE AND  
POLY-TECH INDUSTRIAL, INC.,

Plaintiffs,

vs.

COMPOSITE RESOURCES, INC.,

Defendant.

**CIVIL ACTION NO: 2019-CP-46-00051**

**AFFIDAVIT OF DEREK THOMPSON**

PERSONALLY APPEARED BEFORE ME, Derek Thompson, who, being duly sworn, deposes and states as follows:

1. I am the Chief Financial Officer for Composite Resources, Inc. (“CRI”) and have held that position since June, 2011.

2. In that capacity I am familiar with all payments made to Plaintiff Poly-Tech Industrial, Inc. since July, 2011.

3. CRI purchased the intellectual property assets of Phil Durango, LLC, including the patents for the one-handed combat application tourniquet (the “CAT Tourniquet”), on November 6, 2014.

4. Although Phil Durango, LLC continued to be a legal entity after the sale of its intellectual property assets to CRI, Phil Durango, LLC was dissolved on or about October 25, 2016 by filings in the Colorado Secretary of State’s office.

5. Effective on November 6, 2014, when CRI purchased Phil Durango, LLC’s patents for the CAT Tourniquet, there was no longer a Phil Durango, LLC customer account at CRI.

## ROA 588

6. Despite no obligation to pay Poly-Tech any “commissions” due to the lack of a Phil Durango, LLC customer account and the failure of Plaintiff Poly-Tech to be instrumental in making the sale of any CAT Tourniquets for CRI, CRI erroneously continued paying Poly-Tech from November 6, 2014 to August 2018.

7. In March 2017, CRI reduced its payments to Poly-Tech by \$.625 per black or orange CAT Tourniquet sold to North American Rescue.

8. CRI continued to make the erroneous payments to Poly-Tech from March 2017 until August 2018. With each payment to Poly-Tech, CRI included a statement that reflected the calculations for determining the amount of the payment, including the amount paid per CAT Tourniquet sold.


9. Poly-Tech accepted each monthly payment from March 2017 until August 2018 at the reduced price.

10. Poly-Tech never requested an accounting from CRI or questioned CRI about the amount of the monthly payments from March 2017 to August 2018.

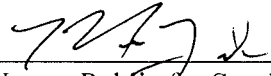
11. Poly-Tech made claim to additional payments from March 2017 to August 2018 after CRI notified Poly-Tech that it was terminating the Sales Representative Agreement dated June 1, 2005 pursuant to Article IX of that Agreement.

12. CRI has asserted in this litigation a counterclaim against Poly-Tech to recover all erroneous payments made to Poly-Tech from August 2014 to August 2018.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Derek Thompson

SWORN to before me this 19th  
day of September, 2019

  
\_\_\_\_\_  
Notary Public for South Carolina (SEAL)

Mariah York  
\_\_\_\_\_  
Printed Name of Notary

My Commission Expires: October 18, 2021



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**EXHIBIT 2**

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

**PLAINTIFF DANIEL P. CEDRONE.'S  
RESPONSES TO DEFENDANT'S FIRST  
REQUESTS FOR ADMISSION**

Pursuant to Rules 26 and 36 of the South Carolina Rules of Civil Procedure, Plaintiff Daniel P. Cedrone (“**Plaintiff**” or “**Cedrone**”) responds to Defendant Composite Resources, Inc.’s (“**Defendant**” or “**Composite**”) Requests For Admissions (“**the Requests**”) as follows. As discovery is ongoing, Plaintiff reserves the right to amend and/or supplement her responses in accordance with the South Carolina Rules of Civil Procedure.

**GENERAL OBJECTIONS**

1. Cedrone objects to this Request for Admissions to the extent it takes specific documents or facts out of context, and therefore, may be misconstrued when reviewed outside their proper context. In responding to these requests, Cedrone reserves the right to elaborate on the meaning of any document through the context in which it was created or maintained.

2. Cedrone objects to the “definitions” provided with the Request for Admissions to the extent they seek to impose any obligations beyond the South Carolina Rules of Civil Procedure. Cedrone reserves his right to supplement these responses as additional materials are discovered or become known.

**RESPONSES TO REQUESTS FOR ADMISSION**

1. Admit that in the Sales Representative Agreement Poly-Tech agreed to refrain from engaging directly or indirectly in any activity or transaction in any way competes with Defendant.

**RESPONSE: Denied. The terms of the Agreement speak for themselves within the context of the entire agreement, as interpreted through applicable law.**

2. Admit that in the Sales Representative Agreement (The “Agreement”) Poly-Tech agreed to refrain from engaging directly or indirectly in any activity or transaction which may result in a conflict of interest or would otherwise adversely affect the proper discharge of the duties of Poly-Tech under the Agreement.

**RESPONSE: Denied. The terms of the Agreement speak for themselves within the context of the entire agreement, as interpreted through applicable law.**

3. Admit that Cedrone is the owner of Poly-Tech

**RESPONSE: Admitted.**

4. Admit that Cedrone founded Poly-Tech

**RESPONSE: Admitted.**

5. Admit that Cedrone is the President of Poly-Tech

**RESPONSE: Admitted.**

6. Admit that Cedrone was one of the inventors of the tourniquet that is the subject of the ‘917 Patent.

**RESPONSE: Admitted.**

7. Admit that Cedrone is identified on the ‘917 Patent as an inventor, along with William R. Carson (“Carson”) and William Crossingham Cannon (“Cannon”), of the tourniquet that is the subject of the ‘917 Patent.

**RESPONSE: Admitted.**

8. Admit that Cedrone collaborated with Carson and/or Cannon prior to March 7, 2018 to develop, invent, improve or design the tourniquet that is the subject of the '917 Patent.

**RESPONSE: Admitted.**

9. Admit that you arranged for Carson to visit the Defendant's facility on May 7, 2012.

**RESPONSE: Cedrone admits he arranged with Composite a meeting between Dr. Carson, a three-tour, frontline, triage combat surgeon in Afghanistan who had used the CAT hundreds of times and Mark Esposito, the inventor of the tourniquet who expressed an interest in possible improvements to the CAT based on Dr. Carson's combat surgery experience. As a result, at least one of Dr. Carson's ideas was implemented without remuneration.**

10. Admit that you and Carson visited the Defendant's facility on May 7, 2012.

**RESPONSE: Admitted.**

11. Admit that you arranged for Carson to visit the Defendant's facility on December 13, 2012.

**RESPONSE: Cedrone admits he arranged, at the request of Composite, a meeting between Dr. Carson, a three-tour, frontline, triage combat surgeon in Afghanistan, who had used the CAT hundreds of times and Mark Esposito, the inventor of the tourniquet, who expressed an interest in possible improvements to the CAT based on Dr. Carson's combat surgery experience. As a result, at least one of Dr. Carson's ideas was implemented without remuneration.**

12. Admit that you and Carson visited Defendant's facility on December 13, 2012.

**RESPONSE: Admitted.**

13. Admit that you attempted to arrange additional visits by Carson to Defendant's facility.

**RESPONSE: Cedrone is without sufficient information or recollection to admit or deny to this allegation therefore this request is denied.**

14. Admit that you discussed with Carson the development, design, assembly, manufacture, and/or marketing of the CAT.

**RESPONSE: Cedrone admits that he was present when Dr. Carson discussed possible improvements to the CAT, under a non-disclosure agreement, with Jonathan Bennett and Mark Esposito, the inventor of the CAT; otherwise, Cedrone denies this request to admit.**

15. Admit that you arranged for Cannon to visit the Defendant's facility on March 28, 2013.

**RESPONSE: Cedrone admits that in a gesture of appreciation for Mr. Cannon's military service as a combat medic in Iraq who had used the CAT, he arranged with Composite for Mr. Cannon to meet with Jonathan Bennett, who failed to appear at the meeting; otherwise Cedrone denies this request to admit.**

16. Admit that you and Cannon visited Defendant's facility on March 28, 2013.

**RESPONSE: Admitted.**

17. Admit that you gave Cannon a tour of Defendant's facility on March 28, 2013.

**RESPONSE: Admitted. When Jonathan Bennett failed to appear for the scheduled meeting, arranged by Cedrone and Composite, with Mr. Cannon, Cedrone asked permission to give Cannon a tour of the facility, which was granted.**

18. Admit that you discussed with Cannon the development, design, assembly, manufacture, and/or marketing of the CAT.

**RESPONSE**: Cedrone admits that with permission from Composite and at the request of Composite, Cedrone gave Mr. Cannon a tour of the facility where the CAT was manufactured; otherwise, Cedrone denies this request to admit.

Respectfully submitted,



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

May 29, 2020

CERTIFICATE OF SERVICE

I do hereby certify that I served a copy of the following document upon counsel of record by depositing a copy in the U.S. Mail, postage paid, to the following address this 29th day of May, 2020:

**DOCUMENT: PLAINTIFF DANIEL P. CEDRONE'S RESPONSES TO DEFENDANT'S FIRST REQUESTS FOR ADMISSION**

ADDRESSED TO:

Burr & Forman, LLP  
Post Office Box 11390  
Columbia, SC 29211  
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William Y. Klett, III (SC Bar No. 64822)

*Attorneys for Defendant*



Ashley L. Couch, Paralegal

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**EXHIBIT 3**



(12) **United States Patent**  
**Carson et al.**

(10) **Patent No.:** **US 10,194,917 B1**  
 (45) **Date of Patent:** **Feb. 5, 2019**

(54) **TOURNIQUET WITH LEVER TENSIONING MECHANISM**

(71) Applicants: **William R. Carson**, Summersville, WV (US); **William Crossingham Cannon**, Concord, NC (US); **Daniel Pompei Cedrone**, Huntersville, NC (US)

(72) Inventors: **William R. Carson**, Summersville, WV (US); **William Crossingham Cannon**, Concord, NC (US); **Daniel Pompei Cedrone**, Huntersville, NC (US)

(\*) Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 0 days.

(21) Appl. No.: **15/914,054**

(22) Filed: **Mar. 7, 2018**

(51) **Int. Cl.**  
**A61B 17/132** (2006.01)

(52) **U.S. Cl.**  
 CPC ..... **A61B 17/1327** (2013.01); **Y10T 24/2147** (2015.01)

(58) **Field of Classification Search**  
 CPC ..... A61B 17/132; A61B 17/1322; A61B 17/1325; A61B 17/1327; Y10T 24/2143; Y10T 24/2147; Y10T 24/2164; Y10T 24/2192

See application file for complete search history.

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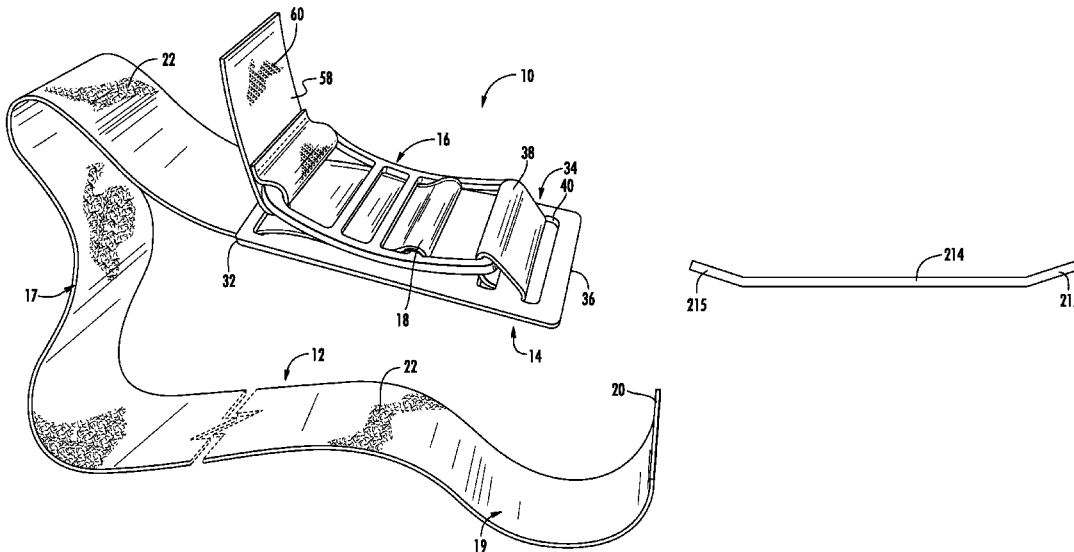
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*Primary Examiner* — Ryan J Severson  
 (74) *Attorney, Agent, or Firm* — Trego, Hines & Ladenheim, PLLC

(57) **ABSTRACT**

A tourniquet includes: a baseplate with first and second ends; a strap having first and second ends, the strap having a first portion adjacent its first end, and a second portion adjacent its second end; a lever with proximate and distal ends, wherein the proximate end is pivotally connected to the baseplate, and the distal end is free; wherein the first end of the strap is pivotally connected to the lever intermediate to the proximal and distal ends; and a connector assembly operable to selectively connect the second portion of the strap to the baseplate, so as to form a closed loop, the connector assembly operable to permit a length of the closed loop to be adjusted.

**27 Claims, 13 Drawing Sheets**



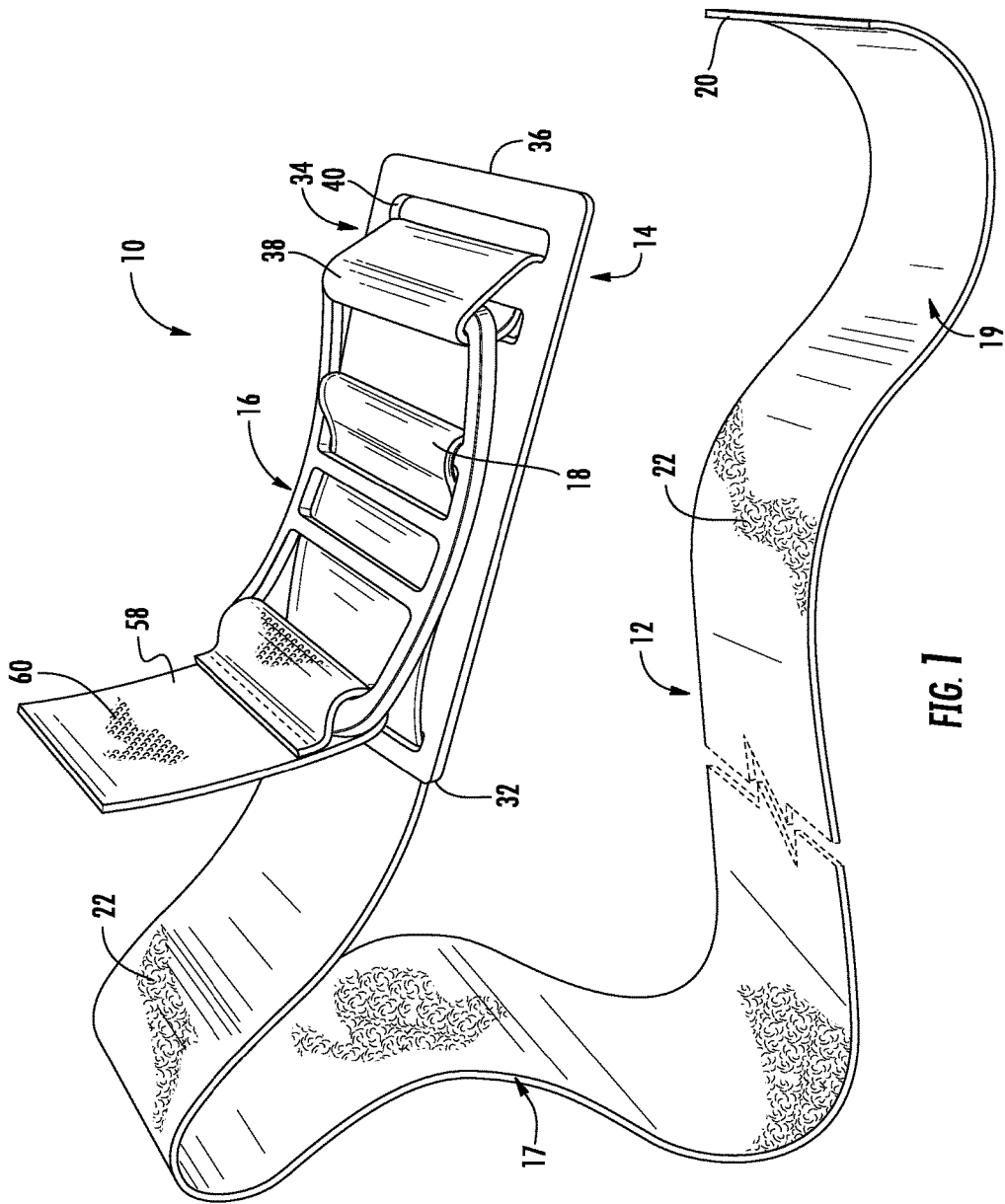
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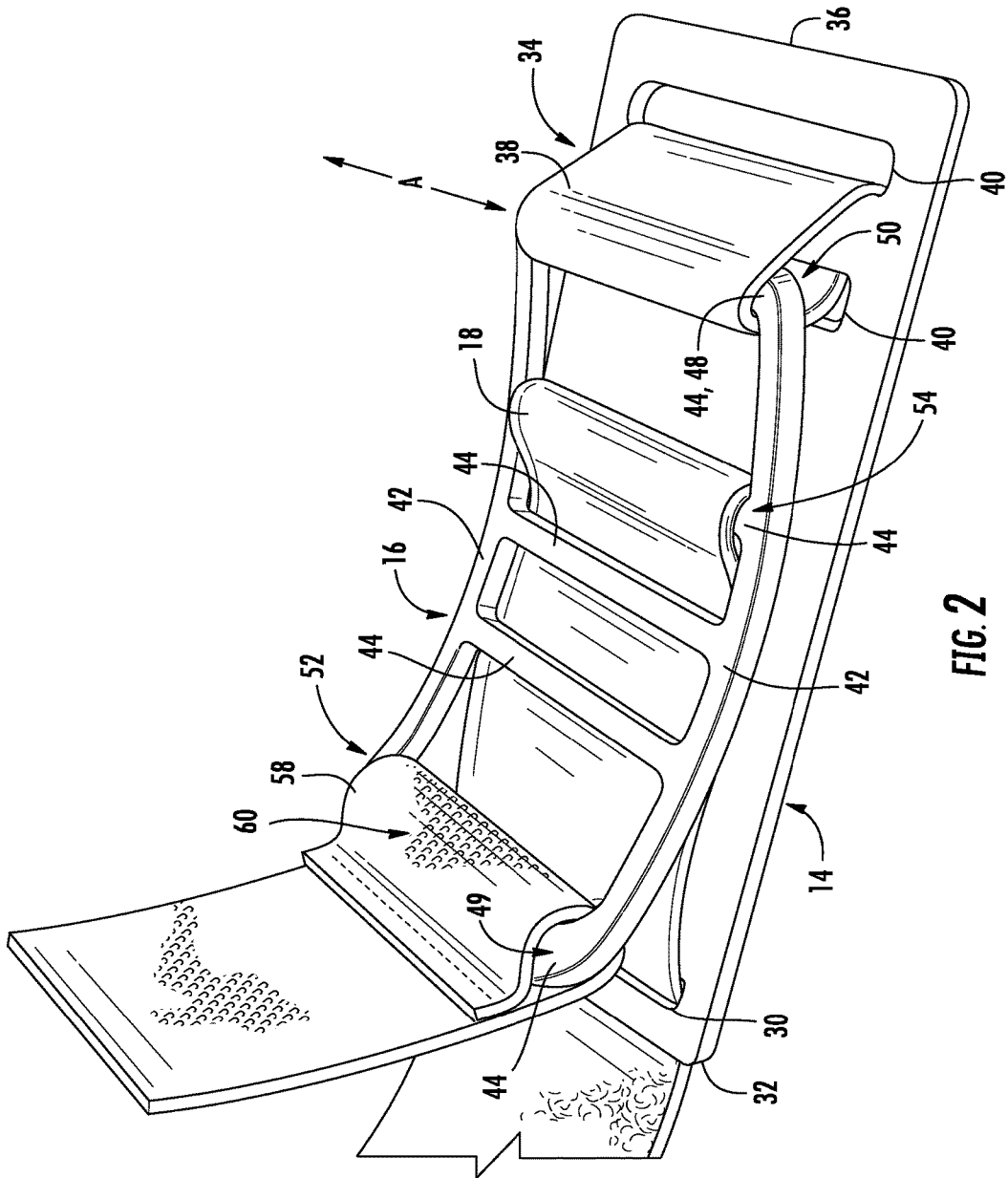
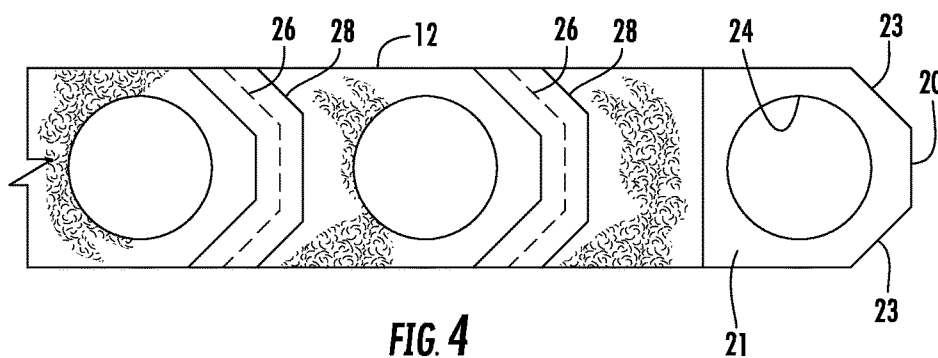
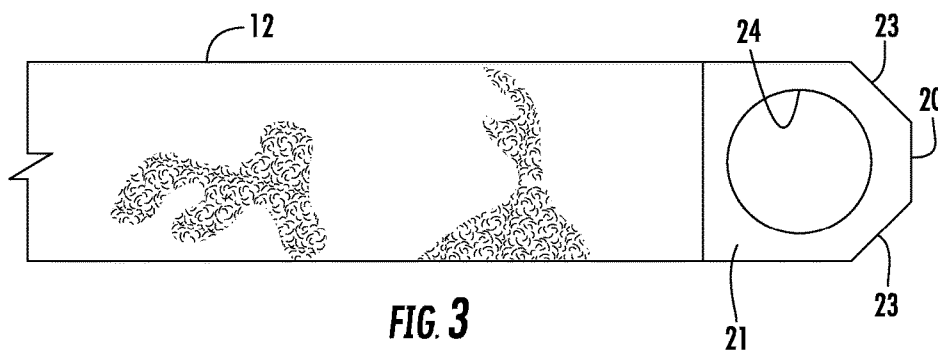


