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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 3 OF 3**

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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' SUPPLEMENTAL
MEMORANDUM 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**”), moved 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. The Court held a hearing on May 4, 2022 and continued the hearing until May 20, 2022 to allow the parties to file supplement submissions regarding material terms to be construed by the Court as matter of law. Plaintiffs submit the below terms should be defined by the Court as follows:

I. Guiding Points of Law

A. Whether a contract or contract term is ambiguous is a matter of law for the Court.¹

B. The construction of a contract is also a question of law for the Court.²

¹ *S.C. Dep’t of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001) (“[i]t is a question of law for the court whether the language of a contract is ambiguous.”).

² *Curry v. Carolina Ins. Grp. of SC, Inc.*, 428 S.C. 60, 71, 832 S.E.2d 760, 765 (Ct. App. 2019) (“[g]enerally, the construction of contracts is a question of law for the court.”) (citations

C. A Court generally construes a contract from within its “four corners”.³

D. Rules of contract construction assist a Court in construing the four corners of a contract as a matter of law.⁴ Those rules of word usage construction include that terms are construed:

1. objectively from time/circumstance when made;⁵
2. generally, in their plain, ordinary, and popular sense;
3. against the background of the whole contract;
4. without making a material term superfluous⁶ or absurd, and
5. with doubt favoring the non-drafter.

CONTRACT DEFINITIONS CHART	
1.	TERM: “<u>Drafter</u>” DEFINTION: Composite Resources, Inc. SOURCE: June 1, 2005 Contract, itself. ANALYSIS: In looking at the whole of the Contract (Sales Representative Agreement), Composite Resources is clearly the drafter. Each and every page of the Contract was prepared on Composite Resources official company stationary. Each page footer of the Contract contains Composite’s tag line. Composite is listed first in the preamble. “Representative” is “appointed by the Company.” Many standard terms

omitted).

³ *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945) (“primarily from the contents of the writing itself, or, as otherwise stated, from the four corners”); *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008).

⁴ *Curry v. Carolina Ins. Grp. of SC, Inc.*, 428 S.C. 60, 71, 832 S.E.2d 760, 765 (Ct. App. 2019) (“[w]he[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect.”) (citations omitted).

⁵ *DD Dannar, LLC v. SC LAUNCH!, Inc.*, 431 S.C. 9, 27, 846 S.E.2d 883, 892 (Ct. App. 2020) (“[t]o give effect to the parties' intentions, the court will endeavor to determine the situation of the parties and their purposes *at the time the contract was entered.*”) (citation omitted).

⁶ *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 418, 756 S.E.2d 148, 153–54 (2014).

CONTRACT DEFINITIONS CHART	
	are one sided, favoring Composite Resources (e.g., Representative must return or discard other party's info; Composite can request Representative to assist in collecting payments from Composite's customers; and governing law is Composite's home state). Composite is listed first on execution page.
2.	TERM: "<u>Independent Contractor</u>" Page 4, Section X. "The relationship ... is that of independent contractor." DEFINTION: An agent who exercises his own judgment and methods to achieve the contracted result, free from supervision or control as to time, place, degree or many of performance. SOURCE: "[W]hen one exercising an independent employment contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer except as to the result of the work, ... and freed from any superior authority in him to say how the specified work shall be done ... he is clearly an independent contractor." <i>McDowell v. Stilley Plywood Co.</i>, 210 S.C. 173, 181, 41 S.E.2d 872, 876 (1947); "The test to be applied in determining whether the relationship of the parties under a contract for the performance of labor is that of employer and servant, or employer and independent contractor, lies in whether the contract gives, or the employer assumes, the right to control the time, manner, and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract." <i>Nelson v. Yellow Cab Co.</i>, 343 S.C. 102, 114, 538 S.E.2d 276, 282 (Ct. App. 2000), aff'd, 349 S.C. 589, 564 S.E.2d 110 (2002); <i>Sellers v. Tech Serv., Inc.</i>, 421 S.C. 30, 40, 803 S.E.2d 731, 736 (Ct. App. 2017) ("the right to direct the person by whom the services are to be performed, the time, place, degree, and amount of said services" is antithetical to status as "independent contractor" in South Carolina). ANALYSIS: The agreement in Section II, page 1, to maintain an office in the United States and faithfully prosecute the business of selling the Products is necessarily, as a matter of law, tempered by the definition and scope of duties of an "independent contractor" as that term is defined by South Carolina law (the law of the Contract, See Section XIII, page 6).
3.	TERM: "<u>Representative</u>" Appears throughout the Contract. DEFINTION: Only Poly-Tech Industrial, Inc. a corporation. SOURCE: Contract, page 1, expressly defines "Representative as including only "Poly-Tech Industrial, Inc., a corporation."

CONTRACT DEFINITIONS CHART	
	ANALYSIS: Any obligation, duty, representation or commitment of the “Representative” under the Contract, is <u>not</u> an obligation, duty, representation or commitment of Dan Cedrone, an individual.
4.	TERM: “<u>Compete</u>” CONTEXT: “Representative” agrees to refrain from activities “which compete” with Composite operations, creates a “conflict of interest” or adversely affects discharge of the duties of “Representative” (i.e., only Poly-Tech, and then only as an “independent contractor.”). DEFINTION: “The struggle between rivals for the same trade at the same time.” SOURCE: BLACK'S LAW DICTIONARY 284 (6th ed. 1990), p. 284. ANALYSIS: First, the limitation on competing applies only to the “Representative” (i.e., Poly-Tech, the company) <u>and</u> only up to the date of termination (August 31, 2018). After August 31, 2018, Poly-Tech is no longer the “Representative” and no longer had “duties” as the Representative. In South Carolina non-compete provision in services contracts are strictly construed as a matter of law. <i>Rental Uniform Service of Florence, Inc. v. Dudley</i>, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983) (“[r]estrictive covenants not to compete are generally disfavored and will be strictly construed against the employer”). If the provision is read more broadly than <i>actual</i> acts of competition during the period in which Poly-Tech was designated the “Representative”, then it is an unenforceable restraint and completely void. “A covenant not to compete is enforceable if it is not detrimental to the public interest [and] is reasonably limited as to time and territory.” <i>Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.</i>, 424 S.C. 444, 453, 818 S.E.2d 724, 729 (2018). To apply the non-compete provision beyond the term of Poly-Tech’s “Representative” status, or against Dan Cedrone at any time, would be a unenforceable at a matter of law as “a restraint upon trade which is against public policy.” <i>Id.</i> Similarly, if the non-compete restriction is not limited the period in which the Poly-Tech has the status as “Representative” (i.e., to August 31, 2018), then there would be no time constraint for this non-compete provision and it would, again, be void as a matter of law. <i>Fay v. Total Quality Logistics, LLC</i>, 419 S.C. 622, 628–30, 799 S.E.2d 318, 322–23 (Ct. App. 2017). Finally, since the Contract only restricts “activities which compete” mere preparation does not meet the definition. <i>Fletcher, Barnhardt & White, Inc. v. Matthews</i>, 100 N.C. App. 436, 441–42, 397 S.E.2d 81, 84 (1990) (holding that actions in “preparing to leave the company and in forming his own business” did not amount to competing

CONTRACT DEFINITIONS CHART	
	“as a matter of law”.) Construed according to its plain meaning, preparation simply is not within the definition of “compete” under the Contract. The Eleventh Circuit has similarly held that preparation activities such as creating business plan, forming company, leasing space, and other preparations did not cause claimant to face “indirect competition” because “it has not faced any competition at all.” <i>MQ Assocs., Inc. v. N. Bay Imaging, LLC</i>, 270 F. App’x 761, 763-64 (11th Cir. 2008). As the Superior Court of Massachusetts put it: Not only does [claimants’] position have no reasonable support in the law, but it also is unreasonable as a practical matter. If a former employee with a routine one year non-compete agreement cannot even prepare to compete with his former employer during the one year, the effective length of the non-competition period, for all practical purposes, would be significantly longer than one year. An employee certainly may agree to a longer non-compete period but he cannot be tricked into a longer effective period of non-competition by signing a routine non-compete provision. Consequently, this Court finds that no reasonable person could conclude that there was a basis in law for [claimants’] claim that mere preparation to compete constitutes prohibited competition under the non-compete provision. <u>Brooks Automation, Inc. v. Blueshift Techs., Inc.</u>, No. CIV.A. 05-3973-BLS2, 2006 WL 307948, at *7 (Mass. Super. Jan. 24, 2006), <u>aff’d</u>, 69 Mass. App. Ct. 1107, 868 N.E.2d 953 (2007).
5.	TERM: “Phil Durango, L.L.C.” CONTEXT: Heading on Page 11 of the Contract under which the tourniquet product commissions, and profit obligations are set forth. DEFINITION: Product rights holder for Combat Application Tourniquets. SOURCE: USPTO Office Combat Application Tourniquet Trademark index, for which the Court made judicial notice. https://tmsearch.uspto.gov/bin/showfield?f=doc&state=4806:xua51x.5.2) ANALYSIS: Under the rules for contract construction, the Court interprets terms as of the time of the contract and against the background of the entire agreement and its general purpose. In looking at the broader contract, accounting maneuvers such as buying the intellectual property from Phil Durango and moving the project under a

CONTRACT DEFINITIONS CHART	
	different stand-alone subsidiary, does not change the fact that the tourniquet production “project continues.” (which is the general purpose of this section of the Contract). In fact, absorbing Phil Durango, is irrelevant since the Contract covers “all the Products the Company [Composite] handles.” Contract, Annex B, Products, page 9. And the C-A-T Tourniquets are still among the products “handled” by Composite. Thus, changing the name on the account may make the words “Phil Durango” go away, but the product line has not gone anywhere, and the general purpose of the Contract is set forth the commission rules for these products, and the commission rule for this tourniquet product is to continue even after the sales relationship is discontinued pursuant to the express special exception on Page 11. This corporate shell game fails because regardless of the “shell”, it is covering these products because the Contract covers “all the Products the Company handles.” In addition, the four corners of the Contract include express provisions making it apply to “successors and assigns” (Contract, Section XII, p. 5), and to sales of any “modified, altered, or changed” products. (Contract, Annex B, page 9). The appropriateness of construing Phil Durango as the Product right holder for Combat Application Tourniquets (and not just a name on an accounting ledger) is validated by the absurdity Composite’s position. Under Composite’s rationale, a woman could change her name and claim not to be the mother of her children because the name on her driver’s license doesn’t match the name of the birth certificate. The DNA would still reveal the truth, and the DNA of the Contract is that under this section of Annex C, when the Contract is read as a whole, including the Annex B’s inclusion of “all the Products the Company handles” Plaintiffs are entitled to commissions and profits on tourniquets for as long as the tourniquet (or some modified, altered or changed versions of the base tourniquet) is handled by Composite, including successors and assigns. Another rule of construction is that the same provision should be applied consistently across the same subject matter. Composite’s failure to be consistent is another reason to discard its attempts to generate ambiguity. For example, after the name Phil Durango was no longer associated with the project, Composite argues that the project ended. However, Composite was still using Poly-Tech as a vendor of raw materials used in the continued production of tourniquets and paying Poly-Tech the mark-up fees for the raw materials set forth in this very same provision. Composite’s affirmation of the tourniquet provision with regard to vending raw materials, estops it from disaffirming the same provision in order to try and generate an ambiguity regarding this provision in the Contract. Finally, from this proper perspective, caption headings have little significance. In fact, they are often expressly neutralized. For example, provisions limiting the impact of section headings are routinely included in court approved settlement agreements. See e.g., <i>Emetoh v. FedEx Freight, Inc.</i>, No. 17-CV-7272-YGR, 2020 WL 6216763, at *24 (N.D. Cal. Oct. 22, 2020) (“Paragraph titles or captions contained in the Agreement are inserted as a matter of convenience and for reference, and in no

CONTRACT DEFINITIONS CHART	
	way define, limit, extend, or describe the scope of this Agreement, or any provision thereof.”). See also, Alan S. Gutterman, Alan S.; BUSINESS TRANSACTIONS SOLUTIONS, Chapter 108 - Professional Services Agreements; § 108:77 - <i>Short-form terms and conditions for professional services agreement</i>. (Sample Format includes: “The captions or headings in this contract are for convenience only and in no way define, limit, or describe the scope or intent of any provisions of this contract.”). As noted in the referenced USPTO index filing, the trademark registration date for the tourniquet is in 2007, almost 2 years <u>after</u> the date the Contract. Whereas the trademark registration date for the Gravitgate product was in 2002, more than two years <u>before</u> the Contract date in 2005. (https://tmsearch.uspto.gov/bin/showfield?f=doc&state=4808:w0htam.2.1). Thus, when the broader Contract provisions are included in construing this term, the non-use of the registered trademark name of the tourniquet product in the caption is explained chronologically by the fact that the Contract pre-dates the C-A-T tourniquet registered trademark date. In addition, it is clear that the headings in Annex C, page 11, of the Contract, are not intended to be limiting as the Gravitgate section also expressly includes GraviBar Products and Gravi-T Products. Composite’s position would have the Court exclude GraviBar sales and Gravi-T sales because they are not listed in the Caption. Such an interpretation runs afoul of another traditional rule for construing a contract within its four corners as a matter of law, to wit: the construction should not make terms superfluous.
6.	TERM: “<u>And</u>” CONTEXT: Page 11 of the Contract, lines1- 2, referencing special exceptions to the “above stated commission rate <u>AND</u> are paid individually as described below.” (emphasis added). DEFINTION: And – “with, as well as, in addition to, [as in] <i>pens and pencils</i>.” SOURCE: Random House Webster’s College Dictionary (2000 ed.), p. 49. ANALYSIS: The plain meaning of this provision is that not only are these special exceptions not controlled by the commission payment terms “above”, they are <u>in addition/as well</u>, only controlled by the payment terms “below.”
7.	TERM: “Commission” and “Rate” and “Above Stated Commission Rate” CONTEXT: Page 11 of the Contract, line 2, referencing special exception to the “above stated commission rate”.

CONTRACT DEFINITIONS CHART	
	DEFINTION: 1. <u>Commission</u> – “a sum or percentage allowed to agents, sales representatives, etc., for their services. 2. <u>Rate</u> – “the amount of a charge or payment with reference to some basis of calculation.” 3. <u>Above stated commission rate</u> – “7% commission on all Rep account sales where Representative is instrumental in making the sale.” (Contract, p. 10) SOURCE: Random House Webster’s College Dictionary (2000 ed.), p. 267 (Commission) and p. 1907 (Rate). ANALYSIS: The “stated commission rate” noted “above” (see, Page 11) is plainly a cross reference to this sentence on page 10 of the Contract, Annex C. In construing these terms against the background of the whole contract, this construction further confirmed by Section I, page 1 of the Contract, which provides, “the commission rates [are] defined in Annex C.” As such, the commission rates paid as described “below” do not carry the “above” qualifier to be “instrumental in making the sale.” This is obvious from the fact that Plaintiffs are the product-rights holder of the Gravigate line of products and these “below” commissions are akin to royalties, as is plainly understood from the simple demarcation between “above” commission rates and the “below” commissions, set forth at the top of Page 11.
8.	TERM: “Regular Contract” and “exception” CONTEXT: Page 11 of the Contract, lines 7 & 26, “if for any reason the regular contract is discontinued”. And, Page 11, lines 1-3, the “exceptions” are “paid individually as described below.” DEFINTION: Regular Contract – the Sales Representative relationship created by pages 1-10 of the Contract, preceding the “exceptions” outlined on Page 11, which are “paid” as “described below” (i.e., thereunder). SOURCE: <u>Regular</u> – “usual, normal, customary.” Random House Webster’s College Dictionary (2000 ed.), p. 1112. <u>Exception</u> – “an instance or case not conforming to the general rule.” Random House Webster’s College Dictionary (2000 ed.), p. 459 (2). ANALYSIS: A discontinuation, including <i>via</i> termination, of the Sales Representative relationship does not impact the obligations under the “exceptions” set forth on Page 11 of the contract.

CONTRACT DEFINITIONS CHART	
9.	TERM: “Commission for this product is to continue ... as long as the product line continues.” And “Commission for this account is to continue ... as long as the project continues.” CONTEXT: Page 11, Contract, last paragraph of each section [1. & 2.]. DEFINTION: A form of perpetual commission akin to a royalty. RELATE TERM: Account – meaning “a course of business dealings or other relations for which records must be kept.” BLACK'S LAW DICTIONARY 284 (6th ed. 1990), p. 19 (5) (e.g., “brokerage account”). SOURCE: The entirety of the Contract. Also, <u>Project</u> – “ a large or important undertaking, especially one involving considerable expense, personnel, and equipment.” Random House Webster’s College Dictionary (2000 ed.), p. 1057 (2). <u>Production</u> – “the act of producing; creation or manufacture.” Production Line – “Assembly line.” Random House Webster’s College Dictionary (2000 ed.), p. 1055. ANALYSIS: In construing these provisions in light the whole contract and its discernable purpose, these phrases are synonymous. As noted above from the USPTO links, these provisions relate to products protected by intellectual property, and the owner of the intellectual property therefore controls whether a production <u>project</u> continues, or whether a <u>product line</u> continues. The owner of the product-rights and the manufacturing of these product are necessarily interconnected. So, whether the product is known by reference to the owner, or the owner is known by reference to the product is legally irrelevant. If the owner of the intellectual property that controls the continuity of the project evolves, a different name may be associate with the product, but if the production project continues, then the account continues according to the plain understanding of the Contract as a whole and its general purpose discernable therefrom.
10.	TERM: “any information of an unpublished, confidential or proprietary nature.” DEFINTION: Meaning “all information not published by or under the permission of Composite Resources.” SOURCE: Contract, page 2, Section V. ANALYSIS: This term, especially in its contractual context, is unenforceable and is “inoperative.” Contract under Section XII, Page 6. In <i>Carolina Chemical Equipment Co., Inc. v. Muckenfuss</i>, the South Carolina Court of Appeals held that a non-

CONTRACT DEFINITIONS CHART	
	disclosure covenant which forbids an employee from using knowledge gained during the course of employment is, for all purposes, a covenant not to compete; as such, it is subject to the same heightened consideration requirements as a non-compete covenant. 322 S.C. 289, 293–294, 471 S.E.2d 721, 723 (S.C.App.1996) (“Despite its designation as a ‘Covenant Not to Divulge Trade Secrets,’ this section would substantially restrict Muckenfuss's competitive employment activities. Because it basically has the effect of a covenant not to compete, we must subject it to the same scrutiny as a covenant not to compete.”).
11.	TERM: “[S]ubsequent to the term of the Agreement” and “after termination of this Agreement.” DEFINTION: Meaning the “termination date (August 31, 2018) through infinity.” SOURCE: Contract, page 2-3, Section V. ANALYSIS: This term, especially in its contractual context, is unenforceable and is “inoperative.” Contract under Section XII, Page 6. See also, Term 10, <i>supra</i>, Analysis.
12.	TERM: “Cause for termination” DEFINTION: <u>Cause for termination</u> – “a condition existing only upon the expiration of twenty days after receipt of written notice of material default of performance, provided the default is not cured with said twenty (20) days.” SOURCE: Contract, Section IX, p. 4. ANALYSIS: Having “cause for termination” does not cause termination. That is because the Contract (Section IX, Page 4) expressly provides that it “may be” terminate at the option of the offended party, and not that it “is” terminated by the offense itself. In addition, since written notice of material breach is a prerequisite, without proof of written notice there can be no cause for termination. Nevertheless, termination could still occur as termination “without cause” was an option.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order granting Plaintiffs' Motion for Partial Summary Judgment, accepting the above listed definitions as a matter of law, and finding that:

As a matter of law, for as long as Composite Resources, or an affiliate company, handles C-A-T tourniquets:

1. Composite Resources was and is obligated to pay Plaintiffs "\$1.75 per [combat] tourniquet sold," or which is sold in the future, and
2. Composite Resources is additionally obligated to pay to Plaintiffs "\$1.12 per yard" of "Aplix 500" material, "\$0.51 per yard" of 1 inch wide "Aplix Hook 800" and "\$0.163 per yard" of 1 inch wide "Aplix Loop 800" which Composite Resources has purchased since August 31, 2018, and which it does purchase after the date of this Order, for the manufacturing of combat tourniquets.⁷

And such other and further relief as this Court deems just and proper.