FIG. 2



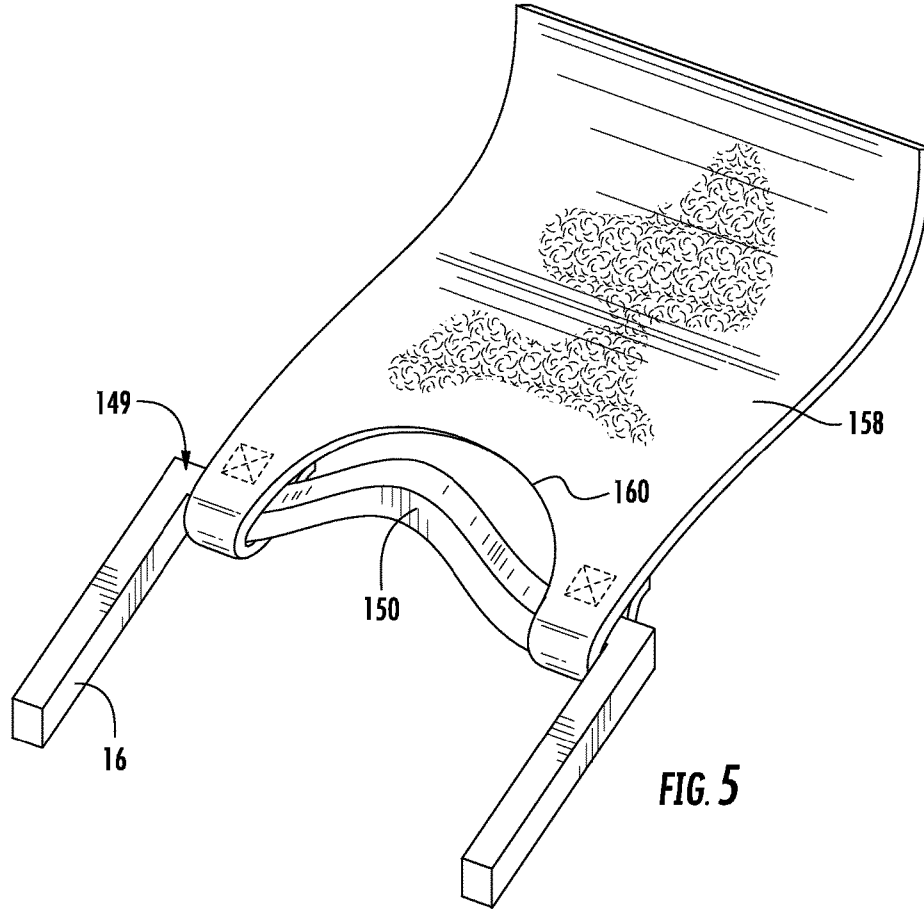


FIG. 5

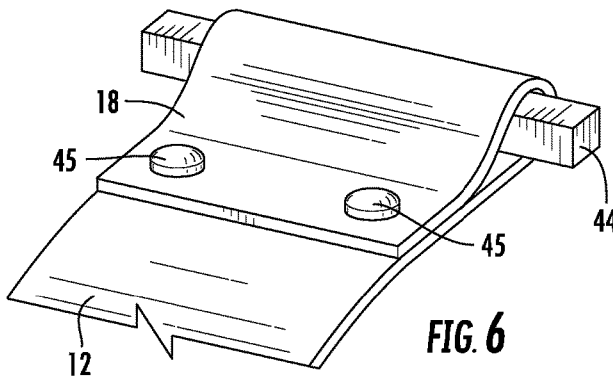


FIG. 6

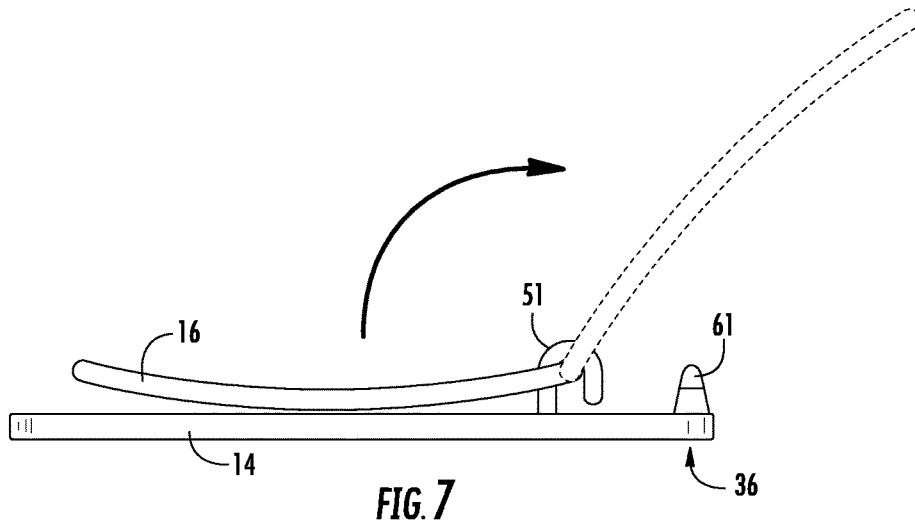


FIG. 7

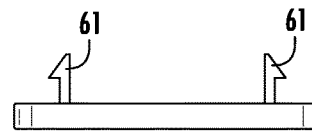


FIG. 22

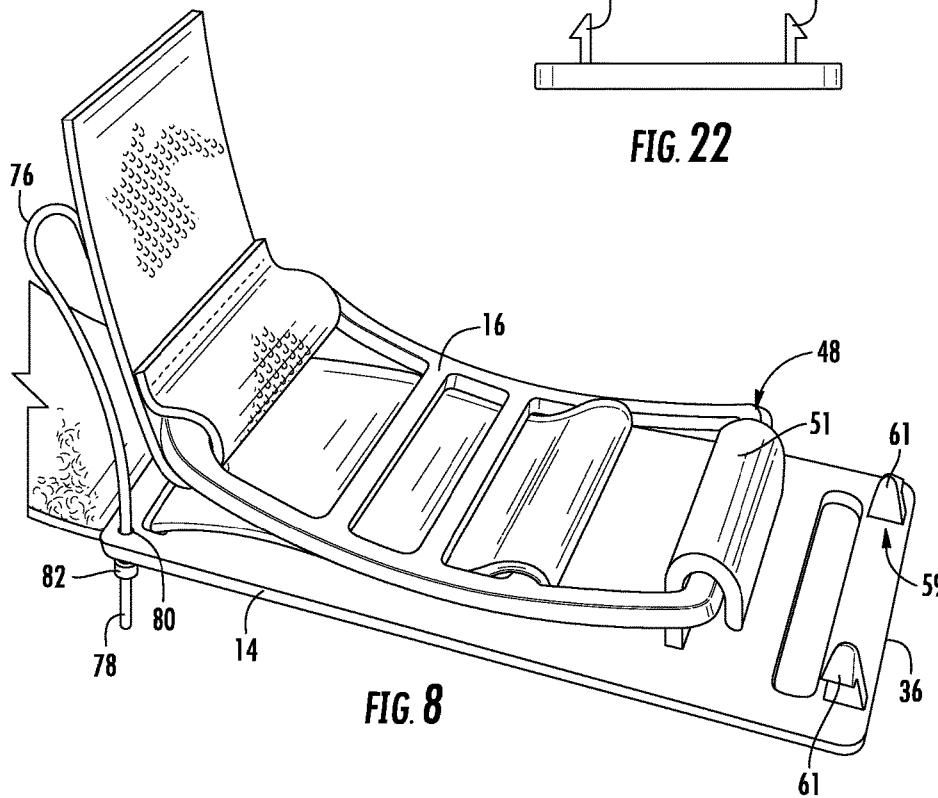
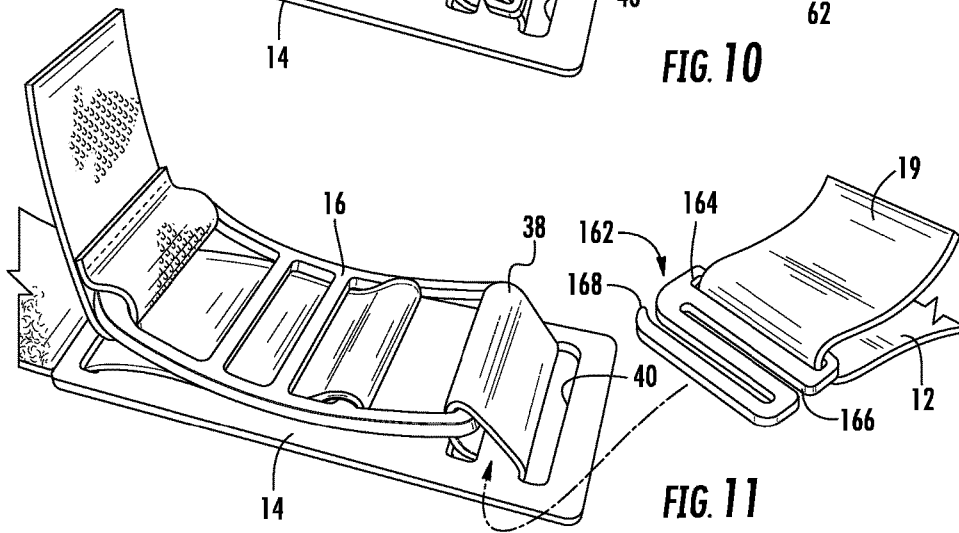
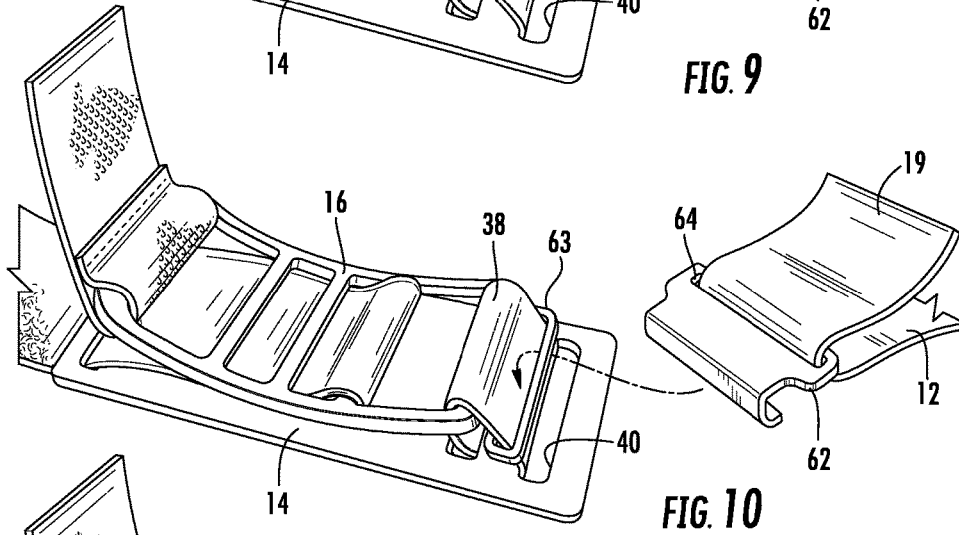
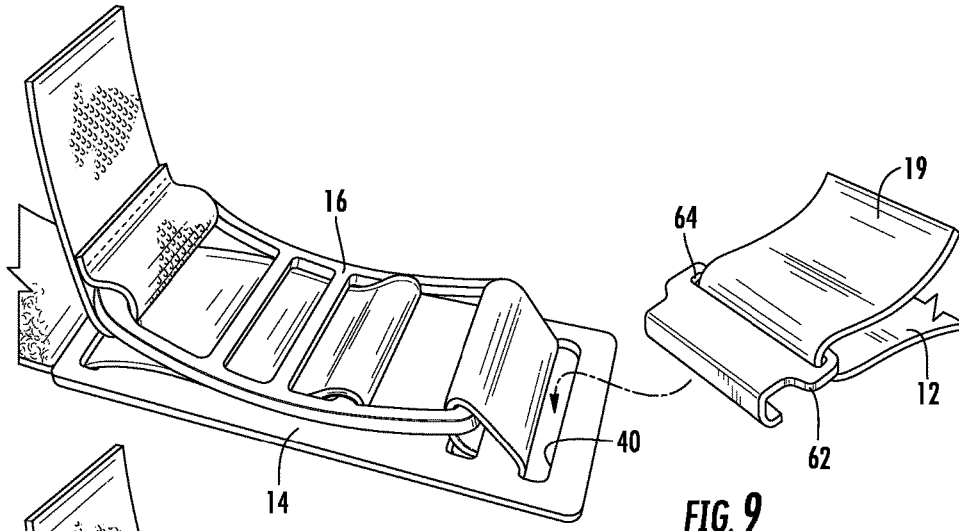