This the 18th day of May, 2022.

Respectfully submitted,

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⁷ 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."

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

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

Defendant Composite Resources, Inc. (“CRI”), pursuant to Rules 52 and 59, SCRCP, hereby files this Motion to Reconsider, Clarify, Alter, or Amend the September 29, 2022 Order Granting Plaintiffs’ Motion for Partial Summary Judgment (the “September 29 Order”) upon the grounds set forth below. These grounds fall into the following general categories: (1) the Order awards relief contrary to and inconsistent with the Complaint; (2) some statements in the Order are demonstrably incorrect; (3) some statements in the Order are unclear and warrant clarification; (4) some statements in the Order are unsupported by the summary judgment record unless properly clarified; and (5) the Order fails to rule specifically on issues raised and arguments made by CRI that would excuse or discharge any commission obligation. CRI further respectfully requests that the Court reconsider its interpretation of Annex C.

I. As drafted, the September 29 Order awards relief that is contrary to and inconsistent with Plaintiffs' pleadings and goes beyond "interpretation of the terms of the contract."¹

A. Finding and ordering that Defendant "was and is" obligated to pay Plaintiffs \$1.75 per tourniquet sold is contrary to and inconsistent with facts established by the pleadings.

As a threshold matter, the September 29 Order as drafted is undisputedly erroneous because it:

- "finds" that "Defendant was and is contractually obligated to pay Plaintiffs a commission of '\$1.75 per tourniquet sold'"²; and
- orders that Defendant "was and is obligated to pay Plaintiffs '\$1.75 per [Combat] [T]ourniquet sold.'"³

But Plaintiffs judicially admitted in their Complaint that in May and August 2013, eight years after entering the Agreement, Plaintiffs agreed to reduce commissions on most tourniquet sales, *i.e.*, less than the \$1.75 commission stated in Annex C, subsection C of the Agreement.⁴ Further still, Plaintiffs specifically alleged an amount of damages based on commission rates less than \$1.75 per tourniquet.⁵ The September 29 Order is therefore contrary to and inconsistent with facts established by the pleadings. *See Bates v. City of Columbia*, 301 S.C. 320, 322, 391 S.E.2d 733, 734 (Ct. App. 1990) ("The trial court, therefore, erred in making a finding of fact, on summary judgment, that was contrary to and inconsistent with a fact established by the pleadings.").

¹ **Exhibit A**, Hrg. Tr. 5/4/2022 at 3.

² Sept. 29 Order at 7.

³ Sept. 29 Order at 18.

⁴ Paragraphs 21-22 of the Complaint demonstrate that Plaintiffs, as to certain tourniquets sold to NAR, had agreed to the following reduction of the \$1.75 per tourniquet commission stated in Annex C of the Agreement (emphasis added): (1) on or about May 31, 2013, Composite, Durango and Poly-Tech agreed to a reduced commission for Poly-Tech on *Red Tip Black Combat Tourniquets* by \$0.50 per tourniquet, so from \$1.75 to \$1.25 per tourniquet; and (2) on or about August 30, 2013, Composite, Durango and Poly-Tech agreed to a reduced commission for Poly-Tech on two discrete categories of Combat Tourniquets: specifically, a *\$0.33 reduction for Red Tip Orange tourniquets and a \$0.25 reduction for Red Tip Blue tourniquets*.

⁵ Compl., ¶ 51 (seeking "perpetual" commissions as follows: (a) \$1.25 per tourniquet on Red Tip Black Combat Tourniquets provided to NAR; (b) \$1.42 per tourniquet for Red Tip Orange Combat Tourniquets provided to NAR; (c) \$1.50 per tourniquet for Red Tip Blue Combat Tourniquets provided to NAR; and (d) \$1.75 per tourniquet for all other Combat Tourniquets).

Surely, the Court did not intend to grant summary judgment for liability beyond the relief requested by Plaintiffs in their Complaint.⁶ The September 29 Order, however, could be read as doing so and should be amended accordingly.

B. As drafted, the September 29 Order could be read as granting partial summary judgment on liability.

On March 18, 2022, Plaintiffs filed a motion for *partial* summary judgment (“MPSJ”) seeking to “have material unambiguous terms ... determined as a matter of law”:

The purpose of this motion for partial summary final judgment is to have the Court judicial [sic] 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.⁷

The “[c]ontract provision at issue” was “Annex C,” in relevant part sub-section (C)(2):

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.

(MPSJ, 13 (highlights added)).

The MPSJ’s self-described objectives were two-fold: (1) to have the Court make a threshold determination whether Annex C’s terms were unambiguous, and (2) if so, interpret

⁶ In their First Cause of Action, Plaintiffs complain that Defendant, in March 2017, unilaterally and wrongly imposed a *third reduction* of \$0.625 per tourniquet for all tourniquet sales to NAR. They seek damages based on this third reduction only. They agree that the prior two reductions remained in place. They agree that from the date of the third reduction (March 2017) to the date that Defendant terminated the Agreement (August 2018), Defendant paid commissions based on the first two reductions, which Plaintiffs do not challenge. They complain, however, that, during this time period and in making these payments, Defendant wrongly reduced those commissions by the unilateral and wrongful *third reduction* of \$0.625 per tourniquet sold to NAR. (See Complaint at pp. 6-9, ¶¶ 23-36). Plaintiffs seek an award of \$2,031,165.05 based on this damage theory. (*Id.* at ¶ 36). Plaintiffs seek the same damage amount in their second, third, fifth, and six causes of action based on this same damages theory. (See Complaint at pp. 9-11 and 13-15, ¶¶ 37-46 and 54-62; compare ¶ 36 with ¶¶ 41, 46, 55, 57, and 59).

⁷ MPSJ, 1.

Annex C's terms as a matter of law.⁸ Plaintiffs confirmed this at the summary judgment hearings, referencing their "request to have the Court interpret terms of the contract."⁹

However, at some point Plaintiffs attempted to convert the MPSJ from a contract interpretation motion into a request for a "find[ing] as a matter of law [CRI is] in breach."¹⁰ At the summary judgment hearing the Court specifically questioned Plaintiffs regarding their attempt to expand the scope of the MPSJ: "That's not what you've asked me to do. What you've asked me to do is to clarify—just to say these terms are unambiguous."¹¹ The Court further appeared disinclined to view the MPSJ as anything more than that:

I know Mr. Munson has walked in here and stated the end part of his argument, which is he wanted me to find a breach. I never saw that's what the purpose of this is. On the issue—therefore, I did not view this argument today to be one that would lead to liability or no liability or breach or no breach.¹²

Plaintiffs responded by clarifying that their position on "breach" was based on nothing more than CRI "ha[s]n't paid," and that the motion should not be viewed as requesting any adjudication of CRI's affirmative defenses or counterclaims:

When I said, they breached it. *I wasn't meaning to carry that to judgement. They may have defenses or excuses for breach,* but the obligations is [sic] there. Which is technically what I asked for and what I'm asking for. And I just think it's recognized fact that they haven't paid, which would constitute the breach if the obligation is recognized.¹³

The Court repeated its disinclination to interpret the MPSJ as more than a contract interpretation motion: "I cannot go beyond that to say that entitles your client to really anything

⁸ *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009) ("It is a question of law for the court whether the language of a contract is ambiguous."); *see also Lee v. Univ. of S.C.*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014) ("[C]onstruction of a clear and unambiguous contract is a matter of law for the court.").

⁹ Ex. A, Hrg. Tr. 5/4/2022 at 5.

¹⁰ Ex. A, Hrg. Tr. 5/4/2022 at 8.

¹¹ Ex. A, Hrg. Tr. 5/4/2022 at 8.

¹² Ex. A, Hrg. Tr. 5/4/2022 at 26.

¹³ Ex. A, Hrg. Tr. 5/4/2022 at 31 (emphasis added).

other than *this document's going to say what this document says*.”¹⁴ Plaintiffs accepted, characterizing their requested relief as “pretty narrow,” and asking for an interpretation of “what the contract says”:

And we're trying to get the Court to say, that's not what the contract says. The contract says, that regardless of any discontinuation of the regular contract, this obligations [sic] continues.

I mean *it seems like that's a pretty narrow thing that the Court could interpret for us here*.¹⁵

The summary judgment hearing reconvened on May 20, 2022. The record does not reflect that the Court appeared to be inclined to expand the scope of the MPSJ beyond contract interpretation. In fact, Plaintiffs again confirmed that the MPSJ was meant to identify “specific terms that we would like to have the Court construe,”¹⁶ *i.e.*, a “finding that the contract requires [CRI] to be obligated to pay Plaintiffs the profit margin on the—on the raw materials and the commission on the tourniquets.”¹⁷

As drafted, however, by using the language “was and is obligated,” the September 29 Order might be read as also granting partial summary judgment on liability under the Agreement, leaving only a determination of the amount of damages, *e.g.*, that CRI owes Plaintiffs a commission of \$1.75 for all tourniquets sold by CRI. But any adjudication of CRI’s liability based on the PMSJ would: (1) not be supported by the summary judgment evidence, and (2) be error for the reasons set forth below. The September 29 Order should be amended to clarify that the only partial summary judgment being granted is the meaning of the disputed terms as unambiguous. *See Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (A party *may* wish to file such

¹⁴ Ex. A, Hrg. Tr. 5/4/2022 at 33.

¹⁵ Ex. A, Hrg. Tr. 5/4/2022 at 34.

¹⁶ Exhibit B, Hrg. Tr. 5/20/2022 at 4.

¹⁷ Ex. B, Hrg. Tr. 5/20/2022 at 5.

a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue.”); *Se. Hous. Found. v. Smith*, 380 S.C. 621, 646, 670 S.E.2d 680, 694 (Ct. App. 2008) (“While the trial court may have initially stated that the lack of a legal expert affected all of the claims against Smith, the court had the power to amend and clarify any misconceptions at the 59(e) stage.”).

As drafted, the September 29 Order concludes that “as a matter of law, *for as long as* [CRI] is associated with the making and selling of C-A-T Tourniquets”:

1. [CRI] *was and is obligated to pay* Plaintiffs “\$1.75 per [tourniquet] sold,” for which this amount has not already been paid, and *for all* [tourniquets] sold *in the future*, and
2. [CRI] *is additionally obligated to pay* Plaintiffs [their claimed materials profits for specified materials] which [CRI] *has purchased since August 31, 2018, and* which it does purchase *after the date of this Order*, for the manufacturing of [tourniquets].¹⁸

These provisions go beyond the Court’s June 8, 2022 preliminary e-mail, which interpreted the language of Annex C as providing that “defendant is contractually obligated to pay plaintiffs the amounts reflected in the contract on page 11 of 11 past the termination date.” *That* ruling would have been one of pure contract interpretation (which was what Plaintiffs requested), without impacting any issue regarding the conduct of the parties after entering the Agreement and the effect of that conduct on the liability of either party to the other. Conversely, the September 29 Order’s provisions above might be read as granting partial summary judgment on liability under the Agreement as construed by this Court, leaving only the determination of the amount of damages.¹⁹

The Order makes eight (8) “Findings of Fact.” (Order at 7-8). Findings 1, 4, and 5 are factual findings. The remaining “findings” are legal rulings on the meaning of the Agreement.

¹⁸ September 29 Order, 18 (emphasis added) (footnote omitted).

¹⁹ Similarly, the September 29 Order’s adjudication that CRI was and is obligated to pay an “amount that has not already been paid” could be read as further *indicia* of a liability adjudication, and thus warrants clarification.

Those findings—2, 3, and 6—state that Defendant “*was and is contractually obligated to pay* Plaintiffs” the commissions and profits sought by Plaintiffs, “including *after* termination of the sales representative relationship on August 31, 2018” and “*after* the date of this Order [and these] *obligation[s] to pay ... survive the termination* of the Contract.” (Emphasis added). Here again, these “findings” might be read as granting partial summary judgment on liability under the Agreement as construed by this Court, leaving only the determination of the amount of damages. While CRI obviously disagrees with and reserves all rights as to the Court’s interpretation of Annex C, the September 29 Order should be clarified as one of pure contract interpretation, limited to ordering that the language of Annex C contractually obligates CRI to pay \$1.75 per tourniquet sold, subject to any modifications, defenses, or counterclaims—all of which have been pled and not yet adjudicated.

C. As drafted, the Order could be read as granting partial summary judgment on CRI’s affirmative defenses and counterclaims even though Plaintiffs did not seek summary judgment on any defense or counterclaim in the MPSJ.

Plaintiffs did not move for summary judgment on CRI’s affirmative defenses and counterclaims. *See Foreign Acad. & Cultural Exch. Servs., Inc. v. Tripon*, 394 S.C. 197, 206, 715 S.E.2d 331, 335 (2011) (“[W]e find the circuit court erred in granting summary judgment because respondent did not seek summary judgment as to this claim.”). If successful, those defenses and counterclaims will preclude any liability for any damages, reduce the amount of any liability, and could result in Plaintiffs being liable to CRI. Six defenses and counterclaims could do so, and Plaintiffs did not seek summary judgment on any of them in the MPSJ, to-wit:

1. Third Defense – Prior Breach (Amd. Answ.at 5-6, ¶¶ 46-49).
2. Fourth Defense – Unclean Hands (Id. at 6, ¶¶ 50-55).
3. Seventh Defense and First Counterclaim – Breach of Contract (Id. at 7, 67-68).

4. Eighth Defense and Second Counterclaim – Unjust Enrichment (Id. at 8, ¶¶ 69-73).
5. Tenth Defense and Fourth Counterclaim – Breach of Contract (Id. at 9-10, ¶¶ 81-99)
6. Eleventh Defense and Fifth Counterclaim – Conspiracy (Id. at 11-12, ¶¶ 100-109).

These defenses and counterclaims include allegations that Plaintiffs breached duties owed to CRI: (a) failing to provide the services required by the Agreement; (b) violating the “no conflict of interest” and non-compete obligations imposed by the Agreement; and (c) disclosing confidential and proprietary information to third parties in connection with a conflict of interest and developing a competing product. (See Amd. Ans. at ¶¶ 50-55, 58-73, and 81-109, *passim*). For example:

- Plaintiffs committed a material breach of Article II of the Agreement *prior to* Defendant’s termination of the Agreement by “engaging directly or indirectly” in activities and business transactions for themselves which “in any way” competed with “any” operation of Defendant, or which may have resulted in a “conflict of interest or would otherwise adversely affect the proper discharge” of Plaintiffs’ duties, “including, but not limited to the soliciting of orders for, or representing, or dealing in, any good competing with any core products handled by” Defendant. (Def. Mem. Opp., 7–8 ¶¶ 8–12, 14–15; Amended Answer, 5 ¶ 48 (“Plaintiffs actively competed against Defendant, starting no later than March 7, 2018, by acting with others to design and invent a tourniquet to compete with Defendant’s CAT Tourniquet for which Poly-Tech was receiving commission payments.”), 8 ¶¶ 64–66, 68, 72 (same and seeking recovery of commissions paid in error)).
- The “account” referenced in Annex C as “**Phil Durango L.L.C.**,” “ceased to be a customer account” for Defendant in November 2014, when Defendant “purchased the CAT® Tourniquet patents from Phil Durango, LLC.” (Def. Mem. Opp., 6; Amended Answer, 3 ¶ 19 (“[N]o sales have been made to any entity listed in Annex C, including the special accounts, since November 6, 2014, and, therefore, Poly-Tech has been entitled to no commission payments since that time.”)).

Under these defenses, CRI would not be liable to Plaintiffs under the Agreement, even under the terms as construed by the Court.

For example, Plaintiffs’ prior material breaches are directly relevant to whether and when CRI was discharged from its obligations under Annex C. *See Sumner v. Bankhead*, 119 S.C. 78, 111 S.E. 891, 894 (1922) (“Whenever there is ... a material breach of contract by the other party,

... equity will not enforce the contract against him.”); *see also Monster Daddy, LLC v. Monster Cable Prod., Inc.*, 483 F. App’x 831, 835 (4th Cir. 2012) (recognizing that under South Carolina law, one party’s breach of a contractual obligation discharges the other party’s obligations that “were dependent upon the promises that the breaching party failed to perform”).