FIG. 8



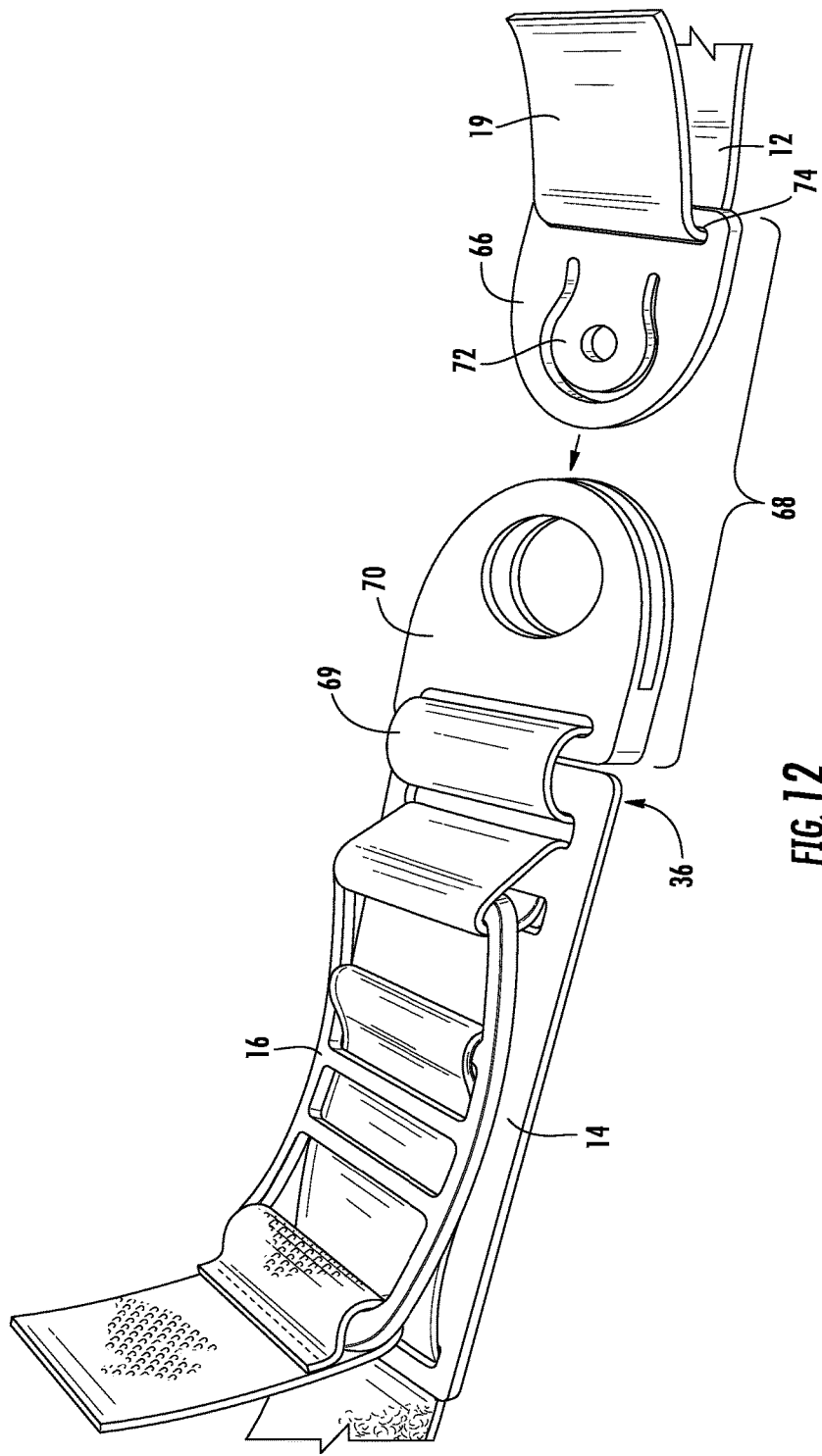


FIG. 12

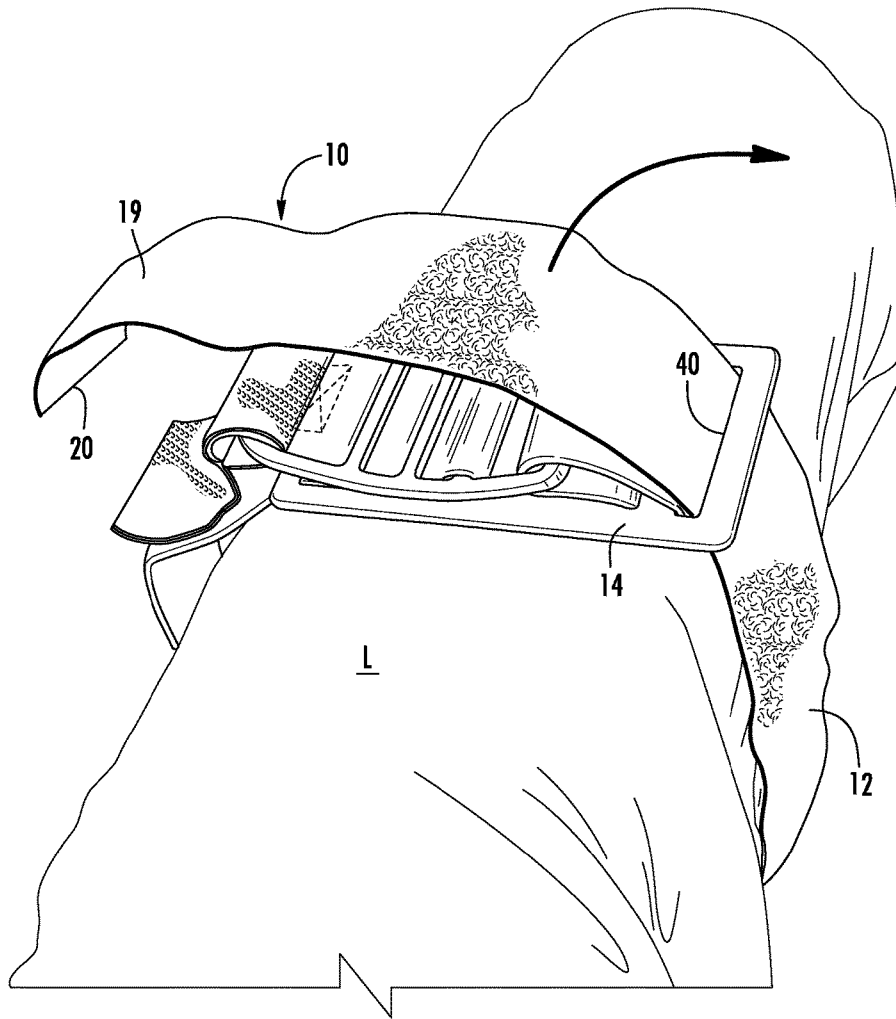


FIG. 13

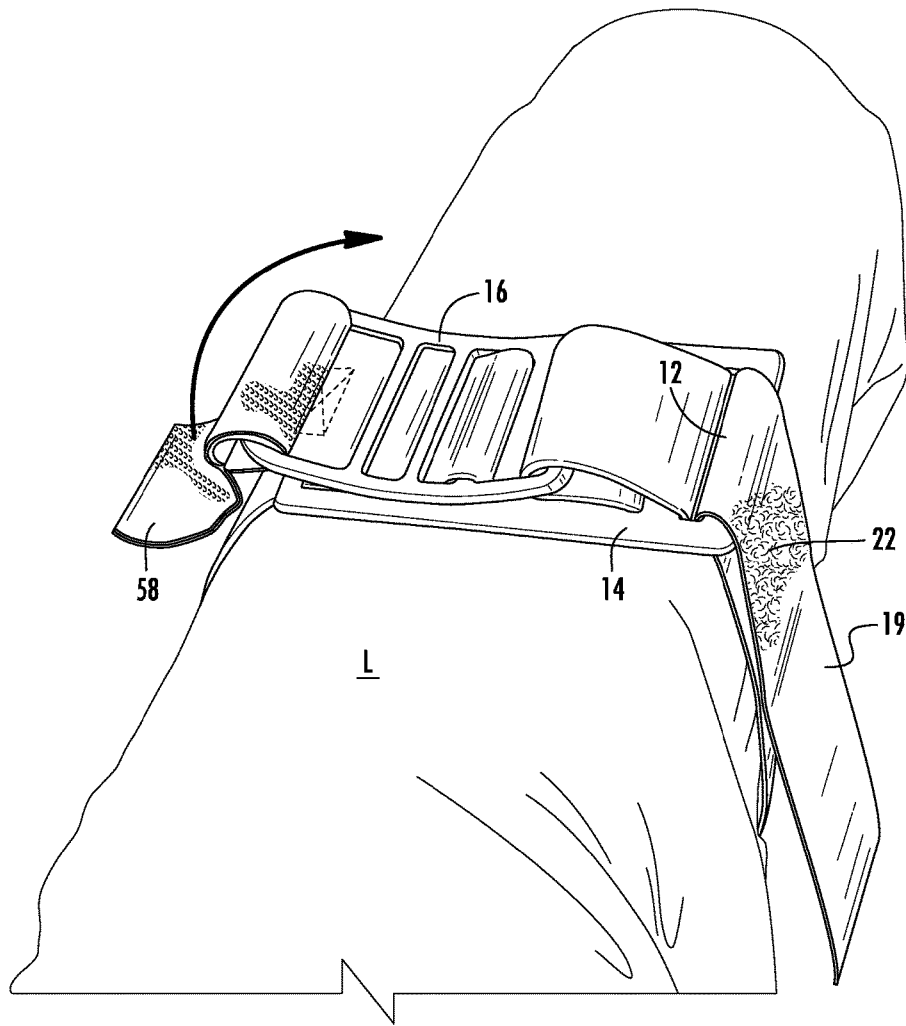


FIG. 14

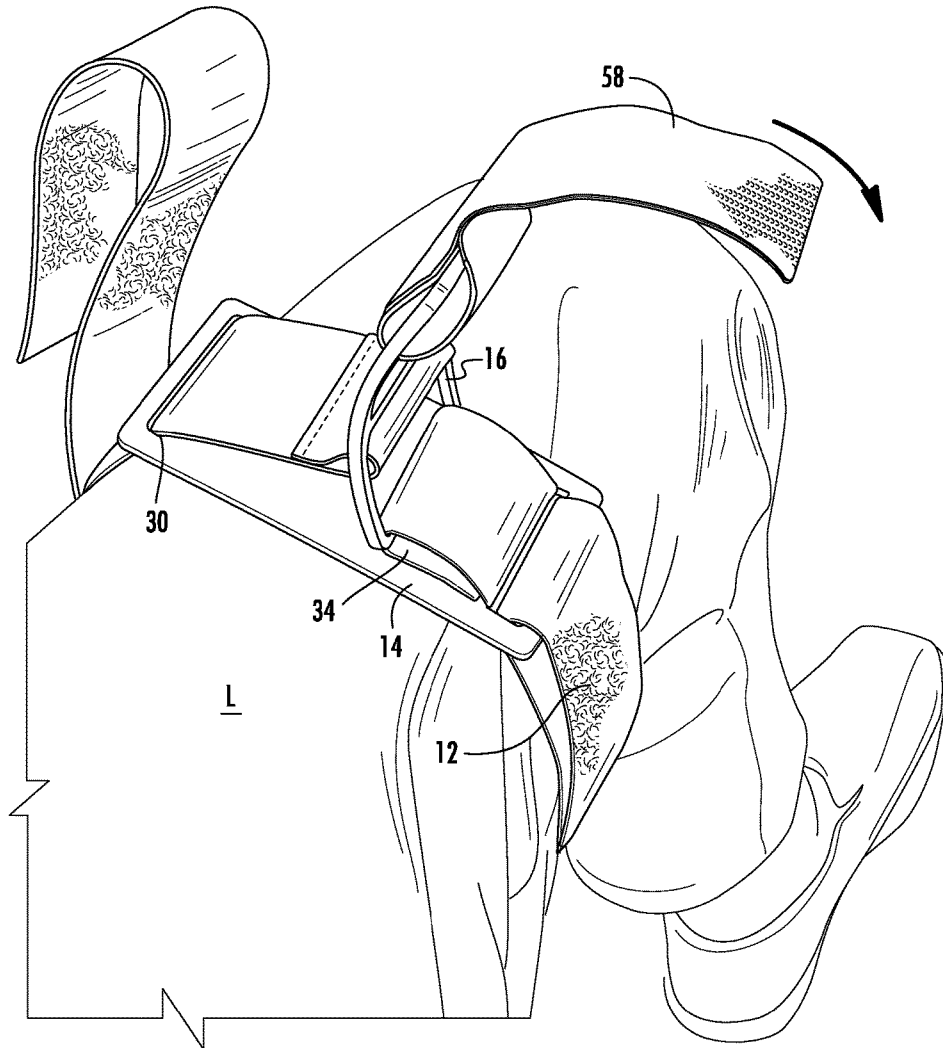


FIG. 15

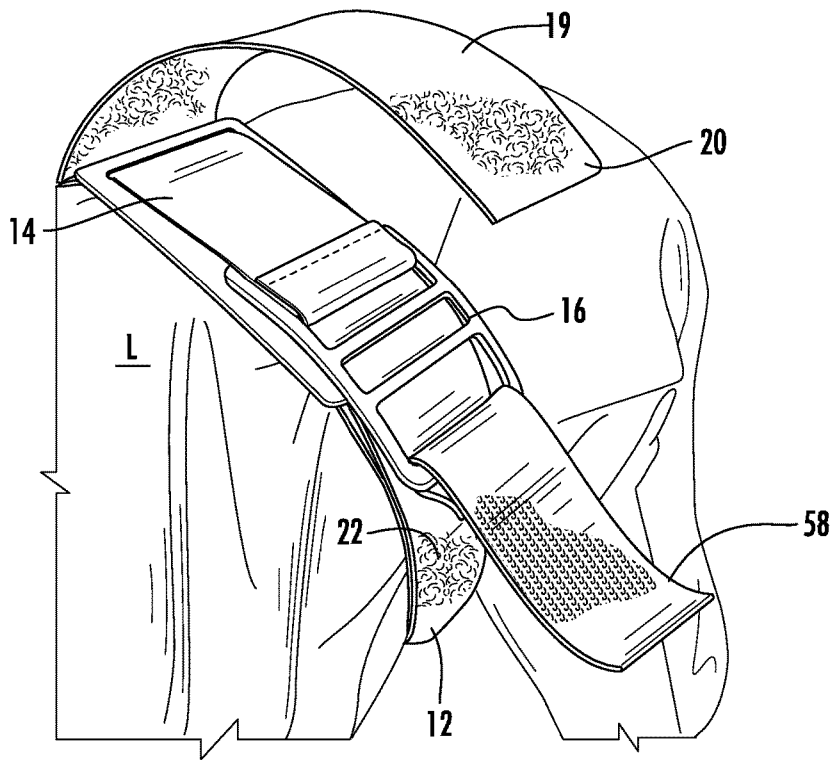


FIG. 16

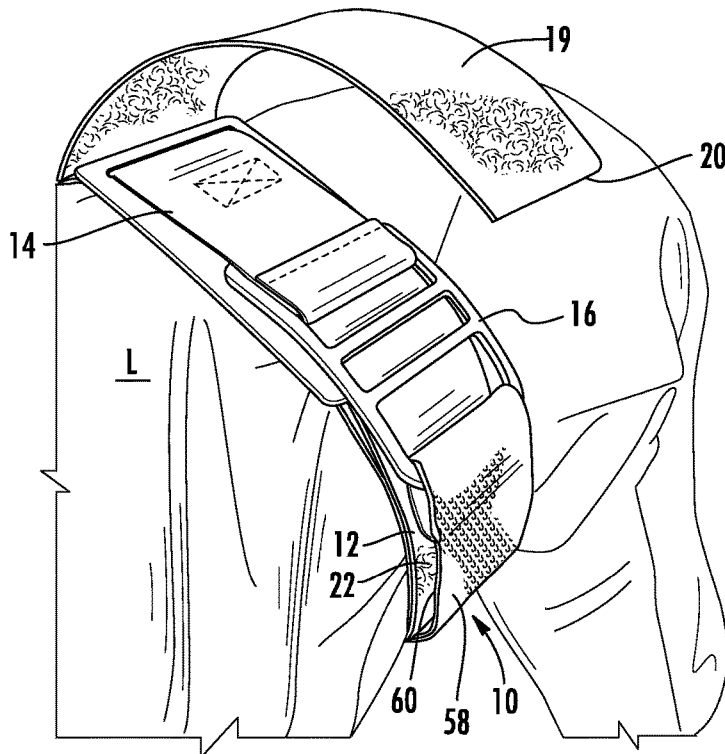


FIG. 17

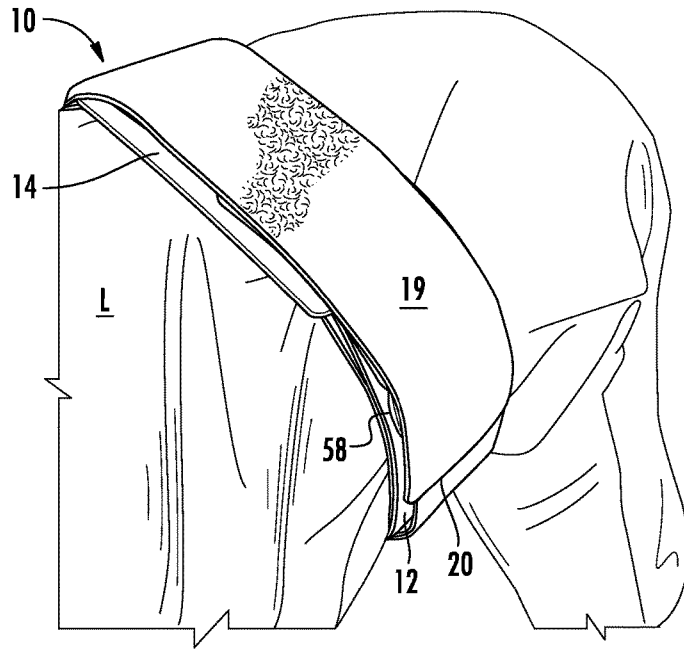


FIG. 18



FIG. 19

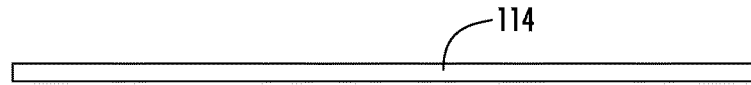


FIG. 20

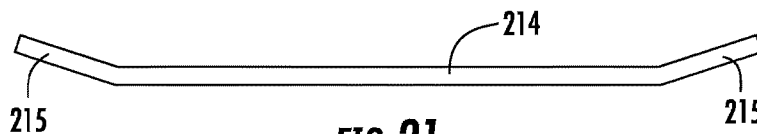


FIG. 21

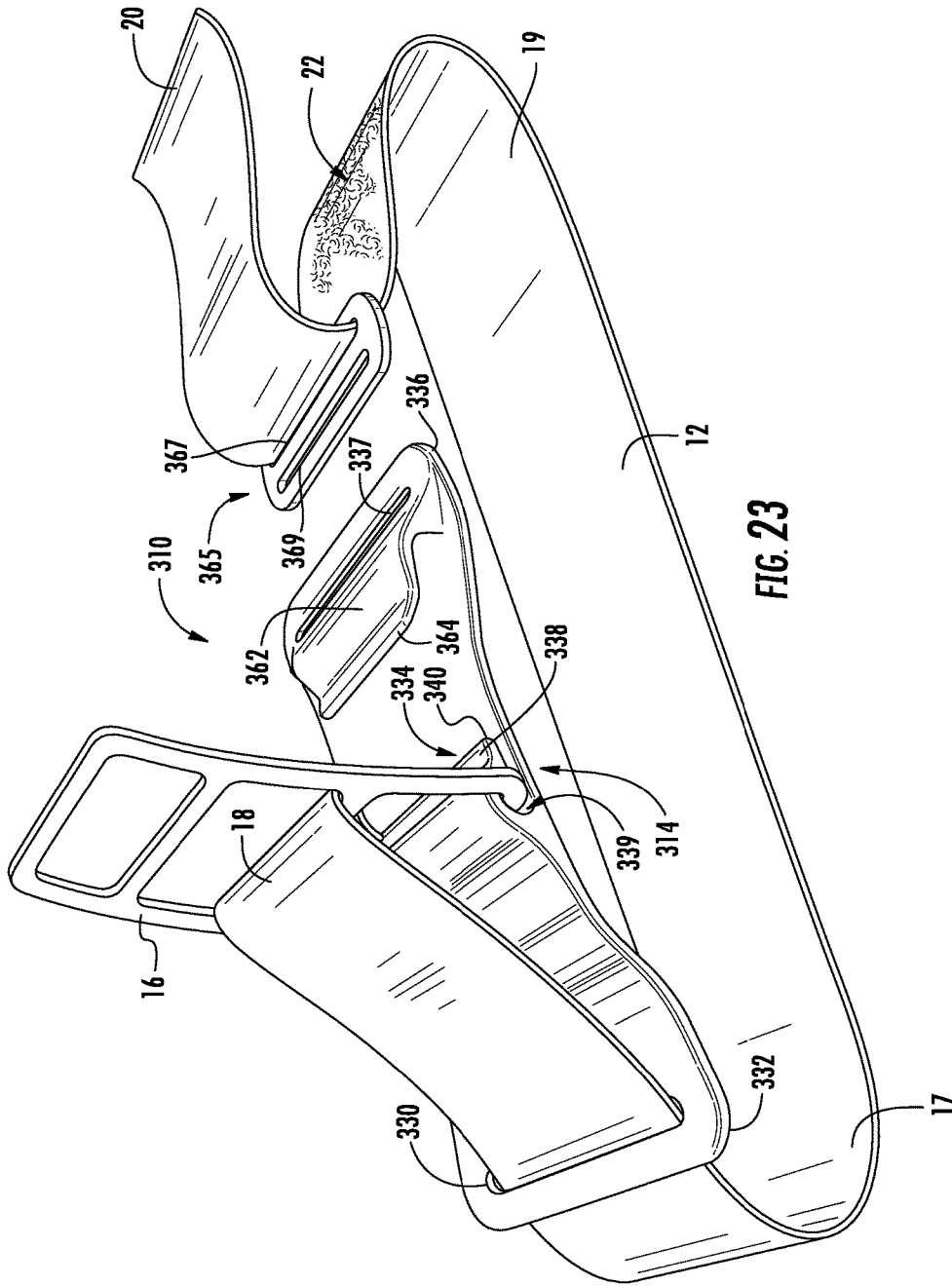


FIG. 23

## TOURNIQUET WITH LEVER TENSIONING MECHANISM

### BACKGROUND OF THE INVENTION

This invention relates generally to tourniquets and more particularly to self-applied tourniquets.