The exception to this rule is that “[f]ailure to perform an independent promise does not excuse nonperformance on the part of the other party.” *Coleman*, 53 N.C.App. at 578, 281 S.E.2d at 434. To distinguish between independent and dependent promises, courts consider the intention of the parties shown by the entire contract as construed in the light of the circumstances of the case, the nature of the contract, the relation of the parties thereto, and other evidence which is admissible to aid the court in determining the intention of the parties. The parties’ intention is, however, not always discernable from the contract language, and the parties often neglect entirely to consider whether they intend a particular covenant to be dependent or independent. For that reason, “it is better to drop any talk about the intention of the parties when they express none and rest doctrines of [constructive dependence] solely on their fairness—a quite sufficient basis.” 6 Williston on Contracts § 825 (3d ed.1962).

A fundamental canon of contractual interpretation is that if one construction of a contract would lead to an absurd conclusion, such interpretation should be avoided. *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) (“An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided.”). Any construction of Annex C as an independent covenant would require CRI to continue paying Plaintiffs commissions as long as the tourniquets are sold *even if Plaintiffs breached Article II’s “no conflict of interest” and noncompete provisions*. That

would lead to an absurd conclusion. Notably, that is exactly what Lisa Bennett testified to in her deposition:

Q. What do you think would be the ramifications if Mr. Cedrone or Poly-Tech developed a competing tourniquet?

A. Well, to me that would engage a breach of contract.

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.

Q. And that was your understanding when this agreement was negotiated?

A. Yes.

Q. Would you be surprised if you were to learn that Mr. Cedrone had done that?

A. Yes, I would be surprised.

Q. Would it also surprise you that he did that while he was drawing commissions from [CRI]?

A. Yes, that would surprise me.

Q. Would it surprise you that the folks he collaborated with in developing a competing tourniquet were brought in to tour [CRI's] facility with Mr. Cedrone?

A. Yes, that would surprise me.

Q. Do you believe that would be a breach of the agreement?

A. Yes.

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 [CRI], right?

A. No.

Q. And you discussed some of the reasons that it could be terminated earlier?

A. Yes.

Q. And I assume competition is one of those reasons?

A. Yes.²⁰

Construing Annex C as an independent covenant would mean that Plaintiffs could intentionally, and in bad faith, violate Article II with a competing tourniquet, but CRI would remain obligated to pay Plaintiffs millions of dollars into perpetuity. Similarly, Plaintiffs could intentionally, and in bad faith, disclose confidential information to third-parties, but CRI would remain obligated to pay Plaintiffs millions of dollars into perpetuity. This concern is not hypothetical. Article IX of the Agreement allows CRI to terminate the Agreement if Poly-Tech commits a “material default in the performance of its obligations under this Agreement.” As Plaintiffs would have it, even these grounds for termination could not extinguish CRI’s ongoing payment obligations. Plaintiffs’ proposed interpretation of Annex C “would lead to an absurd conclusion” and is due to be discarded. And regardless, the summary judgment record reflects more than a scintilla of evidence that Plaintiffs committed a material prior breach of Article II, and that such breach excused any further commission obligation on the behalf of CRI.

Plaintiffs’ “conflict of interest” and non-compete obligations and CRI’s alleged perpetual commission obligations are dependent on one another. The plain language of the two provisions in the Agreement, along with the parties’ intent, and nature of the circumstances surrounding the Agreement indicate that these promises were mutually dependent upon one another such that

²⁰ Def. Mem. in Opp. to Pl. MPSJ,.pdf 66–71.

Plaintiffs' breach of Article II excused further performance by CRI as to its obligations under Annex C.

Article II is entitled "Acceptance of Appointment" and is a "condition"²¹ to Plaintiffs being "appointed" Defendant's "Representative." As a condition to Plaintiffs' acceptance of appointment, they agreed to (1) "refrain from engaging directly or indirectly" (2) "in any activity or business transaction for itself, or any other person, corporation or subsidiary, directly or indirectly," (3) "and regardless of whether remuneration is involved, contingent or otherwise," (4) "which" (a) "in any way competes with any operation of Company," (b) "may result in a conflict of interest or" (c) "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." (Emphasis added). Even given the Court's interpretation that termination of the Agreement does not end the obligation to pay commissions, prior material breach does end such obligation.

Prior material breach excuses future performance even when the prior breach is concealed or unknown. CRI was wholly unaware of Plaintiffs' Article II breaches before this lawsuit was filed. *See* Restatement (Second) of Contracts § 237 (1981) ("[O]ne party's material failure of performance has the effect of the non-occurrence of a condition of the other party's remaining duties, under the rule stated in this Section, even though that other party does not know of the failure." (emphasis added)). And even if CRI had known of Plaintiffs' Article II breaches, that would not have somehow resulted in an automatic termination or "discontinue[ance]" of the Agreement. *See* 17A Am. Jur. 2d Contracts, § 711 (Aug. 2021 Update) (observing that a party to a contract may elect "to keep the contract alive" by "remaining at all times ready, willing, and able

²¹ Article I of the Agreement provides that Poly-Tech was appointed CRI's "Representative" at "the commission rates defined in Annex C ... on the terms and conditions hereinafter set forth." (Emphasis added).

to perform their part of the contract” while still maintaining a claim for breach of contract against the counterparty).

Accordingly, even if the MPSJ had requested an adjudication of the conflict of interest and noncompete issues, and even if the Court had rendered summary judgment against CRI on those issues, that would be error considering the uncontroverted summary judgment evidence reflecting:

- the February 5, 2019 patent for the competing “HALO” tourniquet, reflecting Plaintiff Cedrone as an “Applicant” and an application file-date of “March 7, 2018,” well prior to August 15, 2018 termination of the Agreement²²; and
- Plaintiff Poly-Tech’s deposition testimony admitting that the HALO tourniquet developed by it and Plaintiff Cedrone is a competing product to the CAT²³;

And Lisa Bennett testified that Plaintiffs’ breach of Article II would be “one of” the reasons the Agreement could be terminated by CRI.²⁴

This summary judgment evidence creates at minimum multiple fact issues as to Plaintiffs’ prior material violations of Article II of the Agreement, thereby precluding a liability finding against CRI at this stage. *See Foreign Acad. & Cultural Exch. Servs., Inc. v. Tripon*, 394 S.C. 197, 202, 715 S.E.2d 331, 333 (2011) (“In determining whether any triable issues of material fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.”). And while Plaintiffs have repeatedly referenced the heavy scrutiny and strict construction of non-compete covenants executed in the context of an employment contract, the South Carolina Supreme Court has specifically recognized that review is “more relaxed” and “greater latitude is allowed” outside the employment agreement context, as in agreements between sophisticated parties. *See Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*, 424 S.C. 444, 456, 818 S.E.2d 724, 731 (2018).

²² Def. Mem. in Opp. to Pl. MPSJ, Exhibit 3.

²³ *Id.*, Exhibit 4.

²⁴ *Id.*, at pdf p. 71.

In conclusion, Plaintiffs' Article II breaches excused CRI's Annex C obligations. And Plaintiffs' Article II breaches preceded (and thus discharged/excused Defendant's Annex C obligations prior to) any termination or discontinuance of the Agreement. Plaintiffs' interpretation of Annex C otherwise is absurd and renders other provisions of the Agreement superfluous. Therefore, to the extent the September 29 Order is construed as granting summary judgment that CRI "was and is obligated to pay" (emphasis added) without adjudicating CRI's defenses and counterclaims, it is erroneous. *See Englert, Inc. v. LeafGuard USA, Inc.*, 377 S.C. 129, 133, 659 S.E.2d 496, 498 (2008) (holding that "trial court err[ed] in granting summary judgment where LeafGuard USA's defenses and counterclaims had not been ruled on")

D. The September 29 Order should be amended or supplemented to clarify that it grants partial summary judgment on the meaning of the disputed terms only, and it has no impact on any issue regarding the conduct of the parties after entering the Agreement and the effect if any of that conduct on the liability of either party to the other.

It was and remains CRI's understanding that the issue before this Court was the question of ambiguity and, if not ambiguous, the question of the meaning of certain terms in the Agreement.²⁵ Thus, it was and remains CRI's understanding that this Court intended to grant partial summary judgment on the meaning of certain terms, but not to grant Plaintiffs' judgment on the question of liability.

²⁵ The Court continued the May 4, 2022 hearing for additional submissions from the parties on interpretation of the Agreement. At the second hearing on May 20, 2022, Plaintiffs opened their argument with the same understanding of the issue before the Court, to-wit: the meaning of the terms used in the Agreement: "Based on your potentially—invitation to provide *additional information* on specific terms that we *would like to have the Court construe*, we submitted a filing this week." (Ex. B, 5/20/22 Hrg. Tr. at 4) (emphasis added). Plaintiffs closed in the same manner: "So to conclude, we think this *in conjunction with our original motion*, allows the Court—almost *compels the Court to define these terms* in this way, as a matter of law, unambiguously" (*Id.* at 22) (emphasis added). CRI had the same understanding of the issue before the Court, *i.e.*, the meaning of terms in the Agreement: "It's the Defendant's understanding that the purpose of today's proceeding is to argue *contract construction* and help the Court, if it can, *construe the terms of the agreement*." (*Id.* at 24 (emphasis added)). At the end of the hearing, Plaintiffs thanked this Court for taking "[t]he effort to construe a contract," again confirming Plaintiffs' stated "purpose of this motion for partial summary judgment"—*i.e.*, "to have the Court judicial [sic] recognize that certain material terms of the [Agreement] are unambiguous." (*Id.* at 77; MPSJ, 1).

The September 29 Order as drafted, however, is unclear, and could be read otherwise. Accordingly, the September 29 Order must be amended, by supplemental order or otherwise, to clarify that this Court granted partial summary judgment on the meaning of the disputed terms only, and that the questions of liability and damages under the various claims, defenses, and counterclaims remain at issue under the Agreement as construed by this Court. If this Court intended to grant summary judgment on liability, the September 29 Order must be amended to explain the basis for such a ruling, including explanations for doing so despite: (1) Plaintiffs' admissions in their Complaint that they agreed to commission rate reductions; and (2) the absence of any motion for summary judgment or summary judgment evidence entitling Plaintiffs to judgment as a matter of law on Defendant's defenses and counterclaims.

II. The September 29 Order incorrectly states that CRI did not file any counter evidence in opposition to the MPSJ, and that CRI disclaimed any evidence on intent or interpretation of the Agreement other than the Agreement itself.

The September 29 Order includes the following statement:

Here, Plaintiffs provided specific discovery responses and deposition testimony from Composite Resources' operations director at the time the Contract was executed that directly supports Plaintiffs' Motion. Defendant filed no counter evidence with its filings in opposition to the Motion.... In addition, Defendant's discovery responses, noted above, *disclaim any evidence of the intent or interpretation of the Contract, other than the Contract itself.* (pp. 15-16) (all emphasis added).²⁶

The underlined sentence is unfortunately wrong. CRI submitted numerous exhibits containing extrinsic evidence with its "Defendant's Memorandum in Opposition to Plaintiffs' Motion for

²⁶ September 29 Order at 15–16 (emphasis added). This statement, like others in the Order, indicates the Court considered extrinsic evidence, which is irrelevant unless and until it is determined that the contract is ambiguous. It is thus unclear whether the Order ruled in the alternative, to-wit: (1) the contract is not ambiguous; and (2) if the contract is ambiguous, the extrinsic evidence establishes the meaning of the contract as a matter of law. See II(B), *infra*.

Partial Summary Judgment as to Alleged ‘Unambiguous’ Terms.” CRI filed 55 pages of “counter evidence,” including:

- a. the Affidavit of Derek Thompson, averring that as of November 6, 2014—when Defendant purchased “Phil Durango, LLC’s patents for the CAT Tourniquet” for \$14 million—there was “no longer a Phil Durango LLC customer account”²⁷;
- b. the February 5, 2019 patent for the competing “HALO” tourniquet, reflecting Plaintiff Cedrone as an “Applicant” and an application file-date of “March 7, 2018,” well prior to August 51, 2018 termination of the Agreement²⁸;
- c. Plaintiff Poly-Tech’s deposition testimony admitting that the HALO tourniquet developed by Poly-Tech and Plaintiff Cedrone is a competing product to the CAT²⁹; and
- d. Defendant’s former officer’s testimony that if Plaintiffs developed a competing tourniquet, that would be a breach of the Agreement for which the agreement could and should be justifiably and appropriately terminated.³⁰

Indeed, at the May 4, 2022 hearing, the Court specifically acknowledged that both parties had presented extrinsic evidence: “What y’all have argued to me today, both sides want me to consider other outside extrinsic evidence”³¹

The statement that CRI has disclaimed the existence of or reliance on any evidence on intent or interpretation is also incorrect. CRI’s former officer’s testimony that if Plaintiffs developed a competing tourniquet, that would be a breach of the Agreement for which the agreement could and should be justifiably and appropriately terminated is more than a mere scintilla of exactly such “intent or interpretation” evidence. Throughout its Memorandum, CRI repeatedly asserts that the contract is, at least, ambiguous, and there is extrinsic evidence supporting CRI’s view of the contract. (*See* Defs. Memo and referenced Exhibits, *passim*).

²⁷ Def.’s Mem. in Opp. to Pls.’ Motion for Partial Summ. J. as to Alleged “Unambiguous” Terms, Exhibit 1.

²⁸ *Id.*, Exhibit 3.

²⁹ *Id.*, Exhibit 4.

³⁰ *Id.*, Exhibit 5.

³¹ Ex. A, Hrg. Tr. 5/4/2022 at 33.

This statement that CRI has disclaimed the existence of or reliance on any evidence on intent or interpretation also relies on an incorrect view of the discovery responses referenced by Plaintiffs, wherein CRI referenced the Agreement in response to Plaintiffs' discovery requests.³² No discovery request addressed the issue of ambiguity or extrinsic evidence, and no answer disavowed the existence of or reliance on any extrinsic evidence in the event this Court determined that the Agreement was ambiguous.³³

III. The September 29 Order incorrectly states that CRI did not take the alternative position that Annex C is ambiguous.

In its summary judgment submissions, CRI argued that the last sentence of Annex C is so "indefinite" as to render it legally unenforceable. In rejecting this argument, the September 29 Order includes the following statement:

*In making this argument, Defendant is not taking the position that the Contract is ambiguous and therefore subject to external information to derive the intent of the parties at the time the contract was formed.*³⁴

It is true that "[i]n making" the argument that the contract is too indefinite to enforce, CRI did not argue any extrinsic evidence to define the meaning of the relevant terms. This should not be

³² September 29 Order at 13–14.

³³ The cited "Requests to Admit" simply and only admit that the Agreement: (1) is the "most recent written agreement" between the parties, (2) "governs [Plaintiffs'] rights and obligations," and (3) sets forth the payable commissions at issue here. (Order at 13–14). Nothing in any of these admissions (or the request to admit) calls for a response relating to or having any bearing on any questions of ambiguity or extrinsic evidence. Nothing admits that CRI is not relying and/or will not rely on extrinsic evidence should a question of ambiguity arise.

The cited Interrogatory asks CRI to "[i]dentify and describe the nature and operational terms of any agreements or modifications between [the parties . . .] 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." (Order at 14). CRI objected in part to the Interrogatory and answered that "[t]he June 1, 2005 agreement sets forth 'the nature and operational terms' between the parties." (*Id.*). The interrogatory does not ask any questions about ambiguity or extrinsic evidence, and CRI's response does not disavow the existence of or reliance on any extrinsic evidence if it were determined that the contract is ambiguous.

The cited "Requests to Produce" simply ask for "all documents" used to answer any interrogatory and "all documents . . . related to [Plaintiffs'] rights and obligations" under the Agreement. (Order at 14). CRI replied that the only responsive document was the Agreement – this has nothing to do with the issues of ambiguity and extrinsic evidence, and it does not disclaim either the existence of or reliance on extrinsic evidence to address any question on the meaning of the contract or any ambiguity that might be found by the Court.

³⁴ September 29 Order, 16 (emphasis added).

surprising, because doing so would make no sense in—and would be antithetical to—the context of an “indefiniteness” argument.

But CRI’s “indefiniteness” argument—made in its own “motion and memorandum for contract construction” and argued at the second day of the summary judgment hearing—was an alternative argument that the disputed terms were too indefinite to be enforced. This is as opposed to being simply ambiguous and subject to interpretation through extrinsic evidence—which was made in CRI’s opposition to the MPSJ. CRI’s “indefiniteness” argument was not and never has been CRI’s only argument. Indeed, CRI argued ambiguity in the alternative in the very same motion as its “indefiniteness” argument:

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.*

(Defendants’ Motion at 3) (emphasis added). At least six times in the summary judgment submissions CRI specifically alleged that “the Agreement is, at best, ambiguous as to the terms for which Plaintiffs seek construction”—i.e., Annex C.³⁵

Defendant’s “indefiniteness” argument was a stand-alone alternative to—and did not waive or disavow—CRI’s “ambiguity” arguments. And while CRI’s argument at the second day of the summary judgment hearing focused on the “indefiniteness” argument, CRI began its argument by laying out the alternative arguments:

³⁵ Def.’s Mem. in Opp. to Pls.’ Motion for Partial Summ. J. as to Alleged “Unambiguous” Terms, 2 ¶ 4 (emphasis added), 10 (“These terms seem to be, at best, ambiguous.”), 12 (“At minimum, for purposes of this Motion, Plaintiffs’ ‘certain material terms’ [Annex C] are ambiguous.”), 16 (“The terms for which Plaintiffs seek construction are, at best, ambiguous, and summary judgment is inappropriate.”), 17 (“Plaintiffs’ interpretation [of Annex C] is clearly not reasonable and is, at best, ambiguous.”); Def.’s Motion & Mem. for Contract Construction, 3 (“[I]f the Court does not agree with CRI’s plain, unambiguous, and reasonable interpretation, the Agreement must be deemed ambiguous.”).

[I]f a contract is unambiguous, it is a question of law for the Court to construe. If the Court, however, finds that there is ambiguity in that language, and that determination is also a question of law, then it's a fact issue that goes to the jury for determination of what that ambiguous language means.³⁶

CRI then clarified its argument's focus *that day* would be on the former: "*So what I would like to do is to go through Defendant's proposed contract construction and what we believe to be unambiguous and—and what we believe the Court should find.*"³⁷ CRI's hearing argument was that Annex C's indefiniteness was "plain, straightforward, unambiguous," and thus "doesn't require extrinsic evidence."³⁸ CRI's "indefiniteness" argument should not be taken as a waiver of its repeatedly made alternative argument that Annex C was "at best, ambiguous."