Tourniquets are known and used for stopping blood flow preventing massive hemorrhage which can result in death. Massive hemorrhage remains the number one cause of preventable death on the battlefield despite current tourniquet use. Catastrophic limb injuries are not unique to the battlefield and can occur in the civilian sector with motor vehicle accidents, industrial accidents, agricultural accidents and active shooter episodes.

When a major blood vessel is cut, a short period of time is available to stop the flow of blood and prevent massive hemorrhage and ultimately death.

It is helpful to provide a tourniquet that can be self-applied by the injured person as medical personnel may not be readily available. Self-applied tourniquets are known and used in the art.

One problem with existing self-applied tourniquets is that they require the use of a winding stick, (or windlass), which is used to tension the tourniquet and occlude the arterial blood flow. The stick and other parts of the tourniquet can protrude, catch on objects, become dislodged from its locked position and at times not work. With the windlass dislodged, tourniquet effect is lost creating problems during transport and possibly demise. The windlass also adds weight and increases the bulk of the tourniquet, making it more difficult to store and to carry.

### BRIEF SUMMARY OF THE INVENTION

This problem is addressed by a self-applied tourniquet utilizing a lever tensioning mechanism.

According to one aspect of the technology described herein, a tourniquet includes: a baseplate with first and second ends; a strap having first and second ends, the strap having a first portion adjacent its first end, and a second portion adjacent its second end; a lever with proximate and distal ends, wherein the proximate end is pivotally connected to the baseplate, and the distal end is free; wherein the first end of the strap is pivotally connected to the lever intermediate to the proximal and distal ends; and a connector assembly operable to selectively connect the second portion of the strap to the baseplate, so as to form a closed loop, the connector assembly operable to permit a length of the closed loop to be adjusted.

According to another aspect of the technology described herein, a tourniquet includes: a baseplate with first and second ends, and a strap guide disposed at the first end; a strap having first and second ends, the strap having a first portion adjacent its first end, and a second portion adjacent its second end, wherein the first portion of the strap is engaged with the strap guide; a lever with proximate and distal ends, wherein the proximate end is pivotally connected to the baseplate, and the distal end is free; wherein the first end of the strap is pivotally connected to the lever intermediate to the proximal and distal ends, such that the lever is movable between released and tightened positions, wherein a free length of the strap extending beyond the baseplate is shorter in the tightened position than in the released position; a locking mechanism operable to secure the lever in the tightened position; and a connector assembly operable to selectively connect the second portion of the

strap to the baseplate, so as to form a closed loop, the connector assembly operable to permit a length of the closed loop to be adjusted.

### BRIEF DESCRIPTION OF THE DRAWINGS

The invention may be best understood by reference to the following description taken in conjunction with the accompanying drawing figures, in which:

FIG. 1 is a schematic perspective view showing an exemplary tourniquet;

FIG. 2 is an enlarged view of a portion of FIG. 1;

FIG. 3 is a schematic top plan view of a portion of an alternative strap having a finger hole formed therein;

FIG. 4 is a schematic top plan view of a portion of an alternative strap incorporating cut markings;

FIG. 5 is a perspective view showing an alternative lever end;

FIG. 6 is a perspective view showing an alternative strap end;

FIG. 7 is a schematic side elevational view showing an alternative embodiment of a baseplate with an integral pivot member;

FIG. 8 is a perspective view showing the baseplate and lever of FIG. 7;

FIG. 9 is a perspective view showing a baseplate and a strap incorporating a hook member;

FIG. 10 is a perspective view showing a baseplate and a strap incorporating a hook member;

FIG. 11 is a perspective view showing a baseplate and a strap incorporating an alternative hook member;

FIG. 12 is a perspective view showing a baseplate and a strap incorporating a snap buckle;

FIG. 13 is a perspective view showing a first step in using the tourniquet of FIG. 1, with the tourniquet being initially applied to the limb of a patient;

FIG. 14 is a perspective view showing a second step in using the tourniquet of FIG. 1, with the strap being secured in a closed loop around the limb;

FIG. 15 is a perspective view showing a third step in using the tourniquet of FIG. 1, with a lever thereof being moved towards a tightened position;

FIG. 16 is a perspective view showing a fourth step in using the tourniquet of FIG. 1, with the lever moved to a fully tightened position;

FIG. 17 is a perspective view showing a fifth step in using the tourniquet of FIG. 1, with the lever being secured in the fully tightened position;

FIG. 18 is a perspective view showing a sixth step in using the tourniquet of FIG. 1, with the excess strap being secured over the lever;

FIG. 19 is a schematic side elevational view showing an alternative, concave-curved baseplate in a first condition; and

FIG. 20 is a schematic side elevational view showing the baseplate of FIG. 19 in a second condition;

FIG. 21 is a schematic side elevational view showing an alternative, ramped baseplate;

FIG. 22 is a schematic end view of a baseplate showing a latch mechanism; and

FIG. 23 is a perspective view showing a tourniquet constructed using an alternative baseplate.

### DETAILED DESCRIPTION OF THE INVENTION

Referring to the drawings wherein identical reference numerals denote the same elements throughout the various

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views, FIGS. 1 and 2 illustrate an exemplary tourniquet 10. The basic components of the tourniquet 10 are a strap 12, a baseplate 14, and a lever 16, each of which will be described in more detail below.

The strap 12 is an elongated flexible member extending continuously between first and second ends 18, 20 respectively. For purposes of reference the strap may be described as having a first portion 17 adjacent the first end 18 and a second portion 19 adjacent the second end 20. The strap 12 may be constructed from any material which is flexible and which is capable of withstanding a predetermined tensile force sufficient to cut off (occlude) blood flow in a patient's limb. Nonlimiting examples of suitable materials for the strap 12 include fabric and other textiles, plastics, metals, and combinations thereof. The strap 12 may be configured as a flat, band-like material as shown or may have another form, such as a tube, rope, or cable. In the illustrated example, the strap 12 comprises woven nylon webbing.

The strap 12 incorporates suitable releasable connectors 22. As used herein the term "releasable" refers to a connection that can be coupled and uncoupled in ordinary use without damage to the connectors. In some aspects, the connection is releasable without resorting to the use of tools. By way of example and not of limitation, examples of releasable connectors include buttons, snaps, stud-type snap fasteners, magnets, or hook-and-loop type fasteners (e.g., VELCRO). In the illustrated example, the strap 12 incorporates hook-and-loop type fasteners. These connectors are configured such that the strap 12 may be coiled into a compact bundle and secured to itself. These connectors are further configured such that the second portion 19 of the strap 12 may be folded over and attached to itself. For example, one face or side of the strap 12 may incorporate a loop portion of a hook-and-loop fastener over all or a part of its area, and the opposed face or side of the strap 12 may incorporate a combined hook and loop portion of a hook-and-loop fastener over all or a portion of its area.

FIG. 3 illustrates examples of optional features which may be provided to make it easier to manipulate the second end 20 of the strap 12. In one example, an area at the second end 20 of the strap 12 includes an end marking 21 such as words, letters, symbols, patterns or colors which serve to make the second end 20 easily identifiable. In another example, the second end 20 may be provided with chamfered corners 23 to provide a lead-in element for feeding the second end 20 through the slots described below. In another example, the terminal part of the second end 20, for example about 19 mm (¾ in.) may be smooth and free of fasteners or other protrusions to facilitate easy grasping. A finger hole 24 may be provided at or near the second end 20. The finger hole 24 may be sized to permit use while wearing gloves.

The basic length of the strap 12 may be selected to permit use with a range of users and for different limbs. For example, the basic length may be suitable to encircle the largest limb of the largest possible user. A user may choose to shorten the strap 12 to avoid excess length and to reduce weight, permitting easier storage and transport. Some means may be provided to make it easier to shorten the strap 12. For example, cut markings 26 indicating predetermined length intervals and/or flat sections 28 configured to facilitate easy cutting with hand tools (e.g., scissors, pocket knife) may be provided along the length of the strap 12, as seen in FIG. 4. The fibers within the flat sections 28 may be consolidated (e.g. by thermal or ultrasonic bonding, adhesive sealing) so as to be resistant to fraying and unraveling after cutting; however, these sections otherwise retain the full strength characteristics of the remainder of the strap 12. Optionally,

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the cut markings 26 could indicate specific lengths, for example the maximum possible length required for use with a leg, or the maximum possible length required for use with an arm. Portions of the strap 12 near the flat sections 28 and/or cut markings 26 may be configured so that, after cutting, the remaining portion provides one or more of the original distal end features, such as: an end marking, chamfered corners, a smooth, protrusion-free end, or a finger hole.

The baseplate 14 is a relatively thin, plate-like rigid or semi-rigid member. Nonlimiting examples of suitable material for the baseplate 14 include plastics, wood, metals, and combinations thereof. In the illustrated example, the baseplate 14 is constructed as a flat plate of polymeric material with a generally rectangular plan view shape.

Referring to FIG. 2, the baseplate 14 includes a strap guide 30 at a first end 32 thereof (also referred to herein as an aft end). The purpose of the strap guide 30 is to permit axial movement of the strap 12 relative to the baseplate 14, while preventing lateral movement of the strap 12 relative to the baseplate 14. In the illustrated example, the strap guide 30 comprises a slot formed near the first end 32 of the baseplate 14 through which the first end 18 of the strap 12 is threaded. Other guide structures such as rails or flanges (not shown) could be used as an alternative.

The baseplate 14 includes a lever anchor 34. In the illustrated example, the lever anchor 34 comprises a closed loop 38 of nylon webbing or other flexible material which is fed through the lever 16, and a pair of closely-spaced slots 40 formed in the baseplate 14. In the illustrated example the lever anchor 34 is positioned at or near a second end 36 of the baseplate 14, opposite to the first end 32, but other locations are possible.

The lever 16 is a substantially rigid member which is stiff enough to act as a lever. Nonlimiting examples of suitable material for the lever 16 include metals, plastics, wood, composites, and combinations thereof. In the illustrated example, the lever 16 is constructed as a unitary or monolithic metallic element having a pair of side rails 42 interconnected by crossbars 44. The side rails 42 may be curved such that the lever 16 has an arcuate shape when viewed in side elevation.

The lever 16 includes a first pivot element 48 at a first or proximate end 50 thereof. The first pivot element 48 is connected to the lever anchor 34 such that the lever 16 can pivot relative to the baseplate 14, about a pivot axis "A" passing through the first pivot element 48. It is noted that this axis A is shown merely for reference and that its absolute location may vary depending on the tension in the closed loop 38. In the illustrated example, the first pivot element 48 is defined by one of the crossbars 44 which is captured by the closed loop 38 of the lever anchor 34.

The lever 16 is configured such that it can be manually pivoted about the first pivot element, and may include a handle element 49 for the purpose of providing leverage. In the illustrated example, the handle element 49 is defined by another one of the crossbars 44 located at a second or distal end 52 of the lever 16.

Optionally, the handle element 49 may be contoured or shaped to provide a protruding portion for the purpose of making it easier to grip. For example, FIG. 5 illustrates a variation of a handle element 149 which is curved outwards, defining a convex finger pull 150. This may be implemented in conjunction with a modified lock tab 158 including a cutout 160 to provide access to the finger pull 150.

The lever 16 includes a second pivot element 54 positioned in an intermediate location between the proximate end 50 and the distal end 52. In the illustrated example, the

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second pivot element **54** is defined by another one of the crossbars **44**. The first end **18** of the strap **12** is connected to the second pivot element **54** such that the lever **16** can pivot relative to the strap **12**. For example, the first end **18** of the strap **12** may be wrapped around the second pivot element **54** and then secured to itself using conventional stitching.

Optionally, the tourniquet **10** may incorporate a means for moving the first end **18** of the strap **12** to different positions between the proximate end **50** and the distal end **52**. For example, FIG. **6** shows a first end **18** of the strap **12** wrapped around a representative crossbar **44** and secured to itself using heavy-duty snaps **45** or another similar releasable fastener. The first end **18** could be moved by opening the snaps **45**, placing the strap and around a different crossbar, and then re-securing the snaps **45**. The effect of moving the first end **18** would be to change the mechanical advantage of the lever **16** on the strap **12**, with a corresponding inverse effect on the displacement of the strap **12**. This adjustment may be used to tailor the performance of the tourniquet **10** to an individual user's preference.

Collectively, the lever **16**, baseplate **14**, and strap **12** are assembled such that the lever **16** is movable in a pivoting motion about the pivot axis **A**. Movement from the released position to the tightened position causes the first end **18** of the strap **12** to be drawn through the strap guide **30**. This movement causes a free length of the strap **12**, defined as an amount of the strap **12** extending beyond the perimeter of the baseplate **14**, to be reduced.

Alternative means may be provided for pivotal mounting of the lever **16**. For example, FIGS. **7** and **8** illustrate an optional variation of the baseplate **14** in which the closed loop **38** described above is eliminated, and one of the slots **40** is replaced by a rigid, generally U-shaped member **51** which is formed as part of the baseplate **14** and which captures the first pivot element **48** of the lever **16**.

Some means are provided for securing the lever **16** in the tightened position. In the example shown in FIG. **1**, a lock tab **58** is provided in the form of a strap of flexible material which is looped around the handle element **48** of the lever **16**. The lock tab **58** incorporates suitable releasable connectors **60**. The illustrated example shows a patch of hook-and-loop fastener material.

Optionally, the lock tab **58** may incorporate one or more features to make it easier to identify and/or manipulate, as described above for the second end **20** of the strap **12**, for example, an end marking, chamfered corners, a smooth, protrusion-free end, or a finger hole.

Alternatively, the lever **16** and/or the baseplate **14** may incorporate a latch or other similar mechanism operable to connect the lever **16** to the baseplate **14**, thereby securing the lever in the tightened position. For example, FIGS. **7**, **8**, and **22** illustrate a latch **59** comprising a pair of spaced-apart generally L-shaped resilient hooks **61** with barbed tips protruding from the baseplate **14** near its second end **36**. The hooks **61** are positioned such that the lever **16** can pass around them when it is moved to the tightened position. When the lever **16** reaches the fully tightened position the barbed ends of the hooks **61** engage it and prevent it from being released. If there is a need to release the lever **16**, for example if arterial occlusion is not achieved, then the hooks **61** can be released by squeezing them together, or alternatively, the lever **16** could be pulled up with sufficient force to disengage the hooks **61**.

The tourniquet **10** includes a "connector assembly" operable to selectively connect the second portion **19** of the strap **12** to the baseplate **14**, so as to form a closed loop. The connector assembly is operable to permit a length of the

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closed loop to be adjusted (i.e., lengthened or shortened). It will be understood that the connector assembly may be a discrete element, or it may be defined in whole or part by the strap **12**, the baseplate **14**, or some combination thereof.

In the illustrated example, one of the slots **40** described above located at the second end **36** of the baseplate **14** accepts the second end **20** of the strap **12**. The second portion **19** of the strap **12** can be passed through the slot **40**, pulled to a desired position (i.e., adjusted), and then folded back and connected to the remainder of the strap **12** using the releasable connector **22**. This is an example of a "connector assembly".

Alternatively, the second portion **19** of the strap **12** may be connectable to the baseplate **14** using a hook-type connection wherein one of the baseplate **14** and the strap **12** includes a female element, and the other of the baseplate **14** and the strap **12** includes a complementary male element. For example, the second portion **19** of the strap **12** may have a flat hook **62** attached thereto as seen in FIG. **9**, with a slot **64** that permits adjustment of the strap **12**. The end of the flat hook **62** can in turn be engaged with one of the slots **40** of the baseplate **14**. This is another example of a "connector assembly". Alternatively, a different anchor may be provided for the end of the flat hook **62**. For example, FIG. **10** shows a variation in which a ring **63** with a generally rectangular shape and made of a rigid material such as metal or plastic is attached to the closed loop **38** of the lever anchor **34**. In the illustrated example, the closed loop **38** is simply passed through the center of the ring **63**. Alternatively, the ring **63** could be secured to the closed loop **38** using stitching or some other fastening method (not shown) to force it to remain in a specific position. In use, the end of the flat hook **62** can be engaged with the ring **63**. This provides a secure connection point and prevents stresses on the baseplate **14**, especially the slot **40**.

FIG. **11** shows an example of another type of hook **162** that may be attached to the second portion **19** of the strap **12**. The hook **162** includes a slot **164** that permits adjustment of the strap **12**. The hook **162** has a generally S-shaped body that defines two separate, parallel engagement slots **166**, **168** that are open at opposite sides of the hook body. Either of the engagement slots **166**, **168** can be engaged directly with the closed loop **38**. This avoids fatigue on the baseplate **14**, and permits use from either direction (left or right). This is another example of a "connector assembly".

Alternatively, as seen in FIG. **12**, the second portion **19** of the strap **12** may have a first half **66** of a known type of connector such as a snap buckle **68** attached thereto, and the second half **70** of the snap buckle **68** may be attached to the second end **36** of the baseplate **14**. The two halves of the snap buckle **68** may be engaged by pushing them together, and may be separated by depressing the tang **72** of the first half **70**. The first half **70** includes a slot **74** that permits adjustment of the strap **12**. This is yet another example of a "connector assembly". The snap buckle **68** (or any of the connector assemblies described above) may be attached directly to the baseplate **14**, or by using an intervening strap **69**.

Optionally, the tourniquet **10** may incorporate a counter-pull handle, defined as an element which permits a user to grasp and pull the first end **32** of the baseplate **14**. In the example shown in FIG. **8**, a counter-pull handle **76** comprises a loop of cord with distal ends **78** fed through holes **80** in the baseplate **14** and secured by ferrules **82**.