The analytical import of the September 29 Order's "not taking the position that the contract is ambiguous" statement is unclear. If the purpose is to state that CRI never argued ambiguity or somehow abandoned that argument, then the September 29 Order is unfortunately wrong and should be amended accordingly. If this Court intended simply to state that CRI did not argue "ambiguity" as part of its "indefiniteness" argument, then that statement is correct, but its analytical import is unclear, and the September 29 Order should be amended to explain the analytical purpose of the statement *vis-à-vis* the relief granted.

IV. Some statements in the September 29 Order are unclear and warrant further clarification.

A. It is unclear whether the September 29 Order rules only that the Agreement is unambiguous or whether it also rules alternatively that, if the Agreement is ambiguous, then the extrinsic evidence establishes the meaning of the contract as a matter of law.

A straightforward reading of the September 29 Order would lead to the conclusion that this Court ruled only that the Agreement is not ambiguous, and the plain meaning of the Agreement's

³⁶ Ex. B, Hrg. Tr. 5/20/2022 at 24.

³⁷ Ex. B, Hrg. Tr. 5/20/2022 at 24–25 (emphasis added).

³⁸ Ex. B, Hrg. Tr. 5/20/2022 at 34.

terms is Plaintiffs' interpretation. A closer reading of statements scattered throughout the September 29 Order, however, hints at an alternative implied ruling that, if the Agreement is ambiguous, then the extrinsic evidence of record establishes the meaning of the Agreement as a matter of law and entitles Plaintiffs to the relief awarded.

First, the September 29 Order describes the MPSJ as making the above-described alternative argument, but does not specifically state that the Court agrees with or has sustained it:

*Alternatively, the Motion argues that the *uncontroverted external evidence* filed with the motion papers *as to the past, present and future obligation to pay commissions and raw material profits* eliminates the possibility of a genuine issue of material fact as the relief requested in the Motion.*³⁹

Next, the September 29 Order correctly states that courts have the power to consider extrinsic evidence on the meaning of an ambiguous contract and grant summary judgment on that basis, but it does not state explicitly that this Court is exercising that power:

*Even if this Court were to determine the contract was ambiguous, "it may yet examine evidence extrinsic to the contract that is included in the summary judgment materials, and, if that evidence is, as a matter of law, dispositive of the interpretive issue, grant summary judgment on that basis."*⁴⁰

Five pages later, however, the Order seems to rule in the alternative:

*Because the *relief sought* in this Motion for Partial Summary Judgment is *compelled by the Contract and the plain reading of Defendant's Amended Answer and discovery responses*, as well as the application of South Carolina statutes and common law, this case is *particularly appropriate for entry of partial summary judgment*.*⁴¹

Reliance on the facts stated in Defendant's Amended Answer and discovery responses could be read as an implied ruling based on extrinsic evidence, *i.e.*, an alternative ruling that if the contract is ambiguous, then the extrinsic evidence establishes the meaning of the ambiguous terms and

³⁹ September 29 Order, 4–5 ("Factual and Procedural Background" section) (all emphasis added).

⁴⁰ September 29 Order, 6–7 ("Standard of Review" section) (Citations omitted) (emphasis added).

⁴¹ September 29 Order, 12 ("Conclusion [sic] of Law and Legal Analysis" section) (emphasis added).

entitles Plaintiffs to the ordered relief. On the very next page, however, the Order disavows any such intent:

Although not the basis for granting the relief set forth in this Order, the Court’s review of the *supplemental material* [i.e., extrinsic evidence] confirms that the Contract’s terms set forth in the four corners of the Contract support entry of partial summary judgment establishing that *the Contract obligates Defendant to pay Plaintiff’s the Tourniquet Commissions and Raw Material Profit payments at the rate set forth on page 11 of the Contract during the term of the Contract, beginning in June 2005, extending beyond the termination of the sales representative relationship on August 31, 2018, and lasting for so long as the Combat Tourniquets are produced and sold.*⁴²

If the Court intended to rule only that the Agreement was unambiguous, then the September 29 Order should be amended to eliminate all references to extrinsic evidence. If the Court intended to rule in the alternative based on extrinsic evidence, then this Court should reconsider the question and issue an amended order that rejects the “extrinsic evidence” based alternative ruling for two reasons.

First, and contrary to other portions of the September 29 Order as argued earlier, CRI submitted competing extrinsic evidence. Second, is the controlling standard that, in South Carolina, a “mere scintilla” of evidence defeats summary judgment.⁴³ CRI’s summary judgment evidence manifestly satisfies this very low bar for withstanding summary judgment.

For example, the September 29 Order references the deposition testimony of Lisa Bennett indicating that she considered Annex C to provide that Plaintiffs’ commissions would continue “as

⁴² September 29 Order, 13 (emphasis added).

⁴³ *E.g.*, *Huffman v. Suhshine Recycling, LLC*, 826 S.E.2d 609, 614 (S.C. 2019) (all evidence and inferences must be viewed in the light most favorable to the non-moving party, who need only submit a “mere scintilla” of evidence to withstand a summary judgment motion); *Rainey v. South Carolina Dep’t of Soc. Servs.*, 863 S.E.2d 470, 474 (S.C. App. 2019) (all ambiguities, conclusions, and inferences arising from the evidence must be construed against the moving party, and the non-moving party only required to submit a “mere scintilla” of evidence to withstand a summary judgment motion).

long as the tourniquets were in production.”⁴⁴ However, the September 29 Order ignores CRI’s summary judgment evidence reflecting Lisa Bennett’s additional testimony that:

- the signatory parties’ understanding of the terms and intent in entering the agreement controlled, *not her view of it*⁴⁵;
- her “understanding of the termination clause” in the Agreement was that CRI could “cancel the contract if there was something significant with a breach of contract”⁴⁶;
- if Plaintiffs were to develop a competing tourniquet, that would be a breach of Agreement “Roman numeral II, Acceptance of Appointment”⁴⁷;
- the Agreement had *not* been “drafted in a sense that it could never be terminated by Composite Resources”⁴⁸; and
- “competition” by Plaintiffs was “one of” the reasons the Agreement could be terminated by CRI.⁴⁹

Crucially, Lisa Bennett did not testify that the Agreement supported Plaintiffs’ position that the commission obligation under Annex C would continue even if Plaintiffs breached Article II of the Agreement. What’s more, when Lisa Bennett testified in terms of “as long as the tourniquets were in production,” it is unclear whether she even knew Phil Durango, LLC was no longer involved. Lisa Bennett’s statement that CRI could and should appropriately terminate the Agreement for breach if a competing tourniquet was made is in direct contradiction to the proposition or construction that commissions continue past termination, but rather is in accordance with the dependent/independent analysis above.

Viewing the above summary judgment extrinsic evidence in the light most favorable to CRI and under the “mere scintilla” standard, summary judgment that CRI “was and is” obligated

⁴⁴ September 29 Order at 15.

⁴⁵ Def. Mem. in Opp. to Pl. MPSJ, .pdf 64.

⁴⁶ Def. Mem. in Opp. to Pl. MPSJ, .pdf 65.

⁴⁷ Def. Mem. in Opp. to Pl. MPSJ, .pdf 68–69 (further testifying that Plaintiffs breached the Agreement when “folks [Dan Cedrone] collaborated with in developing a competing tourniquet were brought in to tour [CRI’s] facility with Mr. Cedrone”)

⁴⁸ Def. Mem. in Opp. to Pl. MPSJ, .pdf 71.

⁴⁹ Def. Mem. in Opp. to Pl. MPSJ, .pdf 71.

to pay Plaintiffs tourniquet and raw material commissions is improper. CRI emphasizes that the September 29 Order's "was and is" language was not in the Court's June 8, 2022 preliminary e-mail.

B. Failure to cite a rule of civil procedure in Defendant's Motion.

The September 29 Order further states: "Defendant titled its supplemental filing "Defendant's Motion and Memorandum for Contract Construction", *but did not cite a rule of civil procedure under which it was seeking "motion" relief.*"⁵⁰ Research reveals no authority for the implicit ruling that citation to a rule of civil procedure was essential to the motion, nor does the September 29 Order otherwise explain the analytical import of this statement, if any.

To the extent the Court used this "failure to cite a rule" statement as a basis for its ruling, the September 29 Order should be amended to explain that basis. Regardless, any "authority" needed for filing the motion came from the Court on two separate occasions.

First, the Court specifically authorized this type of motion in its then-controlling November 17, 2021 Scheduling Order, which provided in pertinent part at page 2:

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

(Emphasis added). The Court renewed this invitation to file the motion at the conclusion of the first hearing in this matter held May 4, 2022: "*If defense wants to file some motion* themselves at

⁵⁰ September 29 Order, 16 (emphasis added).

to some issue y'all want *that relates to interpret* (sic) *this contract*, let's go ahead and get those done and filed.”⁵¹

In short, there is no requirement that a motion cite a rule of civil procedure as authority for the motion. If there was any need for authority for CRI's Motion, the Court granted that authority on two separate occasions. If the Court intended that the “failure to cite a rule” statement have some analytical role in the Court's ruling, the September 29 Order must be amended to explain that role.

V. The September 29 Order fails to rule specifically on issues and arguments raised by CRI.

The September 29 Order opens with the following recitation of the basic grounds raised by CRI in its Memorandum in Opposition:

“(1) the agreement (Contract) must be construed as a whole and that the plaintiffs are picking and choosing a few terms that misconstrues the terms;

“(2) other provisions, including the termination clause, is contrary to Plaintiffs' unreasonable construction which leads to the conclusion of an agreement that is perpetual in nature and never can be terminated;

“(3) that Plaintiffs' reliance on extrinsic terms establishes that certain terms in the Contract are ambiguous; and

“(4) if the Contract was not terminable as a matter of law pursuant to the Termination provision, then the Contract is, at best, ambiguous as to the terms for which Plaintiffs seek construction.”⁵²

However, the September 29 Order never rules specifically on these matters, and it should be amended to do so.

The September 29 Order also does not rule specifically on the following issues and arguments also raised in CRI's Memorandum:

⁵¹ Ex. A, 5/4/22 Hrg. Tr. at 39

⁵² September 29 Order at 2-3; see also Defs. Memo. at 2.

1. The payments claimed by Plaintiffs were commissions for the Phil Durango, LLC special account under Annex C, subsection C. That account no longer exists. Therefore, no commissions are due and payable under Annex C, subsection C. At the very least, this provision conflicts with the meaning proffered by Plaintiffs, rendering the Agreement ambiguous. (Defs. Memo. at 6, 9, 10, 12-13).
2. The termination provisions provided that the Agreement may be terminated in one of two ways: for cause and without cause. These termination provisions are inconsistent with the meaning proffered by Plaintiffs, rendering the Agreement ambiguous. (Defs. Memo. at 9, 10, 11).
3. Plaintiff Cedrone testified that, despite the contrary express terms of the Agreement, *e.g.*, that the relationship between the parties was that of “independent contractor,” the Agreement created a profit sharing partnership. He admitted there was no such language in the Agreement but asserted it was in the “spirit” of the Agreement. Thus, as admitted by Cedrone, Plaintiffs’ entire reading of Annex C, subsection C is based on something found nowhere in the Agreement, thereby creating a question of fact on the meaning of the Agreement and rendering it ambiguous. (Defs. Memo. at 15-16).
4. Plaintiffs’ argument hinges on their asserted meanings of “regular contract” and “project,” which are essential but undefined terms used in Annex C, subsection C. These terms have no obvious meaning and therefore require extrinsic evidence, *i.e.*, the Agreement is ambiguous. (Defs. Memo. at 9).
5. Plaintiffs submitted extrinsic evidence in support of their motion, which is antithetical to their assertion that the Agreement is unambiguous. Defendant submitted contrary extrinsic evidence, thereby creating a question of fact for the jury, *i.e.*, the Agreement is ambiguous. (Defs. Memo. at 13-15).
6. The cumulative effect of all of the foregoing, including the exhibits attached to Defendant’s Memorandum, demonstrates that the Agreement is ambiguous. (Defs. Memo. at 17).

The September 29 Order should be amended to rule specifically on these matters and deny summary judgment or, in the alternative, explain the Court’s basis for rejecting these arguments and evidence under the “mere scintilla” standard for defeating summary judgment.

VI. The Court should reconsider its interpretation of Annex C because it fails to give effect to the term “Phil Durango, LLC” in conjunction with “this account” and renders the commission obligation perpetual and terminable at will.

A. Under Annex C’s plain, unambiguous language, without the “special account”—which is “Phil Durango, L.L.C.”—there can be no “commission for this account.”

The plain, unambiguous language of the Agreement provides that Poly-Tech’s entitlement to the disputed commissions is predicated on the “special account[],” “Phil Durango, L.L.C.” Article I of the Agreement provides that Poly-Tech is the “Representative” for CRI “at the commission rates defined in Annex C.”

Annex C is entitled “Commissions.” Subsection (C) of Annex C provides that “the following *special accounts* are exceptions to the above stated commission rate [in Annex C, subsection (A)] and are paid individually as described below.” Subsection (C) lists two “special accounts”: (C)(1) “GraviGate Products,” and (C)(2) “Phil Durango L.L.C.”

Subsection C(1) is as follows:

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.

Subsection (C)(2) is as follows:

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.

"Phil Durango, L.L.C." was a preexisting customer account in 2005 when the Agreement was signed. Subsection (C)(2) clearly and unambiguously ties the "commission" in dispute to "this account," which is "Phil Durango, L.L.C." Accordingly, as a rule of contract interpretation, "Phil Durango L.L.C." must be given effect. *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015) ("[A] court should interpret the agreement so as to give effect to all of its provisions.").

The September 29 Order gives no effect to "Phil Durango, L.L.C." It simply orders that CRI's commission obligation continues "for as long as [CRI] is associated with the making and selling of C-A-T Tourniquets." But that interpretation ignores that any commission owed must be "for this account," which is "Phil Durango, L.L.C." This is further supported by Plaintiffs'

admission in their Complaint that CRI agreed to pay Poly-Tech commissions “[i]n return” for Plaintiffs “convincing Durango to use [CRI] to assemble and mass-produce the Combat Tourniquet,” *not* for selling C-A-T Tourniquets. Para. 14 (emphasis added).

But as the uncontroverted summary judgment evidence demonstrates, “Phil Durango L.L.C.,” “ceased to be a customer account” for CRI in November 2014, when CRI “purchased the CAT® Tourniquet patents from Phil Durango, LLC.” (Def. Mem. Opp., 6; Amended Answer, 3 ¶ 19 (“[N]o sales have been made to any entity listed in Annex C, including the special accounts, since November 6, 2014, and, therefore, Poly-Tech has been entitled to no commission payments since that time.”)).⁵³

The commissions are “for this account,” *not* “for a product,” “for a product line,” or “for a project.” Since “Phil Durango L.L.C.” must be given effect, in the absence of that account, there can be no commission for that account.

Plaintiffs have judicially admitted that although the Agreement is a “Sales Representative Agreement” and Poly-Tech was the “Representative,” Poly-Tech was being paid a commission not based on the *sale* of tourniquets, but for Poly-Tech’s relationship with Phil Durango. When Phil Durango obligated CRI to pay \$14 million to buy its IP so that CRI could continue to assemble and mass-produce the C-A-T Tourniquet, and then Phil Durango, LLC dissolved, the account ceased to exist.

If there is no account, there is no commission—“special accounts,” “Phil Durango, LLC,” and “commissions for this account” must be read together. If the commission was tied to the making of a product without regard to Phil Durango’s involvement, the Agreement would

⁵³ Def.’s Mem. in Opp. to Pls.’ Motion for Partial Summ. J. as to Alleged “Unambiguous” Terms, Exhibit 1.

have simply said “commission for this product,” as it did with respect to the GraviGate account above. But it did not.

To determine that CRI is obligated to pay commissions based on the manufacture of the tourniquet without regard to the involvement of Phil Durango would be to overlook the separateness of the terms, instead defining “account,” “Phil Durango, LLC,” and “project” all synonymously as C-A-T Tourniquets, further disregarding that Poly-Tech’s commission was “in return” for “convincing Phil Durango to use CRI to assemble and mass-produce” its products.

What’s more, the Court’s interpretation of “project” as manufacturing C-A-T Tourniquets ignores the material terms “Phil Durango, LLC” and “this account.” It is unambiguous from the context of the Agreement that Poly-Tech was being paid a commission “for convincing Phil Durango to use CRI to assemble and mass-produce” its products. Based on that contractual context in which the parties chose to use the term “project”—within the Phil Durango, LLC “special account” commission provision—“project” must involve Phil Durango, LLC.

The “project” either:

- (1) unambiguously means CRI assembling and manufacturing C-A-T tourniquets *on behalf* of Phil Durango, LLC, with Poly-Tech being paid a commission “for convincing Phil Durango to use CRI to assemble and mass-produce” the tourniquets, or
- (2) it is ambiguous.

But it cannot be that “project” *unambiguously* means the manufacture of C-A-T Tourniquets, without regard to the involvement of Phil Durango, given the context of the commission provision being referenced in the Agreement under the “Phil Durango, LLC” account and Plaintiffs’ admitted reason for the commissions. To determine that it is unambiguous that

“project” is the manufacture of tourniquets with or without the involvement of Phil Durango is to write “Phil Durango, L.L.C.,” “special accounts,” and “this account” out of the Agreement.

B. Under the Court’s interpretation, Annex C creates a perpetual contract, and is thus terminable at will.

Even though Plaintiffs have judicially admitted at least four times⁵⁴ that their interpretation of Annex C renders it “perpetual,” the September 29 Order erroneously concludes that Annex C is nevertheless “not perpetual because it terminates once the product stops being produced and sold.”⁵⁵ As a threshold matter, that ruling—if accepted on its face—creates more uncertainty and warrants further clarification. For example, at face value this ruling appears to support an argument that if CRI stopped making and selling C-A-T Tourniquets for a month—or even a year—the provision would be “terminated.” CRI does not believe that was the intent of the Order, and Plaintiffs certainly would not agree with that interpretation.