The use of the tourniquet **10** will now be described with reference to FIGS. **13-18**. In these figures, the tourniquet **10** is being shown applied to a limb "L" which happens to be

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a user's thigh; however, it will be understood that the usage steps are similar for any limb.

It is noted that the tourniquet **10** may be stored in a compact configuration by coiling the strap **12** around the baseplate **14** and using the releasable connector **22** of the strap **12** to secure the strap **12** in the coiled configuration. Before carrying out the following steps, the tourniquet **10** would be retrieved and the strap uncoiled to prepare it for use. Alternatively, the tourniquet **10** may be used as a belt by wrapping the strap **12** around a user's torso and using the releasable connector **22** of the strap **12** to secure the strap **12**.

Referring to FIG. **13**, use begins by placing the tourniquet **10** with the baseplate **14** against the limb L. If the end of the limb L is free, the second portion **19** of the strap **12** may be pre-looped through the slot **40** in the baseplate **14**, or the flat hook **62** or snap buckle **68** described above may be pre-connected. Then the entire tourniquet **10** already formed in a closed loop may be slipped over the free end of the limb L and moved into position. However, there may be circumstances where this is undesirable or impossible. For example, a user's foot may be trapped underneath a vehicle or building rubble. Under such circumstances, the second portion **19** of the strap **12** would initially be disconnected from the baseplate **14**. After bringing the second portion **19** around the limb L, the second portion **19** of the strap **12** would then be connected to the baseplate **14**, i.e., by using the slot **40**, the flat hook **62**, or the snap buckle **68** as provided.

In a second step, shown in FIG. **14**, the second portion **19** of the strap **12** is wrapped around the body of the strap **12** and is pulled taut in order to remove the majority of the slack from the strap **12**. The term "majority of the slack" refers to pulling the strap **12** sufficiently taut so that operation of the lever **16** will tighten the strap **12** enough to cut off blood flow to the limb L. The exact tension to be used will depend on the specific user. The user may be trained or provided with instructions as to how to properly remove the majority of the slack. The step of removing the majority of the slack may also be referred to as pre-tensioning the tourniquet **10**. If the optional counter-pull handle **76** is used, the user may pull this in opposition to the pulling taut motion, either to make this step easier or to prevent unwanted movement of the tourniquet **10** relative to the limb L. The lever itself **16** could alternatively be used for this purpose.

Once the slack is pulled out, the strap **12** is connected to itself in order to form (collectively with the baseplate **14**) a closed loop around the limb L. The connection may be accomplished using the releasable fasteners **22**.

In a third step, shown in FIG. **15**, the lever **16** is pivotally actuated by moving it from the released position towards the tightened position, as shown by the arrow in the figure. This may be done, for example by pulling sharply on the lock tab **58** or the lever **16**, itself, in a continuous motion. As the lever **16** is pivotally actuated, the first end **18** of the strap **12** is drawn through the strap guide **30**, while simultaneously the lever **16** applies tension to the lever anchor **34**. The overall effect is to shorten the length of the closed loop formed by the baseplate **14**, the lever **16**, and the strap **12**, thus supplying clamping pressure to the limb L and cutting off blood flow in the blood vessel. The strap guide **30** helps prevent the strap **12** from becoming twisted or misaligned during the tightening operation.

If the optional counter-pull handle **76** is used, the user may pull this opposite to the pivoting movement of the lever **16**, either to make this step easier or to prevent unwanted movement of the tourniquet **10** relative to the limb L. FIG. **16** shows the lever **16** in the fully tightened position.

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Once the lever **16** has been pivotally actuated, it may be secured in the tightened position. For example, FIG. **17** shows the lock tab **58** connected to the strap **12** using the releasable fastener **60**, engaging releasable fasteners **22** of the strap **12**. This prevents the lever **16** from moving out of the tightened position. It is noted that the lever **16** has an over-center motion, and so only a small amount of force is required to hold it in the tightened position, even though the tourniquet **10** may be applying a very high clamping force.

Once the tourniquet **10** has been applied and the lever **16** secured by the lock tab **58**, the free end of the strap **12** may be wrapped around the body of the tourniquet **10**, covering the baseplate **14**, lever **16**, and lock tab **58**, and secured to the lock tab **58**, as shown in FIG. **18**. Thus secured, it performs a function of cutting off blood flow, with a very small exterior profile and no protruding exterior element that could protrude, catch on objects, or become dislodged from its locked position, limiting the user's mobility and possibly causing additional injury.

The baseplate **14** may not be completely rigid and therefore will tend to bend in a convex shape, conforming to the curvature of the limb L, when the tourniquet **10** is applied. It is possible under some circumstances that the corners or edges of the baseplate **14** might tend to cause pinching of the limb L. This possibility may be addressed with the use of a baseplate which is concave-curved in a resting state. FIG. **19** shows a baseplate **114** with this concave curvature. This may be substituted for the baseplate **14** described above. Thus curved, the baseplate would be spaced away from the limb L and would not tend to pinch. When the tourniquet **10** is applied and tightened, the baseplate **114** would tend to flatten out to a deflected shape is shown in FIG. **20**. As another option to address potential pinching, the center of baseplate may be flat, and the distal ends of the baseplate may be bent at an angle, curved, or otherwise displaced, in a direction towards the lever **16**. These ends have a similar effect in preventing pinching to the curvature described above. This feature may be referred to as the distal ends being "ramped". FIG. **21** shows a baseplate **214** with ramped ends **215**.

Several of the features of the tourniquet **10** described above can be integrated into the baseplate in order to simplify its construction. For example, FIG. **23** illustrates a tourniquet **310** constructed using an alternative baseplate **314** along with a strap **12** and lever **16** as described above.

The baseplate **314** is a relatively thin, plate-like rigid or semirigid member. Nonlimiting examples of suitable material for the baseplate **314** include plastics, wood, metals, and combinations thereof. In the illustrated example, the baseplate **14** is constructed as an injection-molded polymeric component with a generally rectangular plan view shape. It has first and second ends **332**, **336**, respectively, and these ends may be ramped as described above.

The baseplate **314** includes a strap guide **330** in the form of a slot formed near the first end **332** of the baseplate **314**. The first portion **17** of the strap **12** is threaded through the strap guide **330**.

The baseplate **314** includes an integral lever anchor **334** between the first and second ends **332**, **336**. In the illustrated example, the lever anchor **334** comprises a resilient flange **338** formed integrally with the body of the baseplate **314**.

As used herein, the term "integral" refers to components which functionally and/or physically form part of a unitary or monolithic whole. For example, components which are machined from a single piece of material, formed as part of an additive manufacturing process, or formed as part of an injection molding process may be considered physically and

functionally integral, unitary, or monolithic. As another example, separate components which are securely attached to each other by means such as fasteners, mechanical joints, thermal or sonic bonding, or adhesives, may be considered functionally integral, unitary, or monolithic.

The flange 338 is shaped so as to define a transverse channel 339 which captures the first pivot element 48 of the lever 16. The flange 338 may be constructed so as to lie tightly against the surface of the baseplate 314, and may include an upturned lead-in feature 340 at its distal end. This facilitates initial assembly, by permitting the lever 16 to be forced between the flange 338 and the baseplate 314. Once the lever enters the channel 339, the flange 338 snaps back into place against the surface of the baseplate 314, and strongly resists removal of the lever 16.

In the illustrated example, a resilient hook 362 is integrally formed as part of the baseplate 314, positioned at or near the second end 336. The hook 362 may be constructed so as to lie lightly against the surface of the baseplate 314, and may include an upturned lead-in feature 364 at its distal end.

A ring 365 with a generally rectangular shape and made of a rigid material such as metal or plastic is attached to the second portion 19 of the strap 12. The ring 365 includes a first slot 367 which is sized to fit the strap 12 with a relatively "tight" (e.g., friction) fit. The exposed portion of the ring 365, and a second slot 369, are collectively sized to fit the hook 362. In the illustrated example, the strap 12 is simply passed through the first slot 367. In use, the end of the ring 365 can be engaged with the lead-in feature 364 and then pulled into full engagement with the hook 362. The spring tension inherent in the hook 362 is made sufficiently light that the ring 365 can be easily removed if necessary.

Once the ring 365 is engaged in the hook 362, the second portion 19 of the strap 12 can be pulled to a desired position (i.e., adjusted), and then folded back and connected to the remainder of the strap 12 using the releasable connector 22. The combined structure of the hook 362 and the ring 365 is another example of a "connector assembly".

The baseplate 314 may optionally incorporate a latch or other similar mechanism (not shown) similar to the latch 59 described above.

The baseplate 314 may incorporate a slot 337 at or near the second end 336. This is similar to the slots 40 described above, and may be used as an alternative to the hook 362 to connect the second portion 19 of the strap 12, in the manner described above.

This version of the baseplate 314 provides for simplified construction and lower parts count. The basic usage of the tourniquet 310 is substantially similar to that of the tourniquet 10 described above.

The tourniquet described above has numerous advantages over pre-existing tourniquets. For example, the tourniquet is of a lighter weight, is a more compact package for easier storage, is easily and more rapidly applied by a user, and has no protruding portions which could limit the users range of motion, become caught on objects and or become dislodged from its locked position rendering the device useless.

The foregoing has described a tourniquet. All of the features disclosed in this specification (including any accompanying claims, abstract and drawings), and/or all of the steps of any method or process so disclosed, may be combined in any combination, except combinations where at least some of such features and/or steps are mutually exclusive.

Each feature disclosed in this specification (including any accompanying claims, abstract and drawings) may be

replaced by alternative features serving the same, equivalent or similar purpose, unless expressly stated otherwise. Thus, unless expressly stated otherwise, each feature disclosed is one example only of a generic series of equivalent or similar features.

The invention is not restricted to the details of the foregoing embodiment(s). The invention extends to any novel one, or any novel combination, of the features disclosed in this specification (including any accompanying claims, abstract and drawings), or to any novel one, or any novel combination, of the steps of any method or process so disclosed.

What is claimed is:

1. A tourniquet, comprising:

a plate-like baseplate with first and second ends, the baseplate having a strap guide disposed at the first end; a strap having first and second ends, the strap having a first portion adjacent its first end, and a second portion adjacent its second end, wherein the first portion is engaged with the strap guide;

a lever with proximate and distal ends, wherein the proximate end is pivotally connected to the baseplate, and the distal end is free;

wherein the first end of the strap is pivotally connected to the lever intermediate to the proximal and distal ends;

a connector assembly operable to selectively connect the second portion of the strap to the baseplate, so as to form a closed loop, the connector assembly operable to permit a length of the closed loop to be adjusted; and

wherein the first and second ends of the baseplate are both ramped towards the lever, in a configuration which would create a space between a limb and the first and second ends of the baseplate, when the baseplate is placed against the limb prior to tightening of the tourniquet.

2. The tourniquet of claim 1 wherein the strap guide comprises a slot formed in the first end of the baseplate through which the first portion of the strap is threaded.

3. The tourniquet of claim 1 wherein the lever is movable between released and tightened positions, wherein a free length of the strap extending beyond the baseplate is shorter in the tightened position than in the released position.

4. The tourniquet of claim 1 wherein the second portion of the strap includes a releasable connector operable to selectively connect the second portion of the strap to the remainder of the strap.

5. The tourniquet of claim 1 wherein the connector assembly includes:

a slot formed in the baseplate sized to receive the strap; and

a releasable connector disposed on the strap and operable to selectively connect the second portion of the strap to the remainder of the strap.

6. The tourniquet of claim 1 further comprising a locking mechanism operable to secure the lever in the tightened position.

7. The tourniquet of claim 1 further comprising a latch carried on the baseplate operable to engage the lever in the tightened position.

8. The tourniquet of claim 1 further comprising a lock tab carried at the distal end of the lever.

9. The tourniquet of claim 8 wherein the lock tab includes a releasable connector operable to selectively connect the lock tab to the strap.

10. The tourniquet of claim 1 wherein the baseplate includes a lever anchor comprising a closed loop of flexible material which surrounds a pivot element of the lever.

11

11. The tourniquet of claim 1 wherein the baseplate includes a lever anchor comprising a rigid U-shaped element which surrounds a pivot element of the lever.

12. The tourniquet of claim 1 wherein the lever comprises a pair of spaced-apart side rails interconnected by a plurality of crossbars.

13. The tourniquet of claim 1 wherein the baseplate has a concave curvature.

14. The tourniquet of claim 1 wherein a finger hole is formed in the second end of the strap.

15. The tourniquet of claim 1 wherein the strap comprises a plurality of spaced-apart flat sections configured to facilitate cutting.

16. The tourniquet of claim 1 wherein the strap comprises a plurality of spaced-apart cut markings.

17. The tourniquet of claim 1 wherein a counter-pull handle is disposed at the first end of the baseplate.

18. The tourniquet of claim 1 wherein:  
the baseplate includes an integral lever anchor disposed between the first and second ends of the baseplate, the lever anchor receiving the proximate end of the lever; and an integral resilient hook positioned at or near the second end of the baseplate; and  
a ring sized to fit the hook is attached to the second portion of the strap.

19. The tourniquet of claim 18 wherein the lever anchor comprises a resilient flange shaped so as to define a transverse channel which captures a first pivot element of the lever.

20. A tourniquet, comprising:  
a plate-like baseplate with first and second ends, and a strap guide disposed at the first end;  
a strap having first and second ends, the strap having a first portion adjacent its first end, and a second portion adjacent its second end, wherein the first portion of the strap is engaged with the strap guide;  
a lever with proximate and distal ends, wherein the proximate end is pivotally connected to the baseplate, and the distal end is free;  
wherein the first end of the strap is pivotally connected to the lever intermediate to the proximal and distal ends, such that the lever is movable between released and tightened positions, wherein a free length of the strap extending beyond the baseplate is shorter in the tightened position than in the released position;

12

a locking mechanism operable to secure the lever in the tightened position;

a connector assembly operable to selectively connect the second portion of the strap to the baseplate, so as to form a closed loop, the connector assembly operable to permit a length of the closed loop to be adjusted; and wherein the first and second ends of the baseplate are both ramped towards the lever, in a configuration which would create a space between a limb and the first and second ends of the baseplate, when the baseplate is placed against the limb prior to tightening of the tourniquet.

21. The tourniquet of claim 20 wherein the second portion of the strap includes a releasable connector operable to selectively connect the second portion of the strap to the remainder of the strap.

22. The tourniquet of claim 20 wherein the connector assembly includes:

- a slot formed in the baseplate sized to receive the strap; and
- a releasable connector disposed on the strap and operable to selectively connect the second portion of the strap to the remainder of the strap.

23. The tourniquet of claim 20 further comprising a lock tab carried at the distal end of the lever, the lock tab including a releasable connector operable to selectively connect the lock tab to the strap.

24. The tourniquet of claim 20 wherein the baseplate includes a lever anchor which surrounds a pivot element of the lever.

25. The tourniquet of claim 20 wherein the baseplate has a concave curvature.

26. The tourniquet of claim 20 wherein:  
the baseplate includes an integral lever anchor disposed between the first and second ends of the baseplate, the lever anchor receiving the proximate end of the lever; and an integral resilient hook positioned at or near the second end of the baseplate; and  
a ring sized to fit the hook is attached to the second portion of the strap.

27. The tourniquet of claim 26 wherein the lever anchor comprises a resilient flange shaped so as to define a transverse channel which captures a first pivot element of the lever.

\* \* \* \* \*

**EXHIBIT 4**

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

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

Plaintiffs,

CIVIL ACTION NO.:

v.

2019-CP-24-00272

COMPOSITE RESOURCES, INC.,

Defendant.

\_\_\_\_\_ /

VIDEOTAPED VIDEOTELECONFERENCE

30 (b) (6)

DEPOSITION OF: POLY-TECH INDUSTRIAL, INC.'S CORPORATE  
REPRESENTATIVE DANIEL P. CEDRONE  
(via video teleconference)

DATE: December 11, 2020

TIME: 10:20 a.m. - 5:03 p.m.

LOCATION: 301 South College Street  
Charlotte, North Carolina

TAKEN BY: Attorney for the Defendant

REPORTED BY: Elizabeth Drumm, CCR, RPR  
Registered Professional Reporter  
(via video teleconference)

VIDEOGRAPHER: Darren Carreras  
(via video teleconference)

1 APPEARANCE OF COUNSEL:

2

3

Via video teleconference on behalf of the Plaintiffs:

4

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Telephone: (864) 255-5412  
8 Keith.munson@wbd-us.com

9

10

11 Via video teleconference on behalf of the Defendant:

12

BURR, FORMAN, MCNAIR  
13 BY: PAUL D. HARRILL, ESQUIRE  
BY: WILLIAM Y. KLETT, III, ESQUIRE  
1221 Main Street  
14 Suite 1800  
Columbia, South Carolina 29201  
15 Telephone: (803) 799-9800  
Pharrill@burr.com

16

17

18 Also Present: Derek Thompson  
Jon Bennett

19

20

21

22

23

24

25 (index at rear of transcript)

1 Q And you continued to get commissions;  
2 right?

3 A Correct.

4 Q And you continued to get commissions for  
5 another two and a half years or more after that?

6 A Correct.

7 Q So to be clear, do you believe that  
8 Poly-Tech should still be getting \$1.75 for every  
9 CAT tourniquet sold?

10 A Yes.

11 Q And when do you believe that obligation  
12 would end?

13 A Never.

14 Q And what have you done to be able to  
15 continue to get \$1.75 per CAT tourniquet forever?

16 A It's in our agreement. It's in the  
17 spirit of the agreement. I got the business  
18 initially, nurtured it throughout the project and  
19 had many conversations with Jon and Lisa and  
20 clarified that this was a forever thing.

21 Q And you said you nurtured it throughout  
22 the project. What does that mean?

23 A From day one I helped with the  
24 manufacturing, the material choices, the design of  
25 the components, sales, trade shows, discussing it

1 like to ask you about.

2 A Sure.

3 Q I'll scroll down when you're ready for  
4 me. Okay. You just tell me.

5 A Yes.

6 Q Are you ready? Are you finished?

7 A Yes, sir.

8 Q Okay. What does that section ten say  
9 that the relationship of Composite Resources and  
10 Poly-Tech is?

11 A Independent contractor.

12 Q Okay. Does that section say anywhere  
13 that they are partners?

14 A No, not there.

15 Q All right. And where in this agreement  
16 does it say that they are partners?

17 A It does not.

18 Q Okay. But you said it's in the spirit  
19 of the agreement?

20 A Yes, sir.

21 Q All right. And is there someplace where  
22 this spirit emanates?

23 A Through the 18 years that it was being  
24 used.

25 Q Okay. So the partnership arrangement

1 grew after the agreement was signed? That's what  
2 you're saying?

3 A No. The partnership arrangement was in  
4 place prior to the agreement. And Lisa, Jon and I  
5 wrote this agreement to insure the perpetuity of the  
6 partnership and the project of the tourniquets and  
7 the other side of the agreement, which is the basic  
8 sales rep side.