On the other hand, it is more likely that the Order would be interpreted as providing that regardless of any periods in which CRI stops making and selling C-A-T Tourniquets, as soon as CRI recommences making and selling C-A-T Tourniquets, the commission obligation recommences as well. If that was the Court’s ruling, then it is incorrect to state that the provision could ever “terminate.” The most that could be said under that interpretation would be that the obligation might become temporarily paused, but it could never truly “terminate.” That would render Annex C a garden-variety perpetual provision that is disfavored under South Carolina law and thus “terminable at will by either party.” *See Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship*, 331 S.C. 385, 391, 503 S.E.2d 184, 187 (Ct. App. 1998).

⁵⁴ MPSJ, 4; Reply in Support of MPSJ, 2; Pls. Supp. Mem., 9 ¶ 9.

⁵⁵ September 29 Order, 17–18 (emphasis added).

Setting that aside, CRI stopping “the making and selling of C-A-T Tourniquets” is not a sufficiently objective termination triggering event that would render Annex C “definite in duration,” or “not perpetual.” In an opinion authored by the Honorable Joseph F. Anderson, Jr., the U.S. District Court for the District of South Carolina has recognized that under South Carolina law, if one party can subjectively control or end a contract, a perpetual contract is created. *See Tower St. Cap. Mgmt. Inc. v. KnightBrook Ins. Co.*, No. 3:17-CV-01781-JFA, 2020 WL 13065453, at *12 (D.S.C. June 15, 2020) (“South Carolina courts support the reasoning that if one party could subjectively control or end a contract, a perpetual contract is created.”). Plaintiffs have judicially admitted that CRI—as the owner of the C-A-T intellectual property—has the “unilateral perpetual power” to decide whether the “project continues”: “the owner of the intellectual property therefore controls whether a ... project continues.”⁵⁶ As in *Tower St.*, “the Agreement is a perpetual contract without an express perpetual term. Thus, South Carolina law mandates that the Agreement is terminable at will, subject only to ‘reasonable notice.’” *Id.* at *13. Such reasonable notice was provided in accordance with Article IX of the Agreement.

Plaintiffs might argue that this interpretation would mean that CRI could have given notice one month into the Agreement and terminate the commission obligation. But that is only an issue if “Phil Durango, LLC” is not part of “project.” When “project” is properly read as a collaboration involving “Phil Durango, LLC”—the “account” giving rise to the commissions—the provision only becomes terminable either when “project” discontinues because the “Phil Durango, LLC” special account is gone, or in the event of a material breach.

When “project” is construed (as the Order does) without giving effect to “Phil Durango, LLC,” it creates a perpetual obligation—as long as CRI is engaged in the business of

⁵⁶ Pls.’ Supp. Mem., 9 ¶ 9.

manufacturing tourniquets, CRI must pay Poly-Tech commissions. As explained above, the Order could be interpreted as ordering that CRI *cannot be involved in the making and selling of C-A-T Tourniquets without Poly-Tech*. That is the definition of a perpetual obligation because one of the parties alone controls the triggering event—discontinuing the activity of making and selling C-A-T Tourniquets.

However, Annex C is subject to an interpretation that would render it definite, not perpetual. When “project” is properly construed—giving effect to and harmonizing it with “Phil Durango, LLC”—the obligation is definite, not perpetual. Construing “project” to mean a collaboration in which CRI is assembling and mass-producing tourniquets *on behalf of Phil Durango* with Poly-Tech receiving a commission “in return” for convincing *Phil Durango, LLC* to use CRI to assemble and mass-produce the C-A-T Tourniquet, the obligation is not perpetual because it does not involve “a unilateral perpetual right of renewal.” *See Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship*, 331 S.C. 385, 391, 503 S.E.2d 184, 187 (Ct. App. 1998). Instead, the obligation continues only for so long as Phil Durango, LLC is part of the project. The obligation terminates when Phil Durango, LLC exits the project—a triggering event that is not within the unilateral control of either party to the Agreement.

Simply stated, the exiting of Phil Durango, LLC, from the project is an objective termination triggering event because it is not within the total control of either party to the Agreement. *See Tower St.*, 2020 WL 13065453, at *9 (“Thus, in *Prestwick* the specific event was tied to actions by third parties to the contract. In contrast, here, the parties, together, have total control over the triggering event—the formation of Newco.”). And it is a reasonable triggering event to terminate the commission obligation since Plaintiffs have judicially admitted

that they were being paid commissions “in return” for convincing *Phil Durango, LLC* to use CRI to assemble and mass-produce the C-A-T Tourniquet, *not* for selling C-A-T Tourniquets.

CONCLUSION

For the reasons set forth above, Defendant CRI respectfully requests that the Court reconsider, clarify, alter, or amend the September 29, 2022 Order Granting Plaintiffs’ Motion for Partial Summary Judgment.

Respectfully submitted,

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CEDRONE AND POLYTECH V. COMPOSITE RESOURCES
CIVIL ACTION No. 2019-CP-46-00051

EXHIBIT A
**TO DEFENDANT’S MOTION TO RECONSIDER,
CLARIFY, ALTER , OR AMEND ORDER GRANTING
PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY
JUDGMENT**

EXCERPTS FROM MAY 4, 2022 HEARING

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

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

May 4, 2022
York, South Carolina

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

THE HONORABLE MARK J. HAYES, II

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

Keith Munson, Esq.
Attorney for the Plaintiff

Michael Montecalvo, Esq.
Attorney for the Plaintiff

Paul Harrill, Esq.
Attorney's for the Defendant

William Klett, Esq.
Attorney's for the Defendant

Maria DiScioscia, RPR
Official Court Reporter

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

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

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

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

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

1 MR. MUNSON: Oh, sorry.

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

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

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

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

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

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

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

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

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

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

3 I've viewed the -- I know Mr. Munson has walked in here
4 and stated the end part of his argument, which is he
5 wanted me to find a breach. I never saw that's what the
6 purpose of this is. On the issue -- therefore, I did
7 not view this argument today to be one that would lead
8 to liability or no liability or breach or no breach.
9 And like wise with this, I know that both sides
10 presented additional evidence that go outside of the
11 four corners of the document. I appreciate that,
12 because I know this is not going to be the end of the
13 end today. And that gave me some idea as to what I'm
14 looking at. If I went to extraneous evidence to
15 interpret a contract, I couldn't do that today. But I
16 do appreciate the extra information, because I feel like
17 that understanding what y'all still have left to do of
18 my understanding of what you haven't done yet, I think
19 it would be premature for me to come to those
20 conclusions. I'm simply looking at what's presented in
21 front of me as far as the document itself and stating
22 where there might be disagreement with that. Now,
23 Mr. Munson, I know you haven't replied yet, I'm just --
24 gonna let you do that, I just thought I'd throw that in
25 there.

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

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

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

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

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

17 MR. MUNSON: I mean --

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

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

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

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

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

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

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

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

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

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

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

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

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

C E R T I F I C A T E

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

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



Maria DiScioscia
Official Court Reporter

CEDRONE AND POLYTECH V. COMPOSITE RESOURCES
CIVIL ACTION No. 2019-CP-46-00051

EXHIBIT B
**TO DEFENDANT’S MOTION TO RECONSIDER,
CLARIFY, ALTER , OR AMEND ORDER GRANTING
PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY
JUDGMENT**

EXCERPTS FROM MAY 20, 2022 HEARING

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

Date: May 20, 2022

Time: 9:38 a.m.

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

Reported by
Amber Payne, CVR

APPEARANCES

Presiding: The Honorable J. Mark Hayes, II

For the Plaintiffs: Keith D. Munson, Esq.
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Paul D. Harrill, Esq.
Burr & Forman, LLP
P.O. Box 11390
Columbia, SC 29211

Also Present: Law Clerk: Zachary Turner, Esq.

1 PROCEEDINGS

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

4 THE COURT REPORTER: Yes, Your Honor.

5 THE COURT: Okay. Good.

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

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

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

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

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

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

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

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

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

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

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

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

4 THE COURT REPORTER: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

1 check with" -- so I got to check with y'all
2 first. That's what I'm trying to, in my mind,
3 set this up compartmentally that I -- y'all
4 get the high priority. Okay. All right.

5 Listen, thank y'all very much. I've --
6 I've been told that I have people already
7 waiting for my next hearing. So thank y'all.
8 I will get back in touch with y'all as soon as
9 I can on this, and I appreciate your patience
10 today.

11 MR. MUNSON: Your Honor, on behalf of all of
12 us, I just want to say thank you for taking
13 the effort here. We don't -- I'm sure all of
14 us don't see this very often, and we
15 appreciate it.

16 THE COURT: What don't you see?

17 MR. MUNSON: The -- the effort --

18 THE COURT: A judge who loses his temper and
19 yells at people.

20 MR. MUNSON: No. The effort to construe a
21 contract. I mean, the thing you invited and
22 what we put on you -- it was a gracious thing
23 for you to invite, and I just want -- I think
24 all of us agree with that.

25 THE COURT: Well, I appreciate you saying

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG) CERTIFICATE

I, Amber Payne, Official Court Reporter for the
Seventh Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a
true, accurate, and complete Transcript of Record of
the proceedings had and the evidence introduced in
the trial of the captioned case, relative to appeal,
in the Court of General Sessions for York County,
South Carolina on May 20th, 2022.

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

Amber J. Payne, CVR

Date: 8/9/2022
Notary public for South Carolina
My commission expires August 12, 2029

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

) SIXTEENTH JUDICIAL CIRCUIT

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

CIVIL ACTION NO: 2019-CP-46-00051

Plaintiffs,

**DEFENDANT’S MOTION FOR LEAVE
TO AMEND OR SUPPLEMENT
AMENDED ANSWER AND
COUNTERCLAIMS**

vs.

Composite Resources, Inc.,

Defendant.

Out of an abundance of caution, and without conceding the necessity of this motion, Defendant Composite Resources, Inc. (“CRI”), pursuant to Rule 15(a) & (c), South Carolina Rules of Civil Procedure, hereby moves for leave to amend or supplement CRI’s Amended Answer and Counterclaims to assert the defense of good faith reliance on the advice of counsel. **CRI respectfully requests the Court’s guidance on this motion as quickly as possible as the parties will be conducting discovery and depositions in the coming weeks where this issue will be relevant.**

I.**Factual Background****A. Pro Hac Counsel appear and prompt further settlement discussions, culminating in an unsuccessful mediator’s settlement proposal.**

On August 26, 2022, the parties mediated this case with Tom Wills as the mediator. After mediation was unsuccessful, CRI engaged Mike Kaeske of the Kaeske Kaw Firm and Jeremy Martin of Martin Appeals, PLLC (collectively, “Pro Hac Counsel”) to assist in CRI’s defense. Shortly after that engagement, Pro Hac Counsel contacted mediator Wills to discuss reconvening settlement discussions.

The dispositive motions deadline was September 15, 2022. Accordingly, CRI timely filed motions for summary judgment as to Plaintiffs’ claims under the Sales Representative Act (S.C. Code Ann. § 39-65-10, *et seq.*) and conversion, both of which were filed by Plaintiffs as a basis to seek punitive damages upon proof of willful, wanton, or reckless conduct—thus directly implicating CRI’s state of mind.

On September 23, 2022, after conferring with CRI and Plaintiffs, mediator Tom Wills issued a mediator’s settlement proposal with a September 26, 2022 response deadline. Unfortunately, the mediator’s settlement proposal was unsuccessful. Three days later, on September 29, 2022, the Court signed an order granting Plaintiffs’ Motion for Partial Summary Judgment as to Unambiguous Material Terms (the “September 29 Order”). The September 29 Order is the subject of CRI’s Rule 59 motion, filed contemporaneously herewith.

The Court entered orders granting Pro Hac Counsels’ admission on September 23 and 29, 2022.

B. Pro Hac Counsel learn of CRI’s defense of good faith reliance on the advice of counsel.

Since their recent engagement, Pro Hac Counsel have learned the following facts, prompting the instant motion.

In 2004, CRI, Phil Durango, LLC, and Poly-Tech, were participating in a “project” together.¹ The “project”—as it was envisioned from the outset and as it existed even before the 2005 Agreement—involved three parties.² CRI was manufacturing C-A-T tourniquets on behalf of Phil Durango, with Poly-Tech being paid a commission for its relationship with Phil Durango.³

¹ Affidavit of J. Bennett, Exhibit 1 hereto, ¶ 2.

² *Id.*

³ *Id.*

This is undisputed—Plaintiffs have alleged that they were to be paid commissions for having “convinced Phil Durango to use CRI to assemble and mass produce the C-A-T.”⁴

In November 2014, Phil Durango ceased “us[ing] CRI to assemble and mass produce the C-A-T,” and therefore the “project” ended. CRI had to buy the intellectual property for the C-A-T from Phil Durango for \$14 million to maintain the ability to manufacture the C-A-T.⁵ The Phil Durango “special account” entitling Poly-Tech to commissions ceased to exist, as did Phil Durango, LLC when it was dissolved by owner Mark Esposito in October 2016, after CRI paid the note on the IP in full.⁶

From the moment CRI and its owner Jon Bennett purchased the IP, CRI was met with near constant pressure from its primary distributor, North American Rescue (“NAR”), to lower the C-A-T price or risk dramatically losing market share.⁷ CRI’s CFO and others familiar with the “project” advised Bennett that since the Phil Durango account was gone and the “project” involving the manufacture of C-A-T tourniquets on behalf of Phil Durango had been discontinued, CRI was no longer obligated to pay Poly-Tech commissions.⁸ Poly-Tech was no longer “convinc[ing]” Phil Durango of anything. Bennett acknowledged but chose not to follow the advice based on loyalty to what he had viewed as his friendship with Cedrone—CRI had purchased the C-A-T IP from Phil Durango *so that CRI could continue making the C-A-T, not as a way to discontinue Poly-Tech’s commissions.*⁹

⁴ Pls.’ Motion for Final Summ. J. as to Def.’s 4th & 5th Counterclaims, 3.

⁵ Exhibit 1 ¶ 3.

⁶ *Id.*

⁷ *Id.* ¶ 4.

⁸ *Id.*

⁹ *Id.*

The pricing pressure came to a head in 2017, when CRI was presented with an existential crisis by its distributor NAR—there was a new tourniquet on the market which was significantly cheaper.¹⁰ NAR told CRI that unless the price of the C-A-T was immediately lowered by \$2.50, CRI and NAR risked losing 80% of their market share.¹¹

NAR agreed to share the price reduction with CRI equally \$1.25/\$1.25.¹² Faced with these decreases in the economics, CRI's CFO revisited the commissions issue and sought the advice of counsel regarding whether the Poly-Tech commissions were still an obligation, and whether the 2005 Agreement could be terminated.¹³ In March 2017, CRI's counsel advised that because the Phil Durango account no longer existed and had been discontinued, no commissions were payable to Poly-Tech, and the Agreement was terminable.¹⁴

Upon receiving this advice, Bennett chose not to cease commission payments to Poly-Tech or terminate the Agreement, but rather to do what had been done in the parties' prior course of dealing.¹⁵ During Phil Durango's prior ownership of the C-A-T IP, when CRI had made price reductions, Poly-Tech had agreed to share in the reductions and reduced its commissions—*e.g.*, the commission was permanently reduced from \$1.75 per tourniquet sold to \$1.25 in 2013.¹⁶

Based on that course of dealing, in 2017 CRI informed Poly-Tech that they would share evenly in a C-A-T price reduction of \$.625 apiece.¹⁷ As it had previously, Poly-Tech agreed to

¹⁰ *Id.* ¶ 5.

¹¹ *Id.*

¹² *Id.* ¶ 6.

¹³ *Id.*

¹⁴ *Id.* ¶ 7.

¹⁵ *Id.* ¶ 8.

¹⁶ Plaintiffs have judicially admitted that: (1) on or about May 31, 2013, CRI, Phil Durango, and Poly-Tech agreed to a reduced commission for Poly-Tech on Red Tip Black Combat Tourniquets by \$0.50 per tourniquet, so from \$1.75 to \$1.25 per tourniquet; and (2) on or about August 30, 2013, CRI, Phil Durango, and Poly-Tech agreed to a reduced commission for Poly-Tech on two discrete categories of Combat Tourniquets: specifically, a \$0.33 reduction for Red Tip Orange tourniquets and a \$0.25 reduction for Red Tip Blue tourniquets. Compl., ¶¶ 21–22 (judicially admitting Plaintiffs “agreed to a reduced commission”).

¹⁷ Exhibit 1 ¶ 9.

“accommodate” the reduction, stating that it would “consider this a temporary accommodation to current market conditions. *If and when* the market can support higher prices, I would expect that *we might one day* reverse this accommodation.”¹⁸

Two weeks later Poly-Tech ignored its own written “accommodation,” tried to walk back its agreement, and became increasingly unreasonable to deal with—ultimately demanding that CRI run all its business decisions past Cedrone.¹⁹ It was after this that CRI again sought the advice of counsel, this time to draft a termination letter.²⁰

CRI later requested and received a second opinion from another counsel, who advised that based on the Agreement, CRI had no further obligations to Poly-Tech after the end of the notice period.²¹

II. Argument & Authorities

Plaintiffs are seeking punitive damages, implicating a determination of whether CRI acted willfully, wantonly, or recklessly. Advice of counsel is a defense to punitive damages and must be considered in determining whether a defendant has acted willfully, wantonly, or recklessly. *See Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 612, 538 S.E.2d 15, 32 (Ct. App. 2000) (“[T]he totality of the evidence in the record *does not justify the imposition of punitive damages in this case*. Hoffman’s partners believed, whether correctly or incorrectly, there was some legal basis for their decision to stop payments on the loan. The partners relied on Meyer ... to guide them in business

¹⁸ *Id.* ¶ 9 (emphasis added)

¹⁹ *Id.* ¶ 10. By that point, the manufacturer of raw materials that CRI was obligated to purchase from Poly-Tech had moved production to China. (*Id.*) Because the C-A-T was used by the U.S. military, compliance with the Berry Amendment—a DOD regulation giving procurement preference to products made in the US—precluded CRI from using Chinese-produced raw materials in the manufacture of the C-A-T. (*Id.*) However, the Agreement purportedly required that Plaintiffs’ “overall profits will be maintained,” resulting in CRI having to find and pay an alternative raw materials provider while continuing to pay Plaintiffs for raw materials CRI could not use in the C-A-T. (*Id.*)

²⁰ *Id.* ¶ 10.

²¹ *Id.* ¶ 11.

decisions regarding the Partnership. Meyer recommended the partners discontinue making payments.” (emphasis added)); *see also Harvey v. Chapman Mirror & Glass & RSRJ, LLC*, No. 2007-UP-440, 2007 WL 8392122, at *5 (S.C. Ct. App. Oct. 9, 2007) (“South Carolina has recognized that acting in good faith under the advice of counsel is a defense to punitive damages.”).

A. Advice of counsel is not a “true” or “mandatory” affirmative defense under Rule 8(c) that must be pled.

South Carolina law is unclear whether advice of counsel is an affirmative defense which must be specifically pled in accordance with Rule 8(c), SCRPC. While unpublished opinions have noted when advice of counsel has been raised “[a]s an affirmative defense,”²² there does not appear to be South Carolina law holding that advice of counsel must be specifically pled, as do affirmative defenses like estoppel or limitations. In such cases, South Carolina courts consider the construction placed on the Federal Rules of Civil Procedure. *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) (“Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.”).

Courts within the Fourth Circuit have reasoned that while advice of counsel is often referred to as the “advice of counsel defense,” this label is actually a misnomer. *See United States v. Stevens*, 771 F. Supp. 2d 556, 565 (D. Md. 2011). Rather, “good faith reliance on the advice of counsel, when proven, negates the element of wrongful intent of a defendant.” *See id.*; *see also Oakley, Inc. v. Bugaboos*, 2010 U.S. Dist. LEXIS 123976, *11–12 (S.D. Cal. Nov. 23, 2010) (just because the “‘advice of counsel defense’ contains the word defense ... does not an affirmative defense make.”); *LG.Philips LCD Co. v. Tatung Co.*, 243 F.R.D. 133, 137 (D. Del. 2007)

²² *Harvey v. Chapman Mirror & Glass & RSRJ, LLC*, No. 2007-UP-440, 2007 WL 8392122, at *5 (S.C. Ct. App. Oct. 9, 2007).

(“[A]dvice of counsel is only an ‘affirmative defense’ in the sense that it must be introduced into the litigation by the accused infringer in mitigation of a claim of willfulness; it is not a ‘true’ or ‘mandatory’ affirmative defense under Rule 8(c) that must be pled in the answer.”); *United States v. Peterson*, 101 F.3d 375, 381 (5th Cir. 1996) (holding that good faith reliance on the advice of counsel is not a defense but rather “simply a means of demonstrating good faith and represents possible evidence of an absence of any intent to defraud”).

Should the Court agree that advice of counsel does not need to be specifically pled, then the purpose of this motion is to give notice so that there may be no surprise.

B. To the extent the Court determines that advice of counsel must be specifically pled in accordance with Rule 8(c), CRI respectfully requests leave to amend or supplement its Amended Answer and Counterclaims.

The “aim of this pleading requirement is to avoid surprise defenses.” *See Plyler v. Burns*, 373 S.C. 637, 648, 647 S.E.2d 188, 194 (2007). Further, “many courts allow the assertion of affirmative defenses despite a technical failure to comply with the initial pleading requirements where the defense is timely raised to the trial court without resulting in unfair surprise to the opposing party.” *See id.* Accordingly, to the extent the Court determines that advice of counsel must be specifically pled in accordance with Rule 8(c), SCRCF, CRI respectfully requests leave to amend or supplement its Amended Answer and Counterclaims.

As the Supreme Court of South Carolina recently noted:

Rule 15(a) provides that when a party asks to amend his pleading, “*leave shall be freely given when justice so requires and does not prejudice any other party.*” Rule 15(a), SCRCF. “This rule *strongly favors amendments and the court is encouraged to freely grant leave to amend.*” *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005) (citing *Jarrell v. Seaboard Sys. R.R., Inc.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987)). “Rule 15(a) is substantially the same as the Federal Rule,” Rule 15(a), SCRCF notes, and the Supreme Court of the United States has referred to the Rule’s “*freely given*” provision as

a “mandate” that “is to be heeded,” *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962).

Patton v. Miller, 420 S.C. 471, 492–93, 804 S.E.2d 252, 263 (2017) (emphasis added). The *Patton* court further noted:

In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—*the leave sought should, as the rules require, be “freely given.”*

Id. (emphasis added); accord *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988). Here, there is no evidence of bad faith, undue delay, or prejudice. Denial of leave to amend would be an abuse of discretion. See *Doe v. Oconee Mem’l Hosp.*, No. 2018-001480, 2022 WL 4361698, at *3 (S.C. Ct. App. Sept. 21, 2022).

To the extent CRI could have previously alleged advice of counsel, there is no suggestion that it did not do so in bad faith or was obligated to do so. Nor has there been undue delay. Pro Hac Counsel’s appearances have just been granted,²³ and it has only been days since Plaintiffs indicated that they intend to amend and seek adjudication of their motion for summary judgment on CRI’s fourth and fifth counterclaims, in which they specifically complain that CRI “unilaterally, and over the objections of Cedrone and Poly-Tech, reduced the commission rate paid to Poly-Tech.”²⁴ Of course, CRI took that action after being advised by counsel that CRI owed *no* commission to Poly-Tech.

²³ See *Pereira for estate of Capala v. Capala*, No. 17CV3434ILGSMG, 2018 WL 4259982, at *3 (E.D.N.Y. Sept. 6, 2018) (“defendants have explicitly disclosed that the purpose of amending the complaint is to assert defenses identified by their new attorney but omitted by prior counsel. This Court has permitted amendments when “defendants’ retention of new counsel ... precipitate[d] new defense strategies.”); *SunTrust Banks, Inc. v. Robertson*, No. 2:09CV197, 2010 WL 11569431, at *3 (E.D. Va. July 22, 2010) (allowing amendment reflecting “strategy changes made by ... new counsel”).

²⁴ Pls.’ Motion for Final Summ. J. as to Def.’s 4th & 5th Counterclaims, 4.

Further still, on September 15, 2022, CRI timely filed motions for summary judgment on Plaintiffs' claims for violation of the Sales Representative Act and conversion, both of which implicate punitive damages and CRI's state of mind. And as Plaintiffs and the Court have acknowledged, those motions may need to be amended based on further depositions and discovery, which the parties are in the process of scheduling and completing.

CRI's advice of counsel defense directly relates to Plaintiffs' allegations that the commissions were fraudulently, willfully, wantonly, or recklessly withheld. The defense arises out of the facts alleged and claims asserted by Plaintiffs in their complaint and dispositive motions. Regardless, "[d]elay in seeking leave to amend pleadings, regardless of the length of the delay, will not ordinarily be held to bar an amendment *in the absence of a finding of prejudice.*" See *Shah v. Richland Mem'l Hosp.*, 350 S.C. 139, 147, 564 S.E.2d 681, 685 (Ct. App. 2002) (emphasis original).

Importantly, "[t]he burden is ... on the party opposing the motion to show how it is prejudiced." *Stanley v. Kirkpatrick*, 357 S.C. 169, 175, 592 S.E.2d 296, 298 (2004). The prejudice contemplated in Rule 15 is not that the non-moving party is forced to defend the merits of a valid claim. *Patton*, 420 S.C. at 491. Rule 15 prejudice is some result flowing from the amendment that puts the non-moving party at a disadvantage in defending the merits, which disadvantage the party would not have faced if the amended claim had been included in the original pleading or a timely motion to amend. *Id.*

Here, discovery is still ongoing, and multiple depositions remain to be taken, including CRI's Jon Bennett. Therefore, Plaintiffs will be able to explore the merits of CRI's advice of counsel defense. And to further eliminate any disadvantage for Plaintiffs in defending the merits

of CRI's advice of counsel defense, CRI will provide Plaintiffs with documents relevant to CRI's advice of counsel defense.

**III.
Conclusion**

For the reasons set forth above, in the event the Court concludes that amendment or supplementation is necessary for CRI to assert its advice of counsel defense, CRI respectfully requests that the Court grant CRI leave to amend or supplement its Amended Answer and Counterclaims accordingly. CRI further requests the Court's guidance on this motion as quickly as possible as the parties will be conducting discovery and depositions in the coming weeks.

Respectfully submitted,

BURR & FORMAN, LLP

By: /s/ Paul D. Harrill

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Admitted Pro Hac Vice

October 10, 2022

Columbia, South Carolina

Attorneys for Composite Resources, Inc.

Affirmation of Consultation

The undersigned hereby affirms that counsel for Defendant has consulted with Plaintiffs' counsel in a good faith effort to resolve the matter contained in this motion and Plaintiffs' counsel has indicated that Plaintiffs do not consent to the relief sought herein.

s/ Paul D. Harrill

STATE OF SOUTH CAROLINA

COUNTY OF YORK

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

Plaintiffs,

vs.

Composite Resources, Inc.,

Defendant.

) IN THE COURT OF COMMON PLEAS
)
) SIXTEENTH JUDICIAL CIRCUIT

CIVIL ACTION NO: 2019-CP-46-00051

AFFIDAVIT OF JONATHAN BENNETT

PERSONALLY APPEARED BEFORE ME, Jonathan Bennett, who, being duly sworn,
deposes and states as follows:

1. I am President, CEO, and owner of Composite Resources, Inc. (“CRI”) and have held that position since before June 2005. In that capacity I am familiar with CRI’s relationship with Plaintiff Poly-Tech Industrial, Inc. (“Poly-Tech”) and Daniel P. Cedrone (“Cedrone”), as well as the relationship between CRI, Phil Durango, LLC, and Poly-Tech. I am also familiar with the history of CRI’s development, assembly, manufacture, marketing, and ownership of the C-A-T tourniquet.

2. In 2004, CRI, Phil Durango, LLC, and Poly-Tech, were participating in a project together. The project—as it was envisioned from the outset and as it existed even before the 2005 Agreement—involved three parties. CRI was manufacturing C-A-T tourniquets on behalf of Phil Durango, with Poly-Tech being paid a commission for its relationship with Phil Durango.

3. In November 2014, CRI had to buy the intellectual property for the C-A-T from Phil Durango for approximately \$14 million to maintain the ability to manufacture the C-A-T. The Phil Durango “special account” entitling Poly-Tech to commissions ceased to exist, as did Phil

Durango, LLC when it was dissolved by owner Mark Esposito in October 2016, after CRI paid the note on the IP in full.

4. From the moment CRI purchased the IP, CRI was met with near constant pressure from its primary distributor, North American Rescue (“NAR”), to lower the C-A-T price or risk dramatically losing market share. CRI’s CFO Derrick Thompson and others familiar with the “project” advised me that since the Phil Durango, LLC account was gone and the “project” involving the manufacture of C-A-T tourniquets on behalf of Phil Durango, LLC had been discontinued, CRI was no longer obligated to pay Poly-Tech commissions. I acknowledged but chose not to follow the advice based on loyalty to what I had viewed as his friendship with Cedrone—CRI had purchased the C-A-T IP from Phil Durango so that CRI could continue making the C-A-T, not as a way to discontinue Poly-Tech’s commissions.

5. The pricing pressure came to a head in 2017, when CRI was presented with an existential crisis by its distributor NAR—there was a new tourniquet on the market which was significantly cheaper. NAR told CRI that unless the price of the C-A-T was immediately lowered by \$2.50, CRI and NAR risked losing 80% of their market share.

6. NAR agreed to share the price reduction equally with NAR \$1.25/\$1.25. Faced with these decreases in the economics, Thompson revisited the commissions issue and sought the advice of counsel regarding whether the Poly-Tech commissions were still an obligation, and whether the 2005 Agreement could be terminated.

7. In March 2017, CRI’s counsel advised that because the Phil Durango account no longer existed and had been discontinued, no commissions were payable to Poly-Tech, and further that the Agreement itself was terminable.

8. Upon receiving this advice, I chose not to cease commission payments to Poly-Tech or terminate the Agreement, but rather to do what had been done in the parties' prior course of dealing. During Phil Durango's prior ownership of the C-A-T IP, when CRI had made price reductions, Poly-Tech had agreed to share in the reductions and reduced its commissions—*e.g.*, the commission was permanently reduced from \$1.75 per C-A-T sold to \$1.25 in 2013.

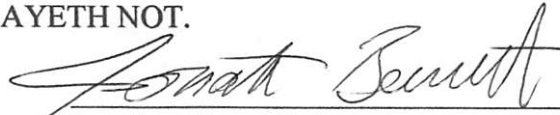
9. Based on that course of dealing, in 2017 CRI informed Poly-Tech that they would share evenly in a C-A-T price reduction of \$.625 apiece. As it had previously, Poly-Tech agreed to "accommodate" the reduction, stating that it would "consider this a temporary accommodation to current market conditions. *If and when* the market can support higher prices, I would expect that *we might one day* reverse this accommodation." Attached hereto as Exhibit A is a true and correct copy of that April 17, 2017 e-mail correspondence.

10. Two weeks later, Poly-Tech ignored its own written "accommodation," tried to walk back its agreement, and became increasingly unreasonable to deal with—ultimately demanding that CRI run all its business decisions past Cedrone. By that point, the manufacturer of raw materials that CRI was obligated to purchase from Poly-Tech had moved production to China. Because the C-A-T was used by the U.S. military, compliance with the Berry Amendment—a DOD regulation giving procurement preference to products made in the U.S.—precluded CRI from using Chinese-produced raw materials in the manufacture of the C-A-T. However, the Agreement purportedly required that Plaintiffs' "overall profits will be maintained," resulting in CRI having to find and pay an alternative raw materials provider while continuing to pay Plaintiffs for raw materials CRI could not use in the C-A-T. It was after this that CRI again sought the advice of counsel, this time to draft a termination letter.

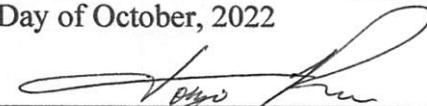
11. Later CRI requested and received a second opinion from another counsel, who advised that based on the Agreement, CRI had no further obligations to Poly-Tech after the end of the notice period.

12. In deciding whether to implement the 2017 commission reduction referenced herein, terminate the Agreement, and stop paying commissions to Poly-Tech, I relied in good faith on the advice of CRI's counsel that because the Phil Durango account no longer existed and had been discontinued, no commissions were payable to Poly-Tech, and further that the Agreement was terminable, and finally CRI would have no further obligations to Poly-Tech after the end of the notice period.

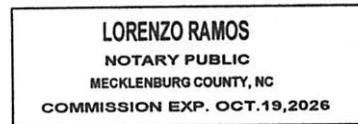
FURTHER AFFIANT SAYETH NOT.


Jonathan Bennett

SWORN to before me this 10th
Day of October, 2022


Notary Public for South Carolina LR (SEAL)

Lorenzo Ramos
Printed Name of Notary
My Commission Expires: OCT 19, 2026



Message

From: Jonathan Bennett [jonbenn@composite-resources.com]
Sent: 4/17/2017 11:50:02 AM
To: Dan Cedrone [DanC@polytechindustrial.com]
CC: Derek Thompson [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=48b651d0be7541dfbadf002c2c518d69-dthompson]
Subject: Re: March Reports

Hi Dan,

I have been trying to reach you.

What time is a good time to call today?

- Jon

On Apr 17, 2017, at 11:17 AM, Dan Cedrone <DanC@polytechindustrial.com> wrote:

Hi Derek and Jon,
I received the below e-mail as well as your note Jon, regarding the reduction in price to the DOD from NAR, C/R to NAR, and then a commission reduction by .062 for each tourniquet sold to NAR. Until I have a conversation with Jon and agree to something permanent, I will consider this a temporary accommodation to current market conditions. If and when the market can support higher prices, I would expect that we might one day reverse this accommodation.

*Thank You,
Dan*

Dan Cedrone

13728 Statesville Road
Huntersville, NC 28078
P: 704-992-8102
www.polytechindustrial.com

Our mission is to contribute to client success through our knowledge of manufacturing technologies, materials; specifications and capabilities along with an innovative approach to solving problems.

From: Derek Thompson [mailto:dthompson@composite-resources.com]
Sent: Thursday, April 13, 2017 4:11 PM
To: Dan Cedrone <DanC@polytechindustrial.com>
Subject: March Reports

Hi Dan,

Attached are the March commission reports. Jon confirmed that the effective date for commission adjustment needs to coincide with the pricing change.

NAR's first invoice at the new pricing was March 7th. (The invoice I sent you earlier today). You will be able to see that reflected in the attached report.

ROA 758

Per our conversation and your request, I have adjusted the additional .625 per Black and Orange Tourniquet sold to NAR from the vendor material commission payable.

I will initiate the wire tomorrow.

Enjoy your evening,

Derek G. Thompson
Chief Financial Officer
Composite Resources, Inc.
483 Lakeshore Parkway
Rock Hill, SC 29730
P|803.325.9330

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 OPPOSITION TO
MOTION FOR LEAVE TO AMEND OR
SUPPLEMENT AMENDED ANSWER AND
COUNTERCLAIMS**

Daniel P. Cedrone (“**Cedrone**”) and Poly-Tech Industrial, Inc. (“**Poly-Tech**”) (“**Plaintiffs**”), responds to Defendant Composite Resources, Inc.’s (“**Composite**” or “**Defendant**”) Motion for Leave to Amend or Supplement Amended Answer and Counterclaims (“**Motion to Amend**”). This case principally involves claims for unpaid commissions and other remunerations under a written 2005 Sales Representative Agreement (“**Contract**”) (which Defendant admitted “speaks for itself”), related to a patented combat tourniquet product (the “**C-A-T Tourniquet**”).

INTRODUCTION

As a preliminary matter, this Motion to Amend should await disposition of the Rule 59 Motion and the expiration of the notice of appeal period so that it does not interfere with the progress made in the case to date.