9 Q But you can't show me anywhere in here  
10 that it references to a partnership?

11 A Correct.

12 Q And you think the spirit of the  
13 agreement creating a partnership overrides the  
14 express terms of clause or section ten that we just  
15 read about, the relationship of the parties?

16 A I need that again.

17 Q Yes, sir. I was just saying that you  
18 believe that the spirit of this agreement, as you  
19 call it, that somehow creates a partnership  
20 arrangement, overrides the express terms of the  
21 agreement, including section ten that we just looked  
22 at establishing an independent contractor  
23 relationship?

24 A Well, I think we -- I don't think that's  
25 the case, but I think we followed it until the

1 regular agreement was terminated.

2 Q You followed what?

3 A The agreement.

4 Q Okay. So when the -- so when the  
5 agreement was terminated, the arrangement became one  
6 of a partnership?

7 A The partnership was already there.

8 Q And where is the partnership created?

9 A In spirit.

10 Q In the actions of the parties before you  
11 entered into this agreement?

12 A Before, during and after. Before and  
13 during I should say.

14 Q Mr. Cedrone, is Poly-Tech currently  
15 competing with Composite Resources?

16 A Not to my knowledge.

17 Q Isn't Poly-Tech marketing and  
18 advertising the HALO tourniquet on its web page?

19 A Yes.

20 Q Isn't the HALO tourniquet a tourniquet  
21 that competes with the CAT tourniquet?

22 A Well, that would be CAT Resources;  
23 right? Or are you combining the two companies?

24 Q I'm talking about Composite Resources.

25 A Yeah, I would say in some respects it's

1 a competitive product, yes.

2 Q Okay. And that competitive product is  
3 being marketed on your web page, Poly-Tech  
4 Industrial; correct?

5 A It's on the Poly-Tech website, but it's  
6 for HALO Tactical, yes.

7 Q Where is the HALO tourniquet being  
8 manufactured?

9 A In Huntersville.

10 Q And at what facility?

11 A Inside Poly-Tech.

12 Q Are there any employees of HALO  
13 Tactical, LLC?

14 A No.

15 Q So whose handling the manufacturing of  
16 the HALO tourniquet?

17 A Poly-Tech Industrial.

18 Q And is that by virtue of a contract you  
19 have with HALO Tactical?

20 A What is being -- it will be, yes.

21 Q How many HALO tourniquets have been sold  
22 to date, if you know?

23 A 250, 300 maybe.

24 Q And how did you come up with your  
25 pricing for the HALO tourniquet?

**EXHIBIT 5**

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF YORK

DANIEL P. CEDRONE AND  
POLY-TECH INDUSTRIAL, INC.

Plaintiffs,

vs.

CASE NO. 2019-CP-46-00051

COMPOSITE RESOURCES, INC.

Defendant.

DEPOSITION OF: LISA BENNETT

DATE: January 26, 2021

TIME: 12:08 p.m.

LOCATION: Womble Bond Dickinson  
301 South College Street  
Charlotte, NC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: SOLANGE RUIZ-URIBE, Court Reporter  
Via VTC

1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR THE PLAINTIFFS  
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4 INC.:

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12 AND

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(appearances continued)

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(appearances continued)

ALSO PRESENT:

RODNEY MYERS, Videographer

JON BENNETT

DAN CEDRONE, Plaintiff

(INDEX AT REAR OF TRANSCRIPT)

1 Q. Okay.

2 A. Yeah.

3 Q. And what about say 100,000 in revenue?

4 A. It was late '90s, around '98, '99.

5 Q. Who is Jonathan Bennett?

6 A. Jonathan is my ex-husband.

7 Q. And how long ago did you meet Jonathan  
8 Bennett?

9 A. We met in college at the University of  
10 Connecticut, I guess it was junior year so that  
11 would have been like 1985.

12 Q. What jobs and positions did he generally  
13 hold between the time you got married and 2001?

14 A. Design engineering.

15 Q. I think you mentioned that he worked for  
16 C.E.M.?

17 A. Yes.

18 Q. What is that?

19 A. They were -- I'm not sure if they are  
20 still in operation, but they are an industrial  
21 equipment company and at the time he was working on  
22 design engineering of one of their industrial  
23 microwaves for the chemical industry.

24 Q. As a design engineer what generally did he  
25 do?

1           **A.**    Again, if the product ceased to exist then  
2 the commission wouldn't be -- you wouldn't have to  
3 pay the commission because you're not providing the  
4 product.

5           **Q.**    What if this account goes away but someone  
6 is still making the GraviGates?

7           **A.**    Well, I think the way the agreement was  
8 written specifically pertains to Composite Resources  
9 make the GraviGate.

10          **Q.**    Okay.

11          **A.**    So if that went away, Composite wouldn't  
12 produce them they wouldn't owe the commission.

13          **Q.**    Okay. And you said this is your  
14 interpretation of this section of the agreement; is  
15 that right?

16          **A.**    Yes, as I read this.

17          **Q.**    Do you think your interpretation or the  
18 words are more important in interpreting and  
19 understanding and enforcing this agreement?

20          **A.**    The words of course.

21          **Q.**    Do you think your interpretation or the  
22 interpretation of the parties that signed the  
23 agreement is more important?

24          **A.**    The parties that signed the agreement.

25          **Q.**    Did you understand that this agreement,

1 the sales representative agreement could be  
2 terminated?

3 **A.** Yes, there is termination process.

4 **Q.** Okay. And what was your understanding of  
5 that termination clause?

6 **A.** I believe that was built in, in the event  
7 for catastrophic, just being able to have -- have a  
8 chance to either renegotiate the contract or to  
9 cancel the contract if there was something  
10 significant with a breach of contract or a pricing  
11 reduction that was beyond what the profit margins of  
12 any of the products was and there needed to be  
13 renegotiation.

14 **Q.** So you think if it's below the profit  
15 margin -- what if -- what if the profit margin were  
16 reduced to a position where Poly-Tech's commission  
17 would be the entire profit?

18 **A.** I think that would be grounds for  
19 renegotiation and I think it's up to the parties as  
20 to whether or not to engage the termination part of  
21 the contract based on negotiation.

22 **Q.** Let me ask you this, I made some notes  
23 here and I may find them or I may not.

24 **A.** Okay.

25 **Q.** I hope I remember the question that I

1 wanted to ask you.

2 **A.** Sure.

3 **Q.** Mr. Munson was asking earlier about sort  
4 of a -- I don't know if he said a partnership or a  
5 sharing of the benefits, the economic benefits, do  
6 you remember asking something about that?

7 **A.** Yes.

8 **Q.** Okay. All right. Let me ask you this:  
9 Who took the risk in the development of the C-A-T  
10 tourniquet?

11 **A.** Composite Resources did.

12 **Q.** Did Dan Cedrone take any risks as far as  
13 buying machinery or outlaying cash?

14 **A.** No.

15 **Q.** Did Composite Resources do that?

16 **A.** Yes.

17 **Q.** Did Dan Cedrone individually take any  
18 risk?

19 **A.** No.

20 **Q.** So you think it would be appropriate to  
21 share evenly the profits in that situation?

22 **A.** No and I never said that I thought that  
23 was appropriate.

24 **Q.** Okay. What do you think would be the  
25 ramifications if Mr. Cedrone or Poly-Tech developed

1 a competing tourniquet?

2 A. Well, to me that would engage a breach of  
3 contract.

4 Q. Okay. And do you recall that provision,  
5 dealing with that being in the contract or the  
6 agreement?

7 A. No, that was -- that was not defined  
8 within the contract.

9 Q. Let me ask you to look at -- go back to  
10 the first page of Exhibit 23?

11 A. Okay.

12 Q. Okay. And if you see the heading Roman  
13 numeral II, Acceptance of Appointment.

14 A. Yes.

15 Q. Go down let's see one, two, three, four,  
16 five, six, eight lines and there is a section there  
17 that says, representative agrees to refrain from  
18 engaging directly or indirectly any activity or  
19 business transaction for itself or any other person,  
20 corporation or subsidiary directly or indirectly and  
21 regardless of whether remuneration is involved,  
22 contingent or otherwise, which in any way competes  
23 with any operation of company. Do you see that?

24 A. Yes, I do.

25 Q. Okay. Does that refresh your recollection

1 as to whether there was any prohibition against  
2 competition?

3 A. Yes, it does.

4 Q. And do you recall that provision now being  
5 in the agreement?

6 A. Yes.

7 Q. And you believe that if Poly-Tech or Dan  
8 Cedrone developed a competing tourniquet that would  
9 be a breach of this agreement?

10 A. Yes.

11 Q. And that was your understanding when this  
12 agreement was negotiated?

13 A. Yes.

14 Q. Would you be surprised if you were to  
15 learn that Mr. Cedrone has done that?

16 A. Yes, I would be surprised.

17 Q. Would it also surprise you that he did  
18 that while he was drawing commissions from Composite  
19 Resources?

20 A. Yes, that would surprise me.

21 Q. Would it surprise you that the folks he  
22 collaborated with in developing a competing  
23 tourniquet were brought in to tour Composite  
24 Resources' facility with Mr. Cedrone?

25 A. Yes, that would surprise me.

1 Q. Do you believe that would be a breach of  
2 the agreement?

3 A. Yes.

4 Q. And you understand that this agreement  
5 establishes a relationship that is a sales  
6 representative relationship, correct?

7 A. Yes.

8 Q. It doesn't establish a manufacturer  
9 relationship or anything like that, correct?

10 A. No.

11 Q. Okay. Earlier you testified about  
12 Mr. Cedrone attending some meetings, I think you  
13 said maybe with the General, I don't remember the  
14 name?

15 A. General Baxter.

16 Q. Yeah.

17 A. Yeah.

18 Q. And maybe some -- General Baxter and maybe  
19 a couple of other times. Do you think it was  
20 important for Mr. Cedrone to, as a sales  
21 representative to be informed of what was going on  
22 with the C-A-T tourniquet?

23 A. Yes.

24 Q. And do you understand that he was at these  
25 meetings as a sales representative?

1           **A.**    Yes.?"

2           **Q.**    I think earlier and I may have misheard  
3 you, Ms. Bennett, but I don't think I did, I think  
4 you said that Mr. Cedrone was the best sales  
5 representative that Composite Resources had?

6           **A.**    Yes.

7           **Q.**    Wasn't he the only sales representative?

8           **A.**    He -- no, we had -- we had two other  
9 gentlemen.

10          **Q.**    Who were they?

11          **A.**    There was a gentleman named Dale Carpenter  
12 and he was hired on as the sales engineering role,  
13 sales slash engineering and then David Smith was  
14 hired as a direct sales representative.

15          **Q.**    Were these outside sales?

16          **A.**    No, they were -- they were brought in on  
17 payroll at Composite Resources.

18          **Q.**    Okay. Did they go -- were they out -- did  
19 they go outside for sales or were they doing stuff  
20 inside?

21          **A.**    Yes, they both were tasked with going  
22 outside for sales.

23          **Q.**    Okay. And when were these gentlemen hired  
24 working in Composite Resources?

25          **A.**    Oh, gosh, Dale, he was the early 2000, I

1 think. I don't recall the time frame when Dale was  
2 there. And then Dave was hired on after the  
3 tourniquets began so he was later 2000s, he was  
4 still with the company when I left.

5 Q. Okay. Was -- dale was gone?

6 A. Dale was gone, I think he was there just  
7 under two years.

8 Q. Okay. So he came and went before the  
9 C-A-T tourniquet was being produced?

10 A. Yes, correct.

11 Q. Did -- I think you've answered this but  
12 you don't think that this agreement was drafted in a  
13 sense that it could never be terminated by Composite  
14 Resources, right?

15 A. No.

16 Q. And you discussed some of the reasons that  
17 it could be terminated earlier?

18 A. Yes.

19 Q. Are there any others?

20 A. No.

21 Q. And I assume competition is one of those  
22 reasons?

23 A. Yes.

24 Q. Let me make sure I'm clear on one issue.  
25 Phil Durango, LLC was -- they were a customer of

1 Composite Resources, right?

2 A. Yes.

3 Q. So they owned -- if Phil Durango, LLC  
4 owned the patents and the rights for the C-A-T  
5 tourniquet, right?

6 A. Yes.

7 Q. So the agreement between Composite  
8 Resources and Phil Durango, LLC was to pay  
9 royalties, not commissions, correct?

10 A. Yes.

11 Q. There was no sales representative  
12 agreement between the two of them, between Composite  
13 and Phil Durango?

14 A. Correct, yeah.

15 Q. So that was a different kind of  
16 relationship than what existed with Poly-Tech and  
17 Composite Resources?

18 A. Yes.

19 Q. When was the last time you looked at this  
20 agreement, this Exhibit 23 before today?

21 A. It probably was around the time it was  
22 drafted so back in 2005.

23 Q. Okay. So you haven't seen it since that  
24 time?

25 A. No.

1 Q. Okay. You didn't look at it between 2005  
2 and 2011?

3 A. No.

4 Q. Okay. I think earlier Mr. Munson was  
5 asking you about who drafted the agreements. Do you  
6 recall Mr. Cedrone sending you a draft document at  
7 any time that formed the basis for any of these  
8 agreements, Exhibits 20 through 23?

9 A. I recall that he sent Exhibit 20 which was  
10 the original agreement December 15th, 2000 between  
11 Poly-Tech and Composite Resources. I do recall that  
12 one. And I believe that was used at the core for  
13 the subsequent agreement, well, drafts and then we  
14 called it agreement.

15 Q. And he obviously had input in what went  
16 into Exhibit 23 which is the ultimate agreement,  
17 right?

18 A. Yes, correct.

19 Q. And we know that because you're telling me  
20 so and we also know it because of Exhibit 24 --

21 A. Yes.

22 Q. -- this email, right?

23 A. Yes.

24 Q. Do you recall who drafted this Section C  
25 to Annex C, really the last page of the document?

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

Case No. 2019-CP-46-00051

**PLAINTIFFS DAN CEDRONE AND POLY-  
TECH INDUSTRIAL’S REPLY IN SUPPORT  
OF MOTION FOR PARTIAL SUMMARY  
JUDGMENT AS TO UNAMBIGUOUS  
MATERIAL TERMS**

Daniel P. Cedrone (“**Cedrone**”) and Poly-Tech Industrial, Inc. (“**Poly-Tech**”) (collectively “**Plaintiffs**”), hereby move for final partial summary judgment pursuant to Rule 56, South Carolina Rules of Civil Procedure on the issue of Plaintiffs’ entitlement to have material unambiguous terms in the Contract with Defendant Composite Resources, Inc. (“**Composite**” or “**Defendant**”) determined as a matter of law and in support hereof states:

Plaintiffs’ counsel received Defendant’s opposition memorandum and exhibits less than 24 hours ago and submits this Reply, with the offer to further reply on any point on which the Court desires additional briefing.

Defendant does not contest any of the following:

1. The issue is appropriate for summary judgment;
2. The Contract attached to the Complaint is the agreement between the parties;
3. Interpretation of the Contract is a matter of law for the Court;
4. The Court can construe provision within the Contract against the background of the “four corners” of the agreement;
5. Only Plaintiffs have moved to have terms determined by the Court as a matter of law.

The admitted Contract provision at issue under the First Cause of Action simply provides for a “Commission rate of \$1.75 per tourniquet sold”, with the Commission to continue “for as long as the project continues” even if the Contract terminated or if Cedrone were to pass away before the project ended. [See Ex. A to Complaint, p. 11 – a copy of which is attached to the Motion as **Exhibit A** as well]. The Combat Tourniquets were subject to the “special account” provisions found in Annex C, Section C of the Contract, page 11 of 11. Specifically, the tourniquet special account provisions state, in relevant part, 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; and
- b. 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” as if it provided all the services and products related to the Combat Tourniquets.

[See Ex. A, Contract, Annex C, Subsection C, page 11].

These special account remunerations, perpetual commissions, and profit guarantees were “to continue [even] if for any reason the regular contract is discontinued.”

### **LEGAL STANDARD**

By definition, a matter of law to be determined by the Court necessarily does not involve a genuine issue of material fact. Defendant concedes this point. Moreover, “[e]ven where a court, however, determines as a matter of law that the contract is ambiguous, it may yet examine evidence extrinsic to the contract that is included in the summary judgment materials, and, if the evidence is, as a matter of law, dispositive of the interpretative issue, grant summary judgment on that basis.” *Sheridan v. Nationwide Ret. Sols., Inc.*, 313 F. App'x 615, 617 (4th Cir. 2009); see also *Sprint Nextel Corp. v. Wireless Buybacks Holdings, LLC*, 938 F.3d 113, 131 (4th Cir. 2019).

Plaintiffs attached several factual exhibits to its motion for summary judgment in case such as second tier analysis is required by the Court. That is, if the Court finds an aspect of the provisions Plaintiffs seek to have confirmed as a matter of law to be a bit fuzzy, and if the uncontested factual evidence submitted in the exhibits provides clarity, then summary judgment as to the meaning of these terms is still appropriate.

**LAW AND ARGUMENT**

Regarding a clear and unambiguous contract, its construction is “a matter of law” for the Court. *Watts v. Monarch Builders Inc.*, 272 S.C. 517, 252 S.E.2d 889 (1979). Over time, this principle has become even better defined in South Carolina. For example, “[w]hen 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.”).

In further support of the Motion, Plaintiffs refer the Court to the attached case addressing essentially identical issues. In *Reyes v. Metromedia Software, Inc.*, 840 F. Supp. 2d 752 (S.D.N.Y. 2012), the federal court had before it a contract that required the payment of commissions for an additional 7 years after the termination of the sales representative agreement. Plaintiff moved for partial summary judgment seeking declaration of entitlement to post-termination commission payments under terms of contract and that employer breached those terms. *Id.* at 753-54. In *Reyes*, a “separate section” of the agreement “provided that if the contract

were ‘terminated for any reason whatsoever ... commissions will be paid to [Reyes] pursuant to Section 2(a)(i) above for a period of seven (7) years from the date of such termination.’ *Id.*

The Court noted in its decision that:

The Employment Agreement's provisions regarding the payment of commissions are clear and unambiguous. Paragraph 2(a)(i) governs the payment of commissions while Reyes is employed by Metromedia. *See* Employment Agreement ¶ 2(a)(i). Paragraph 4(c) of the Employment Agreement governs the payment of commissions in the event Reyes's employment were to terminate, and provides that Metromedia must pay him the same commissions to which he is entitled under ¶ 2(a)(i) for seven years from the termination date, unless it terminates him for certain wrongdoing. *See* Employment Agreement ¶ 4(c).