Frankly, Plaintiffs find the timing and nature of the Motion to Amend suspicious because amended pleadings can cause mischief. For example, in *Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017), it was held that an amended complaint “supersedes the original one and becomes the operative complaint in the case, [and] it renders the original complaint “of no

effect.” (citation omitted). The result in *Fawzy* was that an order of dismissal entered one hour later was entered as to a mooted complaint. *Id.* Filing the Motion to Amend in conjunction with the Rule 59 motion related to the recent partial summary judgment and seeking “guidance on this motion as quickly as possible” seems poised to cause mischief by laying the groundwork for a subsequent argument that granting the amendment supersedes the status of the pleadings on which the partial summary judgment order was based, moots the need for Rule 59 motion, and sends the parties back to square one to file for summary judgment all over again.

In addition to the timing, this suspicion is augmented by the fact that Defendant does not attach the proposed Second Amended Answer to the Motion to Amend. Usually when a litigant wants to amend a pleading, it attaches the proposed amended pleading to its motion. Short of that, the Defendant could have set forth verbatim what the new allegations would be; but it did not.

Similarly, if the purpose of the motion is to introduce the new defense and then accelerate its development so as to lessen the prejudice of this last-minute substitution, one would expect that the Motion to Amend and the supporting affidavit would actually identify the counsel and attach or recite the actual advice forming the basis of the defense. Instead, in Ex A, to the Motion to Amend, Affidavit of Jonathan Bennett, Defendant’s CEO vaguely states: (i) that he sought advice from “others” (para. 4); (ii) that this advice included “advice of counsel” (para. 6); (iii) that in March 2017, “counsel advised” him (para. 7); (iv) that Defendant “again sought advice of counsel” (para. 10); and (v) that Defendant “received a second opinion from another counsel” (para. 11). Defendant does not identify a single lawyer (and based on the affidavit, it might be more than five), and although Defendant attaches correspondence to the affidavit, it is not correspondence to or from any counsel that recites any actual advice. Additionally, one would expect that the newly discovered defense of reliance on advice of counsel would have caused the service of a new witness

list, an amendment to existing written discovery responses and an offer to allow Plaintiffs the opportunity to obtain discovery on this new defense.

LEGAL STANDARD

SCRCP 15(a) sets for the basic legal standard for leave to amend under the circumstances here. As the South Carolina Rule is essentially identical to the federal rule, interpretation of the federal rule is instructive. *Oulla v. Velazques*, 427 S.C. 428, 436, 831 S.E.2d 450, 454 (Ct. App. 2019). One instructive federal case is *In re Warner Advert., Inc.*, where the USDC-SC District Judge explained:

However, leave to amend is “by no means automatic.” *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663, 666 (5th Cir. Unit A), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 672, 70 L.Ed.2d 640 (1981). Instead, the decision to grant or deny leave is one left to the sound discretion of the trial court. In deciding whether leave should be granted, the district court can consider factors such as “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party ... [and] futility of amendment.” *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

No. 95-72771-W, 1996 WL 33340748, at *2 (Bankr. D.S.C. Mar. 7, 1996) (emphasis added).

ARGUMENT

Each of the grounds of undue delay, bad faith, futility and prejudice independently support denying the requested leave to amend.

A. Undue Delay (which also supports prejudice to Plaintiffs)

Defendant’s new counsel, self-described as “Pro Hac Counsel,” suggest that being new and coming up to speed on the litigation somehow equates to diligence on behalf of Defendant. *See*, Motion to Amend, p. 2 (“Since their recent engagement, Pro Hac Counsel have learned the following facts, prompting the instant motion.”). Everything in this case that is just being learned

by Pro Hac Counsel does not make everything newly discovered. Moreover, “facts” that have been stewing in Defendant’s realm since 2014 did not “prompt” this motion. Retaining new counsel prompted this motion. Retaining new counsel does not excuse delay. “If securing new counsel could erase the prejudice and delay incurred by other parties, than [sic] Rule 15(a)’s consideration of delay and prejudice would be meaningless.” *84 Lumber Co. v. F.H. Paschen, S.N. Nielsen & Assocs., LLC*, No. CV 12-1748, 2017 WL 3263084, at *3 (E.D. La. Aug. 1, 2017) (citing, *Winstead v. Georgia Gulf Corp.*, 77 Fed.Appx. 267, 270 (5th Cir. 2003) (affirming denial of motion to amend based on undue delay and holding that “[t]he retention of a new attorney able to perceive or draft different or more creative claims from the same set of facts is ... no excuse for the late filing of an amended complaint.” (internal citation omitted)); *see also Villa v. Chicago*, 924 F.2d 629, 632 (7th Cir.1991)(“the fact that [a party] was represented by a new attorney” did not “warrant[] the filing of an amended complaint.”).

Part of what makes this delay undue is the culmination with all the other delay caused in this case. The list below highlights a sampling of the apparent strategy since the filing of the Complaint on January 7, 2019:

1. Removal by Defendants, February 7, 2019 (Remanded);
2. Plaintiffs’ Motion to Compel, filed November 7, 2019;
3. Amended Answer and Counterclaims, filed April 1, 2020;
4. Answer to Defendant’s Amended Counterclaims, filed April 16, 2020;
5. Plaintiffs’ Renewed Motion to Compel, filed June 2, 2020;
6. Motion for Summary Judgment of 4th and 5th Counterclaims, filed July 16, 2020;
7. Motion to Compel Hearing, October, 2020;
8. Second Removal by Defendants, January 29, 2021;

9. Order Granting Plaintiffs' Motion to Remand Second Removal, filed September 23, 2021;
10. Consent Scheduling Order, November 17, 2021;¹
11. Motion for Rule to Show Cause and Compel, filed January 12, 2022;
12. Motion for Partial Summary Judgment, March 18, 2022;
13. Motion to Compel/Sanctions Hearing, March 31, 2022;
14. Setting of Case for Trial (for July 18, 2022), March 31, 2022;
15. Motion to Deem RFA Admitted and to Compel, filed April 28, 2022; and
16. Order granting partial summary judgment. September 29, 2022.

To try to dampen the undue delay and prejudice, Pro Hac Counsel here, states that “discovery is still ongoing, and multiple depositions remain to be taken, including CRI’s Jon[athan] Bennett. Therefore, Plaintiffs will be able to explore the merits of CRI’s advice of counsel defense.” Motion to Amend, pp. 9-10. This suggestion that discovery can *now* begin is another example of Defendant’s disregard for its discovery obligations because Defendant had knowledge of the facts supporting the new defense of advice of counsel since early 2019. What Pro Hac Counsel means by this statement is that now Defendant is prepared to provide discovery on these supposed facts because new counsel has a new strategy. However, Defendant has not explained why documents responses and interrogatory answers were not provided earlier and have not been provided now. Prior to the appearance of Pro Hac Counsel, the defense strategy seemed

¹ Including agreed Contract Ambiguity Motion provision under which “[a]ny party may move the court ... for an order construing the ambiguity/non-ambiguity of the Contract ... by way of motion for partial summary judgment.”

to benefit from hiding these facts. Defendant continues to hide the ball by its failure to supplement discovery with documents that are responsive to the “new defense”.²

Poly-Tech’s first set of discovery (interrogatories and requests for production of documents), served in March 2019, contained the following instructions and definitions, making clear that information and documents within the custody of counsel was included in the discovery requests:

INSTRUCTIONS

1. In answering these [requests], you are required to identify all information and/or documents within the possession, custody or control of you or your attorneys, agents, representatives or other persons ...

6. If you maintain that any answer to [a request] or any part thereof, is protected by the attorney-client privilege or by the work-product doctrine, specify the general subject matter of the information claimed to be privileged, specify the nature of the claimed privilege, and state the precise ground for the protection. If the privileged material is contained in a Document:

(a) Identify the general subject matter of the privileged material;
(b) Identify the person or persons who authorized or received the original or copy of the document; and

(c) Specify the date or dates on which the document was created. Insofar as you do not maintain that the answer is protected from disclosure, the [request] is to be answered.

7. Any documents responsive to this request that are not produced or detailed by reason of a claim of privilege or otherwise shall be identified in writing by: (a) date; (b) author(s); (c) recipient(s); (d) general subject matter; (e) identity of person(s) to whom the contents of the document have been revealed; (f) identity of the person or entity now in possession or control of the document;

²Defendant states in its motion that “should the Court agree that advice of counsel does not need to be specifically pled, then the purpose of this motion is to give notice so that there may be no surprise.” By providing this notice, Defendant is stating that it will assert the advice of counsel at trial even if its motion to amend is denied. Thus, Defendant is obligated to supplement its discovery responses and allow additional discovery on this topic regardless of the Court’s ruling on the Motion to Amend.

and (g) the basis upon which it is being withheld.³

DEFINITIONS

In connection with these [requests], the following definitions shall apply:

1. Whenever the terms “you,” “your,” or “yours” are used herein, they shall refer to Composite, under any name by which they may have been known, and shall be interpreted to include their agents, employees, attorneys, assigns, and any other kind of representative.

Defendant’s verified answers to Poly-Tech’s first interrogatories are in the record as Exhibit B to the November 7, 2019 Motion to Compel. In the Interrogatories, Poly-Tech asked, *inter alia*, the SC Supreme Court sanctioned standard interrogatories incorporated in the Rules. SC Standard Interrogatory Nos. 1 & 3, asked for names of persons with knowledge about the facts of the case and to summarize those facts (i.e., people with knowledge, not the witnesses you plan to call to support your current litigation strategy). In response, Defendant’s listed three individuals, none of them attorneys (and no attorneys were subsequently identified, and even after filing this Motion to Amend, no attorneys have been identified, and no summary of their knowledge provided). SC Standard Interrogatory No. 2, Poly-Tech asked for prepared documents related to the claims or defenses. In response, Defendant raises a boilerplate attorney-client/work product privilege objection (without providing a privilege log, thereby effectively withholding whether any of these prepared documents related to advice of counsel in 2014, 2017, 2018, or after the termination of the Agreement/Contract).

³ No privilege log listing the requested information as to any supposed advice of counsel in 2014, 2017, 2018 or otherwise has been produced, not even after the filing the Motion to Amend.

Interrogatory No. 7 asked for information about persons who will offer opinion testimony and the subject matters, substance of facts and opinions and grounds for each opinion. In response, Defendant did not list any attorneys, and CRI has not supplemented this interrogatory in conjunction with or since filing this Motion to Amend. In Interrogatory No. 10, Poly-Tech asked for information about how and why each operational term in the Contract impacts the obligations and benefits of the Contract. Defendant objected as irrelevant, and stated that the Contract sets forth the nature and operational terms between the parties. Nowhere in this answer, or any supplementation in the 3 ½ years since, not even after filing this Motion to Amend, has Defendant amended this interrogatory answer to provide the supposed information from 2014, 2017, 2018 or otherwise.

Interrogatory No. 15 asked for a detailed description of the corporate history of Phil Durango, LLC, and its relationship with Composite, including contracts with Composite. Defendant objected to this interrogatory as “not relevant to the issues in this dispute.” It now appears that “not relevant” meant, not supportive of its then litigation strategy. Now that Pro Hac Counsel has appeared and adopted a different litigation strategy, CRI is now willing to allow Plaintiffs to seek discovery of responsive information that was previously suppressed,⁴ because it now serves their current strategy.

Defendant’s responses to Poly-Tech’s request for production are similarly unrevealing.⁵ In RFP 1, Poly-Tech sought “any and all ... correspondence, analysis, interpretations, documents ...

⁴ For example, on Wednesday, November 13, 2019, Paul Harrill emailed Keith Munson (with copy to Corky Klett) stating: "...[t]he only information we have about Phil Durango, LLC is pulled from the Colorado Secretary of State's website. That was made clear in Derek Thompson's affidavit...."

⁵ Defendant’s responses to Poly-Tech’s first request for production are in the record as Exhibit A, to Plaintiffs’ motion to compel, filed November 7, 2019.

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”)[or Contract]. In response, Defendant raises a boilerplate attorney-client/work product privilege objection (without providing a privilege log, thereby effectively withholding the fact of whether any of these documents related to advice of counsel in 2014, 2017, 2018, or after the termination of the Agreement).

In RFP 38, Poly-Tech sought “any and all correspondence, notes, documents, letters, emails, ... memoranda, ... and/or communications, including all attachments ..., related to North American Rescue’s, purchases, sales, distributions, and/or development of combat application tourniquets for both military and civilian application.” Defendant objected “to this Request on the basis that it seeks information not relevant to the instant dispute.” Now new Pro Hac Counsel wants to begin discovery on North American Rescue’s impact on tourniquet sales because it has now become *relevant to them*.

In RFP 54, Poly-Tech sought “any and all correspondence, notes, documents, letters, emails, ... product changes, product development, and/or communications, including all attachments ..., which were to or from Derek Thompson and relate to tourniquets or the business relationship between Composite Resources and Poly-Tech/Dan Cedrone.” In response, Defendant objected as overly broad and unduly burdensome and did not produce any documents. In the Motion to Amend, Defendant now takes the position that Derek Thompson is someone from whom Jonathan Bennett sought advice, and who also sought advice from attorneys, related to the business relationship between the parties.

The above discovery recitation shows that the information Defendant wants to introduce pursuant to this Motion to Amend has been part of this litigation since its inception. Waiting until

a subject becomes important to the amending party to acknowledge its relevance, even though the subject has been part of the litigation for over 3 ½ years, is a quintessential example of undue delay.

Just because Defendant's former litigation strategy did not include producing information or documents from numerous attorneys supposedly providing advice of counsel of the issues in the lawsuit does not excuse the delay and prejudice created by the deliberate failure to identify its existence in a privilege log. *See S.C. Coastal Conservation League v. Ross*, 431 F. Supp. 3d 719, 725 (D.S.C. 2020) ("The Court is concerned that without a privilege log, the Court would have no way to evaluate assertions of privilege and whether documents were improperly excluded from the administrative record."). As more fully explained in *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 106 (D.N.J. 2006):

The purpose of a privilege log is to identify for the opposing side those documents that exist in response to a document request but are not being produced because of a privilege assertion. The privilege log then allows the court and counsel to determine whether there should be a further inquiry into the bases for the assertion. This process cannot begin if the documents, which are the subjects of the log, are never identified in discovery. Local Civ. R. 34.1 and Fed.R.Civ.P. 26(b)(5) govern the production of privilege logs in discovery. The Advisory Committee Notes to the 1993 Amendments of Rule 26(b)(5) state:

A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.

This requirement applies to advice of counsel information as well. As noted by SC District Judge Norton in *Oppenheimer v. Williams*:

(party was “required to expressly state in his privilege log that all such communications were primarily for the purpose of securing legal advice and describe the subject matter of those communications so that defendants could challenge such an assertion. Oppenheimer was not entitled to delay in setting forth the necessary facts to establish his claim of privilege ...The ship for Oppenheimer's discovery compliance has sailed.”).

No. 2:20-CV-4219-DCN, 2021 WL 5359283, at *4 (D.S.C. Nov. 17, 2021).

The record establishes that the failure to provide a privilege log was deliberate because as far back as November 7, 2019, Plaintiffs were demanding a privilege log in their motion to compel. Specifically, Plaintiffs argued that Composite Resources “should be required to provide a log or explanation as the privileged/work product statement in its response. In re Mt. Hawley Insurance Company, 829 S.E.2d 707, 710, 427 S.C. 159, 164 (S.C., 2019) quoting, Wilson v. Preston, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008) (“In general, the burden of establishing the privilege rests upon the party asserting it.”).” See November 7, 2019 Motion to Compel, p. 5. Even after multiple motions and multiple hearings, at the March 31, 2022 discovery hearing, Defense Counsel acknowledge not providing a log of information covering “correspondence, analysis, interpretations” of the Agreement (RFP No.1). See Annex A, at the end of this motion, excerpts from the March 31, 2022 hearing, pp. 40-45. The relevant exchange included:

THE COURT: All right. So, your, your position in this case is there will be no other emails that are related to the 2005 – 2001/2005 sales and modification agreement other than Lisa Bennett’s email dated June the 7th, 2005?

...

MR. HARRILL: I just want to make sure. There, there is one I think, Your Honor, that is attorney/client privilege and our response said attorney/client. We have not given a privilege log on that one document.

THE COURT: You need to give a privilege log.

...

MR. MUNSON: But there is one, on single additional ---

MR. KLETT: There is one additional. It is attorney/client.

MR. MUNSON: Are, are you guys the attorneys and it's after the disputes kind of arose?

MR. HARRILL: No. No, no. No, no.

(emphasis added). After Plaintiffs' counsel questioned the lack of documents related to the 2017 "haircut", the exchange continued:

THE COURT: But, Mr. Munson, I can not tell them what is true or not true. ... or at some point in the future will come back and say judge, they lied to you or they've acted in bad faith, and, therefore, look you know, they said there were only two emails. Judge, my client received emails from them X date to Y date and then, you know, they're talking about this sales group and they're not producing them. We know there's more out there.

And so, at some point, you can come back to me and ask for remedies for, if you believe they're misrepresenting this and they're withholding emails, they're withholding facts, there's remedies to it. But I cannot, I cannot require a party to produce something that they say does not exist.

...

[directed at Defense Counsel] – it's still your position that your client on has two emails ...?

MR HARRILL: I would answer it this way, Your Honor, I don't agree with what [Mr. Munson]'s saying is his interpretation. ...

THE COURT: Well, I read that as being responsive ... And I need you to go to your client and ask for this information ...

MR. HARRILL: We'll, we'll do that, Your Honor.

This case is very similar to *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014), in which the Circuit Court dismissed the non-complying party's claims as sanctions for discovery violation, including privilege log issues. In affirming the dismissals, the South Carolina Supreme Court stated:

We disagree with Appellants' claim that the sanctions imposed here were unduly harsh. With respect to the discovery orders regarding

privileged documents, the circuit court made every effort to ensure that no privileged documents were compelled, and Appellants refused to comply merely because these rulings had adverse implications on their cases. We also note that the circuit judge provided Appellants ample opportunity to amend their discovery responses both before and after he issued the Discovery Order, and Appellants willfully and repeatedly failed to comply with the circuit court's orders in any meaningful way. Thus, in our view, Appellants' failure to comply with the various orders of the court was willful and deliberate and caused unnecessary delay of this case and prejudice to Respondents. Accordingly, we hold the circuit court did not err in issuing the Dismissal Order as a sanction for Appellants' noncompliance with the court's orders.

Id. at 544 (emphasis added).

As established herein, on the basis of undue delay and prejudice alone, Defendant's Motion to Amend should be denied.