*Reyes*, 840 F. Supp. 2d at 755. The federal court rebuked Defendant’s argument that termination ended the obligation, noting that:

Paragraph ¶ 4(c), by contrast, serves a different purpose to set forth the compensation Reyes was entitled to receive in the event the employment relationship terminated. The fact that these commissions were to be paid post-termination, however, is not inconsistent with Metromedia's obligation to pay Reyes certain defined salary and commissions “only” while Reyes was employed. Indeed, the independent purpose and function of ¶ 4(c) are rendered all the more obvious because ¶ 4(c) *specifically mentions* ¶ 2(a)(i) that is, ¶ 4(c) ties the amount of the post-termination commissions to the very amounts that would have been due to Reyes under ¶ 2(a)(i) had he remained an employee. The drafters of the contract thus understood that, in creating the obligation to pay post-termination commissions in ¶ 4(c), they were doing so in the face of a separate obligation to pay commissions during the term of Reyes's employment.

*Reyes*, 840 F. Supp. 2d at 756. Adding that, “[a]ccepting Metromedia's interpretation, however, requires a strained—indeed, almost nonsensical—reading of the contract and violates the cardinal rule that a contract should not be read to render any provision superfluous.” *Id.* And concluding that: “[b]ecause [Defendant] does not dispute that it has failed to pay Reyes for the amounts owing pursuant to ¶ 4(c) of the Employment Agreement, Reyes is entitled to partial

summary judgment on the issue of [Defendant's] breach. *Id.* at 758.

**CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order granting their Motion for Partial Summary Judgment and such other and further relief as this Court deems just and proper. Specifically, the Court should enter an order finding that:

As a matter of law, pursuant to the terms of the Contract, Composite was and is obligated to pay Plaintiffs "\$1.75 per [combat] tourniquet sold," or which is sold in the future, by Composite Resources, including any affiliated companies, and 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, or which it does purchase after the date of this Order, for the manufacturing of combat tourniquets.<sup>1</sup>

This the 4th day of May 2022.


Respectfully submitted,

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<sup>1</sup> In *Southern Recycling, supra*, (D.S.C. Mar. 31, 2016), District Judge Hendricks, entered a summary judgment order in similar term. Specifically, "[t]hus, the Court finds, as a matter of law, that pursuant to the terms of the purchase contract, [Defendant] was obligated to deliver the copper wire in containers to the Port of Manila, Philippines and, if [Defendant] failed to satisfy this obligation, [Defendant] bore the risk of loss."

 KeyCite Yellow Flag - Negative Treatment  
Distinguished by [Morelli v. Patient Safety Technologies, Inc.](#), C.D.Cal.,  
December 22, 2015

840 F.Supp.2d 752

United States District Court,  
S.D. New York.

Valdenor REYES, Plaintiff,  
v.

METROMEDIA SOFTWARE, INC., Defendant.

No. 11 Civ. 02155 (GWG).

|  
Jan. 4, 2012.

### Synopsis

**Background:** Former employee filed suit against employer for allegedly breaching employment contract. Employee moved for partial judgment on pleadings seeking declaration of entitlement to post-termination commission payments under terms of contract and that employer breached those terms.

**[Holding:]** The District Court, Gabriel W. Gorenstein, United States Magistrate Judge, held that employee's post-termination commission payments were required by contract.

Motion granted.

West Headnotes (8)

#### [1] **Contracts** 🔑 Language of contract

Under New York law, a court interpreting a contract must give effect to the intent of the parties as revealed by the language they chose to use.

[3 Cases that cite this headnote](#)

#### [2] **Contracts** 🔑 Application to Contracts in General

**Contracts** 🔑 Ambiguity in general

Under New York law, the proper interpretation of an unambiguous contract is a question of law for the court, and courts are to enforce the contracts as written.

[6 Cases that cite this headnote](#)

#### [3] **Contracts** 🔑 Ambiguity in general

Under New York law, when the meaning of the contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented.

[1 Cases that cite this headnote](#)

#### [4] **Contracts** 🔑 Ambiguity in general

Under New York law, whether a contractual provision is ambiguous or not is a threshold question of law to be determined by the court.

[4 Cases that cite this headnote](#)

#### [5] **Evidence** 🔑 Nature and Existence of Ambiguity in General

Under New York law, if a court determines that a contractual provision is ambiguous, the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract.

#### [6] **Contracts** 🔑 Existence of ambiguity

Under New York law, a contract is not ambiguous simply because the parties have urged conflicting interpretations; rather, a contractual provision is ambiguous only when it is reasonably susceptible to more than one reading.

[7 Cases that cite this headnote](#)

#### [7] **Contracts** 🔑 Construction as a whole

Under New York law, a court must evaluate the disputed language in the context of the entire agreement to safeguard against adopting an interpretation that would render any individual provision superfluous.

3 Cases that cite this headnote

**[8] Labor and Employment** 🔑 Effect of termination of employment

Under New York law, employer was required to pay former employee post-termination commissions, pursuant to unambiguous terms of employment contract providing that for seven years after employee was terminated, he was entitled to payment of same commissions to which he was entitled “only” during his employment, in accordance with other terms of contract that did not conflict with terms governing post-termination commissions that continued to apply after parties executed second agreement.

**Attorneys and Law Firms**

\*752 **Scott A. Korenbaum, Scott A. Korenbaum, Esq.**, New York, NY, for Plaintiff.

**David Glenn Ebert, Mioko Catherine Tajika**, Ingram Yuzek Gainen Car, Roll & Bertolotti, LLP New York, NY, for Defendant.

**\*753 OPINION AND ORDER**

**GABRIEL W. GORENSTEIN**, United States Magistrate Judge.

Plaintiff Valdenor Reyes brings this action against his former employer Metromedia Software, Inc. on the ground that Metromedia violated his employment contract. Reyes has moved for partial judgment on the pleadings seeking a declaration that he is entitled to certain commission payments under the terms of his employment contract and that Metromedia has breached those terms.<sup>1</sup> For the reasons discussed below, Reyes's motion is granted.<sup>2</sup>

**I. BACKGROUND**

**A. Facts**

The facts relevant to this motion are undisputed.

Defendant Metromedia Software, Inc. (“Metromedia”) entered into an employment contract with Reyes, which was drafted by Metromedia and is dated January 1, 1998. *See* Employment Agreement, dated Jan. 1, 1998 (annexed as Ex. A to Reyes Decl.); Complaint, filed Mar. 29, 2011 (Docket # 1) (“Compl.”) ¶ 8. Reyes's responsibilities under the contract included selling Metromedia's “Hotelexpert product” and providing training and support services relating to the use of that product. *See* Employment Agreement ¶ 1.

Paragraph 2 of the Employment Agreement, entitled “Compensation,” is divided into two parts. The first part provided for compensation as consideration for “the due and faithful performance of the Services under this Agreement, and only for so long as you are an employee of the Company ... and only for so long as you are rendering such Services to the Company.” *Id.* ¶ 2(a). The provisions of this paragraph promise Reyes three forms of compensation: (i) commissions equal to 6% of annual “gross revenues”; (ii) \$50,000 for services rendered between May 20 and December 31, 1998; and (iii) a weekly salary of \$2,884.62 beginning on January 1, 1999. *Id.* ¶¶ 2(a)(i)-(iii). The second part provided for the issuance of 53 shares of stock to Reyes as compensation for past services. *Id.* ¶ 2(b).

A separate section of the Employment Agreement, ¶ 4, is entitled “Term and Termination.” This paragraph provides that Reyes's employment would commence on January 1, 1998 and continue for five years unless Metromedia terminated him for cause, the possible bases for which are listed in the agreement. *See id.* ¶ 4(a). This section also provides that if Reyes continued to perform services after the termination date of the agreement—that is, after December 31, 2002—without a written extension, the parties' continued employment relationship would be governed by the same terms and conditions contained in the Employment Agreement unless the parties entered into a new agreement or either party terminated the existing agreement on 30 days notice. *Id.* ¶ 4(b).

The next section of ¶ 4 provided that if the contract were “terminated for any reason \*754 whatsoever, other than fraud, embezzlement, or gross negligence, commissions will be paid to [Reyes] pursuant to Section 2(a)(i) above for a period of seven (7) years from the date of such termination.” *Id.* ¶ 4(c).

The parties executed a second agreement, dated November 9, 2007, entitled “Memorandum of Agreement.” See Memorandum of Agreement, dated Nov. 9, 2007 (annexed as Ex. B to Reyes Decl.) (“Mem. of Agreement”); Compl. ¶ 15. The Memorandum of Agreement provided that “[i]t is the intention of both [Reyes] and [Metromedia] to extend the terms of [the Employment Agreement]” and that “[a]ll terms contained in the Employment Agreement, unless otherwise modified by this Memorandum, shall continue in effect until June 30, 2008 (“Employment Term”).” Mem. of Agreement at 1. Furthermore, the Memorandum of Agreement provided that the original Employment Agreement “shall automatically be extended until December 31, 2008,” unless either party notified the other of its intention not to extend the contract by May 31, 2008. *Id.*

The Memorandum of Agreement's substantive modifications to the Employment Agreement principally related to the terms of Reyes's agreement not to compete with Metromedia in the event the Employment Agreement were terminated and to the commissions Reyes would receive under sales contracts arising out of an agreement Reyes was then negotiating with Hilton Hotels Corporation on behalf of Metromedia. *See id.* at 1–3.

Metromedia terminated Reyes's employment on January 8, 2010. Compl. ¶ 28. Metromedia did not terminate Reyes's employment for any of the reasons listed in ¶ 4(c) of the Employment Agreement. Compl. ¶ 29. Metromedia paid commissions owed to Reyes pursuant to the Memorandum of Agreement for the years 2008 and 2009, and some commissions for 2010—presumably consisting of commissions earned prior to his termination. Compl. ¶ 24; Answer ¶ 10. But Metromedia believes it is not obligated to pay Reyes post-termination commissions. *See* Opp. Mem. at 9.

#### B. *The Instant Motion*

Reyes has moved for partial judgment on the pleadings requesting a declaration that Metromedia is obligated to pay Reyes “commissions, in accordance with the terms of their Employment Agreement ..., dated as of January 1, 1998, for seven years following the termination of his employment on January 8, 2010.” Notice at 1. Reyes also requests a declaration that Metromedia breached the Employment Agreement “by failing to pay Mr. Reyes commissions, in accordance with the terms of the Employment Agreement, following the termination of his employment on January 8, 2010, to the present.” *Id.* at 1–2.

Metromedia contends that summary judgement should be denied because it is not obligated to pay commissions to Reyes following his termination. It argues that paragraphs 2(a)(i) and 4(c) are irreconcilable or that the contract is otherwise ambiguous. Opp. Mem. at 7–16. It therefore requests the opportunity to present extrinsic evidence to resolve the alleged ambiguity or a ruling that ¶ 4(c) of the Employment Agreement is invalid. *Id.* at 9.

## II. DISCUSSION

### A. *Principles of Contract Interpretation*

Because the parties have relied on New York State law in presenting their arguments, we apply New York law to Reyes's claims. *See, e.g.,* [Merrill Lynch Interfunding, Inc. v. Argenti](#), 155 F.3d 113, 121 n. 5 (2d Cir.1998) (citing [Hannex Corp. v. GMI, Inc.](#), 140 F.3d 194, 203 n. 7 (2d Cir.1998)).

\*755 [1] [2] Under New York law, a court interpreting a contract must “give effect to the intent of the parties as revealed by the language they chose to use.” [Seiden Assocs., Inc. v. ANC Holdings, Inc.](#), 959 F.2d 425, 428 (2d Cir.1992) (citing [Slatt v. Slatt](#), 64 N.Y.2d 966, 967, 488 N.Y.S.2d 645, 477 N.E.2d 1099 (1985)). “The proper interpretation of an unambiguous contract is a question of law for the court,” [Omni Quartz, Ltd. v. CVS Corp.](#), 287 F.3d 61, 64 (2d Cir.2002) (citing [Seiden](#), 959 F.2d at 428); *accord* [Citibank, N.A. v. Morgan Stanley & Co. Int'l](#), 724 F.Supp.2d 398, 404 (S.D.N.Y.2010), and “courts are to enforce them as written,” [Vill. of Sylvan Beach v. Travelers Indem. Co.](#), 55 F.3d 114, 115 (2d Cir.1995) (citing [Maurice Goldman & Sons, Inc. v. Hanover Ins. Co.](#), 80 N.Y.2d 986, 987, 592 N.Y.S.2d 645, 607 N.E.2d 792 (1992)).

[3] [4] [5] “However, when the meaning of the contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented,” [LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.](#), 424 F.3d 195, 205 (2d Cir.2005) (quoting [Postlewaite v. McGraw–Hill, Inc.](#), 411 F.3d 63, 67 (2d Cir.2005)). Whether a contractual provision is ambiguous or not is a “threshold question of law to be determined by the court.” [Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.](#), 472 F.3d 33, 42 (2d

Cir.2006) (quoting *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 390 (2d Cir.2005)). If a court determines that a contractual provision is ambiguous, “the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract.” *Id.* at 43 (quoting *Morgan Stanley Grp. Inc. v. New England Ins. Co.*, 225 F.3d 270, 275–76 (2d Cir.2000)).

[6] [7] A contract is not ambiguous simply because the parties have urged conflicting interpretations. *Sayers v. Rochester Tel. Corp. Supplemental Mgmt. Pension Plan*, 7 F.3d 1091, 1095 (2d Cir.1993) (citing cases). Rather, a contractual provision is ambiguous only “when it is reasonably susceptible to more than one reading.” *U.S. Fire Ins. Co. v. Gen. Reinsurance Corp.*, 949 F.2d 569, 572 (2d Cir.1991). Importantly, a court must evaluate the disputed language “in the context of the entire agreement .... [to] safeguard against adopting an interpretation that would render any individual provision superfluous.” *Sayers*, 7 F.3d at 1095 (citations and internal quotations omitted).

#### B. Analysis

[8] The Employment Agreement's provisions regarding the payment of commissions are clear and unambiguous. Paragraph 2(a)(i) governs the payment of commissions while Reyes is employed by Metromedia. *See* Employment Agreement ¶ 2(a)(i). Paragraph 4(c) of the Employment Agreement governs the payment of commissions in the event Reyes's employment were to terminate, and provides that Metromedia must pay him the same commissions to which he is entitled under ¶ 2(a)(i) for seven years from the termination date, unless it terminates him for certain wrongdoing. *See* Employment Agreement ¶ 4(c).

In the face of this apparent clarity as to the commission obligation, Metromedia argues that its obligation to pay Reyes commissions terminated when Metromedia discharged Reyes from his employment. Metromedia's main argument is that ¶ 2(a)(i) and ¶ 4(c) are “irreconcilable.” *Opp. Mem.* at 9. To support this argument, Metromedia points to the opening sentence of ¶ 2(a), which states that Metromedia's obligation to pay Reyes a salary and commissions exists “only for so long as [Reyes is] an employee of the Company ... and only for so long as [Reyes is] \*756 rendering ... Services to the Company.” *Id.* at 8. Metromedia contends

that because the obligation to pay commissions pursuant to ¶ 2(a)(i) exists “only” while Reyes is an employee, Metromedia's promise in ¶ 4(c) to pay Reyes commissions after his termination is inconsistent with ¶ 2(a)(i). Essentially, Metromedia argues that the introductory description in ¶ 2(a)—referring to compensation that is to be paid during the period Reyes is employed by and rendering services to Metromedia—applies to the promise contained in ¶ 4(c), even though ¶ 4(c) addresses only the compensation Reyes would receive after he was terminated. Under Metromedia's interpretation, therefore, Metromedia's promise in ¶ 4(c) to pay Reyes commissions for seven years after Reyes's termination was meaningless and illusory. It could never have been fulfilled under any set of circumstances because once Reyes was terminated, Reyes would no longer be employed by Metromedia and thus would fail to come within the introductory description contained in ¶ 2(a). Therefore, Metromedia argues, the contract is ambiguous.

Accepting Metromedia's interpretation, however, requires a strained—indeed, almost nonsensical—reading of the contract and violates the cardinal rule that a contract should not be read to render any provision superfluous. *See*

*Scholastic, Inc. v. Harris*, 259 F.3d 73, 83 (2d Cir.2001) (“In determining whether a contract is ambiguous, a court must look at ‘the entire integrated agreement,’ to ‘safeguard against adopting an interpretation that would render any individual provision superfluous.’”) (quoting *Sayers*, 7 F.3d at 1094–95). The structure of the contract itself, along with the contractual language, reflect that the purpose of ¶ 2(a) was to set forth the compensation Metromedia had to pay Reyes while Reyes was with the company. It therefore makes sense that, as a means of compensating Reyes for services performed in furtherance of Metromedia's interests, the commission component of Reyes's compensation—like his weekly salary—would be available to Reyes “only” for the duration of Reyes's employment with Metromedia.

Paragraph ¶ 4(c), by contrast, serves a different purpose to set forth the compensation Reyes was entitled to receive in the event the employment relationship terminated. The fact that these commissions were to be paid post-termination, however, is not inconsistent with Metromedia's obligation to pay Reyes certain defined salary and commissions “only” while Reyes was employed. Indeed, the independent purpose and function of ¶ 4(c) are rendered all the more obvious because ¶ 4(c) specifically mentions ¶ 2(a)(i) that is, ¶ 4(c) ties the amount of the post-termination commissions to the

very amounts that would have been due to Reyes under ¶ 2(a) (i) had he remained an employee. The drafters of the contract thus understood that, in creating the obligation to pay post-termination commissions in ¶ 4(c), they were doing so in the face of a separate obligation to pay commissions during the term of Reyes's employment.<sup>3</sup>

In sum, all the provisions of the Employment Agreement survive by giving the two allegedly conflicting provisions their \*757 natural readings. The “only for so long as you are an employee of [Metromedia]” condition in the opening sentence of ¶ 2(a) applies to commissions provided as compensation while Reyes worked for Metromedia. Paragraph 4(c)'s post-termination provision applies to commissions paid as termination compensation. Putting aside the clarity of the language, this interpretation, unlike the interpretation proffered by Metromedia, renders neither provision superfluous.

Metromedia makes some additional arguments relying on the later Memorandum of Agreement, but none of them are persuasive. First, it points to a provision of the Memorandum of Agreement regarding payment of the particular class of commissions relating to the Hilton Hotel, and argues that this provision reflects on the intent of the parties to the Employment Agreement. *See* Opp. Mem. at 13–14; Mem. of Agreement at 2. However, in light of the fact that the Employment Agreement is unambiguous, the Memorandum of Agreement cannot be used as extrinsic evidence to cast light on the meaning of the Employment Agreement's provisions. In any event, there is nothing inconsistent about the Hilton Hotel provision in the Memorandum of Agreement, as it was clear that the Memorandum of Agreement was making special provisions for the payment of the Hilton-related commissions and was not otherwise altering the commission obligation arising from other sales. Indeed, after the discussion of the Hilton-related commissions, the Memorandum of Agreement has a separate section entitled “Other Commissions” which specifically refers to commissions “[e]xcluding commissions earned under the Hilton Agreement.” Mem. of Agreement at 3. This makes clear, to the extent there could otherwise be any doubt, that the conditions imposed on Reyes's receipt of commissions under the Hilton Agreement were unrelated to Reyes's receipt of non-Hilton commissions under the Employment Agreement.

Metromedia also points to the provision in the “Other Commissions” section that obligates Metromedia to pay Reyes commissions within five days of Reyes's delivering

“the monthly financial statements for the current month.” Opp. Mem. at 14. Again, in light of the Employment Agreement's clarity, this provision is irrelevant to its interpretation. In any event, the provision is consistent with the Employment Agreement because the paragraph is most reasonably and naturally read as requiring Metromedia to make prompt payment to Reyes during the time he has access to those financial statements—that is, while he is employed. It thus gave Reyes a right to prompt payment of his commissions under ¶ 2(a)(i) that had not previously existed.

Finally, Metromedia argues that the “continued enforceability” of ¶ 4(b)—stating that the Employment Agreement was to continue in effect after its expiration unless one party terminated it on 30-days notice—is an “open issue” and “questionable” because “[i]t is unclear” if ¶ 4(b) survived the Memorandum of Agreement. Opp. Mem. at 15, 16. Metromedia bases this argument on the fact that the Memorandum of Agreement states in relevant part that the Employment Agreement shall “automatically be extended until December 31, 2008” but does not state what happens after that date. Mem. of Agreement at 1; *see also* Opp. Mem. At 15–16. Metromedia does not explain what contractual \*758 arrangement it thinks governed the parties' employment relationship after December 2008. In any event, the contractual documents are clear on this point as well the Memorandum of Agreement states that it is “the intention of both the Employee and the Employer to extend the terms of their employment relationship” as stated in the Employment Agreement, subject to “certain modifications” contained in the Memorandum of Agreement. Mem. of Agreement at 1. The Memorandum of Agreement contains no provision modifying the Employment Agreement's general provision that if Reyes continued to provide services *after* the termination date of the Employment Agreement, the term of the Employment Agreement would be extended unless it were terminated on 30 days notice by either party. *See* Employment Agreement ¶ 4(b). Thus, the continued applicability of the Employment Agreement to the employment relationship as of Reyes's termination date is unambiguous<sup>4</sup>

Because Metromedia does not dispute that it has failed to pay Reyes for the amounts owing pursuant to ¶ 4(c) of the Employment Agreement, Reyes is entitled to partial summary judgment on the issue of Metromedia's breach.

### III. CONCLUSION


For the foregoing reasons, the plaintiff's motion for partial judgment on the pleadings (Docket # 11) is granted.

#### All Citations

SO ORDERED.

840 F.Supp.2d 752

#### Footnotes

- 1 See Plaintiff's Motion and Notice of Motion for Partial Judgment on the Pleadings, filed July 12, 2011 (Docket # 11) ("Notice"); Declaration of Scott A. Korenbaum in Support of Plaintiff's Motion for Partial Judgment on the Pleadings, filed July 12, 2011 (Docket # 12); Plaintiff's Memorandum of Law in Support of His Motion for Partial Judgment on the Pleadings, filed July 12, 2011 (Docket # 14); Declaration of Valdenor Reyes in Support of his Motion for Judgment on the Pleadings, filed July 13, 2011 (Docket # 15) ("Reyes Decl."); Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Partial Judgment on the Pleadings, filed Sept. 9, 2011 (Docket # 17) ("Opp. Mem.").
- 2 The parties have consented to having this matter decided by a United States Magistrate Judge pursuant to  28 U.S.C. § 636(c).
- 3 It is hardly surprising that an employer would enter into an agreement with a salesman under which the salesman is entitled to collect commissions once his employment ended. From the employee's perspective, guaranteeing post-termination commissions provides a disincentive to the employer to terminate an employee in order to avoid paying commissions that had been generated by the employee's efforts. From the employer's perspective, it incentivizes the employee to maximize the generation of sales up until the last moments of his employment, secure in the knowledge that if he quits or were suddenly terminated, he would not lose the commissions on the sales generated late in his tenure. Therefore, not only are the two provisions in the Employment Agreement not irreconcilable, the termination provision in ¶ 4(c) actually operates to ensure that Reyes will give the "due and faithful performance" of the services for which he receives salary and commissions under ¶ 2(a)(i).
- 4 Metromedia finds it "odd" that under the Employment Agreement, Reyes would be entitled to receive post-termination commissions under ¶ 4(c) if he was terminated due to criminal convictions or breach of the employment agreement as long as the conviction or breach did not involve fraud, embezzlement or gross negligence. See Opp. Mem. at 14–15. Accepting *arguendo* the assertion that such a situation is "odd," its purported oddness does not render ambiguous the contractual provisions at issue in this motion.

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
 COUNTY OF YORK ) SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

Composite Resources, Inc.,

Defendant.

CIVIL ACTION NO: 2019-CP-46-00051

DEFENDANT'S MOTION AND  
 MEMORANDUM FOR CONTRACT  
 CONSTRUCTION

The Defendant Composite Resources, Inc. ("CRI") respectfully submits this Motion and Memorandum for Contract Construction. The instant case involves the June 1, 2005 Sales Representative Agreement (the "Agreement") between Plaintiff Poly-Tech Industrial, Inc. ("Poly-Tech") and Defendant Composite Resources, Inc. ("CRI"). Defendant CRI hereby requests that the Court construe the plain and ordinary language of the terms of this unambiguous Agreement as set forth below. The Agreement is attached hereto as Exhibit A and is incorporated by reference.

**I. APPLICABLE LAW OF CONTRACT CONSTRUCTION**

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). "In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." *Southern Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 80-81, 562 S.E.2d 482, 484-85 (Ct.App.2002); accord *D.A. Davis Constr. Co., Inc. v. Palmetto Props., Inc.*, 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984); *Williams v. Teran, Inc.*, 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976); *RentCo., a Div. of Fruehauf Corp. v. Tamway Corp.*, 283 S.C. 265, 267, 321 S.E.2d 199, 201 (Ct.App.1984). "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).

Courts are without authority to alter a contract by construction or to make new contracts for the parties, and words cannot be read into a contract which impart an intent wholly unexpressed when the contract was executed. *Gilstrap v. Culpepper*, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984). "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.

The parties' intention must, in the first instance, be derived from the language of the contract. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); *C.A.N. Enters., Inc. v. S.C. Health & Human Services Fin. Comm'n.*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) ("In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties."); *Jacobs v. Service Merch. Co.*, 297 S.C. 123, 375 S.E.2d 1 (Ct.App.1988). To discover the intention of a contract, the court must first look to its language-- if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect. *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973). "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); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93-94, 594 S.E.2d 485, 493-94 (Ct.App.2004); accord *Kable v. Simmons*, 217 S.C. 161, 166, 60 S.E.2d 79, 81 (1950).

The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. *Thomas-McCain, Inc. v. Siter*, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977); see also *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct.App.2000) ("The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used."). 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); *Bruce v. Blalock*, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962); *Mattox v. Cassady*, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct.App.1986).

If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect. *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993); *Blakeley* at 72, 221 S.E.2d at 769. “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* at 93, 594 S.E.2d at 493 (quoting *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct.App.2001)). 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); *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993).

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 another construction which is equally consistent with the language employed, would make it reasonable, 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).

In the present case, it is the position of CRI that the language of the Agreement is plain, unambiguous, and capable of only one reasonable interpretation-- no construction is required and its language determines the Agreement's force and effect. In the alternative, if the Court does not agree with CRI's plain, unambiguous, and reasonable interpretation, the Agreement must be deemed ambiguous.

Whether a contract's language is ambiguous is a question of law. *South Carolina Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001); *Southern Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 80-81, 562 S.E.2d 482, 484-85 (Ct.App.2002), *aff'd* as modified, 356 S.C. 444, 590 S.E.2d 27 (2003). Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. *Id.*; see also *Charles v. B & B Theatres, Inc.*, 234 S.C. 15, 18, 106 S.E.2d 455, 456 (1959) (“[W]hen the written contract is ambiguous in its terms, ... parol and other extrinsic evidence will be admitted to determine the intent of the parties.”) (citation omitted). The determination of the parties' intent is then a

question of fact for the jury to determine. *South Carolina Dep't of Natural Resources*, 345 S.C. at 623, 550 S.E.2d at 303.

“A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear.” *Ellie* at 94, 594 S.E.2d at 493; accord *Bruce* at 160, 127 S.E.2d at 441; *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct.App.1997). “[A]n ambiguous contract is one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.” *Carolina Ceramics, Inc. v. Carolina Pipeline Co.*, 251 S.C. 151, 155-56, 161 S.E.2d 179, 181 (1968) (citation omitted).

## II. TERMS FOR CONSTRUCTION

### A. Section I: Appointment of Nonexclusive Sales Representative

The first section of the Agreement provides for the appointment of Poly-Tech as a *nonexclusive* sales representative for CRI. Importantly, this section identifies three (3) additions to the Agreement. Annex A identifies the *geographic territory* for the sales representation. Annex B identifies the *products* for the sales representation. Annex C identifies the *commission rates* for the sales representation.

The plain language of Section I of the Agreement sets forth the details of the sales representative relationship, clearly pointing to the Annexes for definition of the territory, products and commission rates. Section I should be construed to reflect that each Annex A-C identifies territory, products, and commission rates, respectively.

### B. Section II: Acceptance of Appointment

In Section II, Poly-Tech expressly accepts its appointment as a nonexclusive sales representative. In addition to this acceptance, Section II also contains an express noncompete provision. The plain language of this section provides that Poly-Tech “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 whether remuneration is involved, contingent or otherwise, which competes with any operation of the Company (CRI)...”

The plain language of this provision should be construed as precluding Poly-Tech, while acting as Sales Representative, from engaging in any activity related to any business of CRI (including, specifically, tourniquets), for itself or any other person (Defendant Cedrone) or

company (HALO Tactical Products, LLC). This noncompetition provision is effective during the term of the Agreement.

### **C. Section III- Term of Appointment**

Section III expressly sets forth the term of the Agreement. Specifically, the term of appointment under the Agreement shall be for one (1) year, and automatically extended for one (1) year intervals unless terminated by either party in accordance with the terms and conditions of the Agreement. Section IX, *infra*, governs termination of the Agreement by either party.

This provision should be construed to mean that the Agreement has a definite term, and may be terminated by either party consistent with the provision of the Agreement, specifically, Section IX.

### **D. Section IV- Commissions and Expenses**

Section IV provides that CRI will pay Poly-Tech commissions at the rates set forth in Annex C. Of equal importance, this provision states that “[i]n the event Commissions are paid in error, the Commissions will be repaid by Representative to the Company...”

This section should be construed to mean that Annex C sets forth the commission rate to be paid under the Agreement, and any commissions that CRI erroneously or mistakenly paid to Poly-Tech must be returned to CRI. The clear and unambiguous language of the Agreement supports this construction.

### **E. Section V- Confidentiality**

This section of the Agreement contains a relatively standard confidentiality provision requiring Poly-Tech to keep confidential all information of an unpublished, confidential or proprietary nature. Such obligation was in place during the term of the Agreement and continued after termination. This obligation is not only directed to “trade secrets,” but extends to all confidential or proprietary information.

This section should be construed to mean that Poly-Tech, including its agents, employees, and representatives, must not disclose any of CRI’s proprietary information. This obligation does not terminate with the Agreement, and is supported by the plain language of Section V.

### **F. Section IX- Termination**

This section provides the express mechanism by which the Agreement may be terminated by either party. “*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.” Agreement, Section IX

(emphasis added). This section complements Section III, which sets forth successive terms of the Agreement, unless the Agreement is terminated. Such termination may be without cause (in which case notice is required) or immediate (in the event of default or sale).

This section also contains an important provision directed to post-termination commission payments. Section IX states “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.” Agreement, Section IX (emphasis added).

Under the clear and unambiguous language of Section IX, the Agreement should be construed as having a termination provision, and after termination of the Agreement, no further commissions are payable to Poly-Tech after the end of the 60-day Notice Period.

**G. Section X- Relationship of the Parties**

Section X expressly states, “The relationship between Company and Representative established by this Agreement is that of independent contractor.” The plain language of this provision dictates that Poly-Tech be an independent contractor to CRI. The parties to the Agreement are not to be considered partners, joint venturers, or any other relation to each other except that of independent parties.

**H. Section XI- Waiver**

The plain language of this section of the Agreement provides that 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...” The unambiguous language of Section XI provides that should a party to the Agreement not enforce any part of the Agreement, such failure may not be deemed a waiver of that unenforced provision. Such provision may be enforced against the obligated party.

**I. Annex A- Territory**

Consistent with Section I, discussed above, Annex A should be construed as defining the *geographic territory* of the sales representation of the Agreement. Specifically, this territory is the United States of America. There is no ambiguity associated with this language, and Annex A provides a limitation to and informs the terms and conditions of the entire Agreement.

**J. Annex B- Products**

Like Annex A and consistent with Section I, discussed above, Annex B should be construed as defining the *products* covered by the Agreement. Specifically, the “Products covered by this

Agreement are all the Products the Company handles.” Notably, CRI reserved the right to change or discontinue any or all of the Products it “handles.” There is no ambiguity associated with this language, and Annex B also provides a limitation to and informs the terms and conditions of the entire Agreement.

#### **K. Annex C- Commissions**

Like Annexes A and B and consistent with Section I, Annex C should be construed as setting the commission rates to be paid to Poly-Tech under the Agreement. These rates are expressly divided into three (3) categories, with a rate set for each category.

##### Subsection A:

The plain language of the Agreement provides that Poly-Tech was to receive a commission rate of 7% for all sales of products in the United States where Poly-Tech was “instrumental in making the sale.”

##### Subsection B:

This subsection lists specific accounts for which Poly-Tech would not be entitled to the same 7% commission rates.

##### Subsection C:

This subsection lists two (2) additional specific, “special accounts” that are “exceptions to the above stated commission rate” of 7%. The first of these accounts addresses “GraviGate Products.” A rate of 17% is to be paid on all “GraviGate, GraviBar & Gravi-T Products sold.” The plain language of the Agreement provides for this different commission rate for the GraviGate “special account.”

Likewise, the second “special account” is an exception to the commission rate of 7%. The second “special account” is the “Phil Durango, LLC” account. Subsection C provides a commission rate of \$1.75 per tournament sold for this account. Further, Poly-Tech was also to be paid specific commissions for pre-sewn bases and other raw materials associated with the Phil Durango LLC account. The plain language of the Agreement provides for this different commission rate for the Phil Durango LLC “special account.”

There is no ambiguity associated with this language, and Annex C provides a limitation to and informs the terms and conditions of the entire Agreement. None of Annex A, B, or C can stand alone- these schedules merely provide detail to the Agreement related to territory, product

scope, and commission rate. The Annexes must be construed in the context of the four corners of the entire Agreement.

Lastly, Annex C contains language that is indefinite and unenforceable. At the end of Annex C, there is the following sentence:

*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 the project continues.*

There is no definition of the terms “regular contract,” “estate of Daniel P. Cedrone,” or “project.” These are not terms defined by the Agreement. There is no reference for the meaning of the term “discontinued,” as the Agreement has express provisions for termination. The term “regular contract” cannot refer to the Agreement at issue, as this contract is referred to as “Agreement” throughout the document.

Under South Carolina law, when a contract provision is indefinite and uncertain, it is unenforceable. *See Ellis v. Taylor*, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1994) (finding a provision for continuing child support in an amount to be later agreed upon indefinite, and therefore, unenforceable); *Maxwell v. Standard Furniture Co.*, 127 S.C. 225, 120 S.E. 834, 836 (1924) (“[I]f the contract is indefinite, uncertain, or ambiguous, or does not embrace all the material terms, it will not be enforced.”); *see also Anderson v. Hall*, 155 S.C. 320, 152 S.E. 521, 522 (1930) (noting that the contract between the parties was indefinite and unenforceable because the contract provided for later negotiations on the monthly rental price).

Where the provision of a contract is indefinite, extrinsic evidence cannot supplement the description. *See Cash v. Maddox*, 265 S.C. 480, 485, 220 S.E.2d 121, 123 (1975) (“In the absence of equities removing the case from the operation of the Statute of Frauds, which do not here exist, we hold before a court will decree specific performance of a contract for a sale of land, the writing must contain the essential terms of the contract. *They must be expressed with such definiteness, certainty and clarity that it may be understood without recourse to parol evidence to show the intention of the parties.* The terms of the contract must be such that neither party can reasonably misunderstand them. It would be inequitable to carry a contract into effect where the court is left to ascertain the intention of the parties by mere guess and conjecture.” (emphasis added)); *Martin v. La Boon*, 116 S.C. 97, 107 S.E. 320, 321–22 (1921) (finding that a written contract for the sale

of land was too indefinite in describing the parcel, so parol evidence would not be allowed to supplement the description).

The last sentence of Annex C is indefinite and must be deemed unenforceable. The parties cannot characterize this sentence as “ambiguous” and look to extrinsic evidence to fill the void. This last sentence appears to address some future circumstance that may or may not occur. This cannot form the basis of a contract. *N. Am. Rescue Prod., Inc. v. Richardson*, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015) (“Provisions which are essentially agreements to agree in the future have no legal effect. *See Ellis v. Taylor*, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1994) (‘A contract provision leaving material terms open for future agreement is **void for indefiniteness.**’). Thus the mere mention of a future option agreement that was never executed **does not create an ambiguity in an otherwise unambiguous document.**”).

### III. CONCLUSION

Based upon the well-established tenets of South Carolina contract construction, the Court is urged to review the plain and unambiguous language of the Sales Representative Agreement, and in the context of the entire Agreement, adopt the construction supported above.

Respectfully submitted,

By: BARR & FORMAN, LLP  
*s/ William Y. Klett III*  
 William Y. Klett, III (SC Bar No. 64822)  
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 Columbia, SC 29211  
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May 13, 2022  
 Columbia, South Carolina

Attorneys for Composite Resources, Inc.

CEDRONE, ET AL. V. COMPOSITE RESOURCES, INC.  
2019-CP-46-00051

**EXHIBIT A**  
TO DEFENDANT'S MOTION AND MEMORANDUM  
FOR CONTRACT CONSTRUCTION

*JUNE 1, 2005 SALES REPRESENTATIVE AGREEMENT*

## Sales Representative Agreement

Representative: Poly-Tech Industrial

# COMPOSITE RESOURCES

01 June 2005

An Agreement, effective June 1<sup>st</sup>, 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

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## COMPOSITE RESOURCES

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### 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

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# COMPOSITE RESOURCES

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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

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**COMPOSITERESOURCES**

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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

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## COMPOSITERESOURCES

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

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## COMPOSITERESOURCES

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 if 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

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# 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

Poly-Tech Industrial

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**COMPOSITE RESOURCES**

**ANNEX A**

**TERRITORY**

The Territory covered by this Agreement is described as follows:

- A. The entire states of: USA

485 LAKESHORE PARKWAY  
ROCK HILL, SC 29730

F 803 300-9700  
F 803 366-9710

ROA 671

Poly-Tech Industrial

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**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.

Poly-Tech Industrial

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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)

Poly-Tech Industrial

COMPOSITE RESOURCES

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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.