B. Bad Faith (which also supports prejudice to Plaintiffs)

To the extent the facts, proceedings and arguments above overlap with a bad faith basis to deny leave to amend, they are incorporated in this section.

Bad Faith is an independent basis to deny a motion to amend. *Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017). Bad faith:

may be revealed through the procedural history of the case, as well as material changes to facts and theories pled if the new facts and theories were known to the plaintiff at the outset of the case. *See, e.g., Kant v. Columbia Univ.*, No. 08 Civ. 7476 (PGG), 2010 WL 807442, at *6–7 (S.D.N.Y. Mar. 9, 2010) (denying leave to file a third amended complaint because, *inter alia*, there was evidence of bad faith insofar as the proposed pleading contained allegations that directly conflicted with those in the prior pleading concerning the formation of the contract dispute); *Whimsicality, Inc. v. Battat*, 27 F. Supp. 2d 456, 465 (S.D.N.Y. 1998) (denying motion to amend because plaintiff intentionally misrepresented facts to the court and acted in bad faith, which alone is a basis to deny leave to amend).

MacGregor v. Milost Glob., Inc., No. 117CV06691LTSKHP, 2019 WL 2453340, at *5 (S.D.N.Y.

Apr. 19, 2019), *report and recommendation adopted*, No. 17-CV-6691-LTS-KHP, 2019 WL 2723522 (S.D.N.Y. July 1, 2019; *see also*, *Kant v. Columbia Univ.*, No. 08 CIV. 7476 (PGG), 2010 WL 807442, at *4 (S.D.N.Y. Mar. 9, 2010) (denying leave to amend and noting that “Plaintiffs proposed third amended complaint presents new facts and allegations so contradictory to his earlier pleadings as to indicate bad faith.”).

In Composite Resources Amended Answer and Counterclaims, filed April 1, 2020 (**Amended Answer**), it alleges that over \$17 Million in tourniquet commissions after November 2014 were “paid in error”, were “proximately cause[d]” to be paid by Plaintiff’s breach, were “unjust” and “were improperly made by Defendant Composite Resources and should be refunded.” Amended Answer, para. 62, 66, 72, 73, and Prayer for Relief (B). In support of these inadvertent commission payment allegations, in September 2019, in opposition to Plaintiffs’ 2019 motion for summary judgment, Defendant filed the affidavit of its CFO Derek Thompson, (filed September 20, 2019). In three separate paragraphs of his affidavit, CFO Thompson alleges that these post-2014 commission payment were inadvertent. [Paragraph 6: “CRI erroneously continued paying Poly-Tech from November 6, 2014 to August 2018”; Paragraph 8: “CRI continued to make the erroneous payments to Poly-Tech”; and Paragraph 12: Defendant seeks “to recover all erroneous payments”]. This factual position that the post-2014 commissions were “erroneously” paid was echoed by Defense Counsel in its September 20, 2019 Memorandum in Opposition to Plaintiffs’ [2019] Motion for Partial Summary Judgment As to Commission Entitlement. Opposition Memo pp. 4, 5. For example, on page 7, Defense Counsel states that CRI seeks “reimbursement of all of the commissions that were paid in error to Poly-Tech after November 2014.” (emphasis added).

Apparently realizing that the recoupment counterclaim will not survive the impact of the Court’s September 29, 2022 Order granting partial summary judgment, Composite Resources,

through new Pro Hac Counsel, attempts to rewrite the facts regarding the payment/non-payment of commissions after 2014 to at least try and dampen the evidence that would support punitive damages. Specifically, according to the new affidavit of Jonathan Bennett, filed with the Motion to Amend, no longer were the post-2014 commissions inadvertently paid to Poly-Tech, but now, they were purposefully paid because Jonathan Bennett is so generous. See Affidavit of Jonathan Bennett, Exhibit 1, to Motion to Amend (“Bennett’s New Affidavit”). For example, in paragraph 4 of Bennett’s New Affidavit, he states that after allegedly getting advice in 2014 that commission payments were not required, he knowingly and voluntarily “chose not to follow the advice” and continued making commission payments, not out of error, but out of “loyalty”. Then in 2017, he sought advice again, and then again knowingly “chose not to cease commission payments to Poly-Tech.” (Bennett’s New Affidavit, paragraphs 7-8). Later, CRI allegedly sought advice a third time, (including a second opinion as to that advice), and still Defendant knowingly and voluntarily (not in “error”) paid commissions to Poly-Tech even after sending the termination letter in June 2018.

Facts are not fungible. Defendant’s post-summary judgment flip-flop on the facts to justify leave to amend represent a level of bad faith sufficient to deny the motion to amend pursuant to the legal standard and authorities referenced herein. Moreover, the “prior facts” have been the working facts in this case since 2019, and to change the working facts after years of discovery, and months after the case was set for trial, would require significant re-plowing of previous discovery efforts,⁶ and unfairly prejudice Plaintiffs, who have not had a commission payment in over 4 years. *See e.g., Vielma v. Eureka Co.*, 218 F.3d 458, 468 (5th Cir. 2000)(holding that “[m]uch of the

⁶ For example, in response to Standard Interrogatory No. 5, seeking damage information, Defendant listed \$17 million in “erroneously paid commissions.” Defendant has not amended or supplemented this interrogatory answer to coincide with its current factual position that these commissions were knowingly and voluntarily paid to Poly-Tech.

value of summary judgment procedure in the cases in which it is appropriate ... would be dissipated if a party were free to rely on one theory in an attempt to defeat a motion for summary judgment and then, should that theory prove unsound, come back long thereafter and fight on the basis of some other theory.”) (citation omitted).

C. Futility

Defendant did not attach a proposed Amended Answer to its Motion to Amend, or otherwise include the language of any revised and/or new allegations that would comprise the amendment. The failure to provide sufficient facts that show a plausible defense is grounds for denial of a motion to amend. Once the proposed amendment is produced it will become clear that the allegations are insufficient. *See Wells Fargo Bank, N.A. v. Hodges*, No. 2019-001565, 2022 WL 3440355, at *1 (S.C. Ct. App. Aug. 17, 2022)(denying motion to amend answer where it “would have been an exercise in futility”). Absent any recitation of the allegations to be plead, Defendant cannot avoid futility, since non-plead allegations necessarily fall short of well-plead allegations. *See Hart v. Hanover Cnty. Sch. Bd.*, No. 3:10-CV-794, 2013 WL 1867388, at *3–4 (E.D. Va. May 2, 2013), *aff’d*, 547 F. App’x 298 (4th Cir. 2013)(denying leave to amend as futile where proposed allegations failed to meet minimum pleading standard of Rule 8).

Even if Bennett’s New Affidavit was substituted for actual allegations and measured against the futility standard, the Motion to Amend would still fail. It does not state facts showing Defendant is entitled to the relief it seeks as required by Rule 8 “short and plain statement” mandate. Broken into its component parts, the advice of counsel defense requires: “(1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5)

and acted strictly in accordance with the advice of his attorney who had been given a full report.” *United States v. Al-Shahin*, 474 F.3d 941, 947 (7th Cir. 2007).

Bennett’s New Affidavit does not list any attorneys from whom advice was sought. It does not state any particular’s attorney’s advice. It does not recite what facts were relayed to these mysterious attorneys. And, most crippling of all, Bennett’s New Affidavit actually affirmatively states that he continually, knowingly and purposefully ignored the alleged advice of every consulted counsel every month from 2014 through August 2018.

On the basis of futility alone, the Motion to Amend should be denied.

D. Undue Prejudice to Plaintiffs

In addition to the prejudice expressed and inherent in the arguments above, starting over with a new and contradictory set of working facts after four years of litigation in and of itself unfairly prejudices Plaintiffs. *Winstead v. Georgia Gulf Corp.*, 77 F. App’x 267, 270 (5th Cir. 2003) (A four-year delay would have clearly prejudiced the ability of the [] defendants to defend themselves as relevant witnesses may have no longer been available and memories would have inevitably faded.”). In this case, additional undue prejudice is established from the sheer drudgery Plaintiffs have endured to get this point under the prior set of facts, as reflected in the record and docket of this case.

For example, one key witness on the new facts will be CFO Derek Thompson, who submitted an affidavit setting forth the prior facts, and who coordinated obtaining advice of counsel, and provided advice himself to Jonathan Bennett. See Bennett’s New Affidavit, paragraph 4-5 (“CFO Derrick⁷ Thompson ... advised me ... Thompson ... sought the advice of

⁷ Misspelled by Mr. Bennett in his affidavit. According to Mr. Thompson’s affidavit, he spells his first name Derek.

counsel ...”). None of this information was mentioned by Mr. Thompson in his two earlier deposition sessions. To obtain discovery from Mr. Thompson on the changed set of facts would be unduly prejudicial to Plaintiffs. To put just this one example in perspective, the below chart sets forth the effort required to obtain discovery from Mr. Thompson previously in this case.

Date	Event
June 28, 2019	Composite’s Answers to Interrogatories objecting to information about Phil Durango LLC as irrelevant (Interrogatory No. 15) and identifying Derek Thompson as witness to commission payments (Interrogatory No. 3)
July 19, 2019	Motion for Partial Summary Judgment on pre-termination unpaid commissions
Sept 19, 2019	Derek Thompson affidavit asserting that Composite’s purchase of Phil Durango LLC eliminated the requirement for commission payments – i.e., Suddenly the Phil Durango information that was “irrelevant” on June 28, 2019, <i>supra</i> , becomes the information relied on by Defendant to oppose summary judgement.
Sept 24, 2019	SJ Hearing – Composite agues Affidavit of Derek Thompson creates issue of fact. (Transcript, page 14, lines 14-17) – Order denying motion as premature followed on Nov. 12, 2019.
Nov.5, 2019	<u>First</u> request by Plaintiff’s counsel for dates for deposition of Derek Thompson (“can I get dates for the depositions of Derek Thompson”). Defense Counsel responded essentially, not yet.
Jan. 17, 2020	<u>Second</u> request by Plaintiff for Derek Thompson deposition dates.
Jan. 24, 2020	<u>Third</u> request by Plaintiff for Derek Thompson deposition dates.
Jan. 27, 2020	Composite’s responses: “we are attempting to get you some dates for Derek Thompson and will get back to you soon.”
Feb. 14, 2020	<u>Fourth</u> request by Plaintiff for Derek Thompson deposition dates and notice of intent to move forward with service of process.
Feb. 16, 2020	Composite response – still looking for dates. AND for the first time since this discussion began on Nov. 5 2019, counsel states “I think it is appropriate for Plaintiff’s deposition to be taken first.”
Feb. 24, 2020	Unilateral notice of Plaintiff’s deposition for March 27, 2020, at Defense Counsel’s office in Columbia SC and email offering Derek Thompson only after Plaintiff’s deposition.

March 2, 2020	Unilateral notice, subpoena and service of process of deposition of Derek Thompson for March 18, 2020.

E. Conclusion

For the foregoing reasons, individually and in total, Defendant's Motion to Amend should be denied.

This the 20th day of October 2022.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

DANIEL P. CEDRONE AND POLY-
TECH INDUSTRIAL, INC.

PLAINTIFFS,

V.

COMPOSITE RESOURCES, INC.,
DEFENDANT.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Case No. 2019-CP-46-00051

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO DEFENDANT'S
MOTION TO RECONSIDER, CLARIFY,
ALTER, OR AMEND ORDER
GRANTING PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT**

Daniel P. Cedrone (“**Cedrone**”) and Poly-Tech Industrial, Inc. (“**Poly-Tech**”) (“**Plaintiffs**”), respond to Defendant Composite Resources, Inc.’s (“**Composite**” or “**Defendant**”) Motion to Reconsider, Clarify, Alter, or Amend Order Granting Plaintiffs’ Motion for Partial Summary Judgment (“**Motion for Reconsideration**”). This case principally involves claims for unpaid commissions and other remunerations under a written 2005 Sales Representative Agreement (“**Agreement**” or “**Contract**”) (which Defendant admitted “speaks for itself”), related to a patented combat tourniquet product (the “**C-A-T Tourniquet**”).

INTRODUCTION

Nothing in the September 29, 2022 Order Granting Plaintiffs’ Motion for Partial Summary Judgment (the “**Order**”) is controversial or unexpected. That a contract must first be interpreted as a matter of law by the trial court is a fundamental staple of American commercial jurisprudence, as sound as the rule of law itself (which uses a similar standard

in the interpretation of statutes). For example, the United States Supreme Court observed in *Travelers Indem. Co. v. Bailey*:

If it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent, see 11 R. Lord, *Williston on Contracts* § 30:4 (4th ed.1999), it is all the clearer that a court should enforce a court order, a public governmental act, according to its unambiguous terms. This is all the Bankruptcy Court did.

557 U.S. 137, 150–51, 129 S. Ct. 2195, 2204, 174 L. Ed. 2d 99 (2009). This has been the case since at least 1823. *See Green v. Biddle*, 8 Wheat. 1, 89–90 (21 U.S. 1, 89–90), 5 L. Ed. 547 (1823) (“[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements”).¹

The Order is also not unexpected. On November 16, 2021, the Defendant submitted a proposed Consent Scheduling Order, which was entered on November 17, 2021. In that Consent Scheduling Order, Defendant and Plaintiffs expressly provided in Paragraph 4:

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

¹ The universality of this point is confirmed by a *Westlaw* search of ["contract interpretation" /p "matter #of law" /p "court must"] that returned 688 cases.

motion of partial summary judgment as to contract interpretation.

Both sides availed themselves of this opportunity. On March 18, 2022, Plaintiffs filed a Motion for Partial Summary Judgment as to Unambiguous Material Terms (the “**MPSJ**”). This is the motion which is determined in the Order. To the extent that Defendant’s Motion for Reconsideration takes issue with the Court undertaking its interpretive task at this point in the litigation, it is too late to seek reconsideration of the November 2021 Order.

Orders have consequences. That Defendant can see down the road and predict those consequences does not mean that this Order itself improperly imposes any of those consequences. For example, an order in limine barring a defendant’s rebuttal medical expert on permanent injury, will likely have the consequence of a jury finding permanent injury, but the order in limine does not itself establish permanent injury liability.

Similarly, whether ultimately the dollar amount of the judgment liability for past and future commissions is a mathematical calculation based on \$1.75/tourniquet (per contract obligation) or \$1.42/tourniquet (per alleged course of dealing) is irrelevant here. The Order merely confirms that the plain and unambiguous language of the Agreement is that Defendant obligated itself in 2005 by entering into the Agreement to pay \$1.75/tourniquet up to today and into the future. That there might be some extra-contractual reasons that the ultimate liability/judgment is mathematically different is not a basis to challenge this Order. 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) was previously instructive on main motion, and it is also instructive to the Motion for Reconsideration on the issue of

the clear distinction between a contract obligation and ultimate liability. In *Southern Recycling*, the court granted partial summary judgment after determining that the defendant was “obligated” under the unambiguous terms of contract to deliver the goods to the port. *Id.* at *2. Subsequently, defendant filed a motion for reconsideration (and to amend defenses) arguing that the terms of the contract should be defined by subsequent action (i.e., different delivery) as opposed to the express wording used in the written document. *Id.* [Docket Entry-74]. In denying the motions, the district court noted that “[w]hile these points may support Defendant’s argument that Plaintiffs failed in their duty to mitigate damages, that is not before the Court at this time.” *Id.* That is, it is not relevant to the unambiguous meaning of the contract terms. In the same way, Defendant’s misconstruing in the Motion for Reconsideration of “obligation” in the contract as “liability” in the lawsuit, for the purpose of arguing that the Order goes too far, and falls short of justifying reconsideration of the Order.²

LEGAL STANDARD

Broadly speaking, Defendant’s motion is more of a demand to the Court for an “answer” (i.e., specific response to each material allegation in Defendant’s papers), rather than reconsideration of an “order” (i.e., “a command, direction or instruction”³). That is, the focus is on what the Order did not grant, as opposed to clarifying what it did grant. The Order clearly explains the basis for granting relief to the Plaintiffs. There is no requirement

² Black’s Law Dictionary, Ninth Edition, defines “obligation” as including merely “a duty arising by contract.” *Id.* at 1179.

³ Black’s Law Dictionary, Ninth Edition, at 1206.

for a detailed explanation as to why this partial summary judgment order did not accept Defendant's requested relief. "[I]t is unnecessary to make findings of fact and conclusions of law in denying motions for summary judgment." *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 459, 814 S.E.2d 643, 658 (Ct. App. 2018).

Rule 52(b), SCRCF *allows* a court to "amend its findings or make additional findings and may amend the judgment accordingly," and Rule 59(e), SCRCF states the court *may* grant a "Motion to Alter or Amend a Judgment". *Stone Int'l, LLC v. Byte Software, LLC*, No. 2019-000601, 2022 WL 470418, at *1 (S.C. Ct. App. Feb. 16, 2022). The South Carolina Rule is substantial the Federal Rule. *Heins v. Heins*, 344 S.C. 146, 153, 543 S.E.2d 224, 227 (Ct. App. 2001).

Under the Federal Rule "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). In addition, "[a] motion for reconsideration is not, however, an opportunity to relitigate issues already ruled upon simply because a party is dissatisfied with the outcome." *Regan v. City of Charleston, South Carolina*, 40 F. Supp. 3d 698, 702 (D.S.C. 2014). However, in South Carolina state court, although it might be ill-conceived, a disappointed litigant is free "to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21–22, 602 S.E.2d 772, 778–79 (2004). Defendant takes full advantage of this permissive standard in its lengthy rehashing of the arguments made in

multiple filings and hearings leading to the Order.⁴ Nevertheless, the invitation is not limitless. For example, “a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the [trial] court prior to judgment, but did not.” *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014). In addition, the Court has broad discretion to deny a motion for reconsideration, including the discretion to deny the motion on the papers “filed by the parties without oral argument.” Rule 59(f), SCRPC.

ARGUMENT

Defendant lays out its Motion for Reconsideration in Six Sections I-VI, with multiple cascading subsections.

In Section I (Motion to Reconsider, pages 2-15), Defendant claims the Order “awards relief ... that goes beyond interpretation of the terms of the contract.” To try to substantiate that claim, Defendant ignores the language of the Order and infuses supposition where none is warranted. Instead of discussing what is in the Order, Defendant spends most of the Motion discussing what “could”, “would”, “might” and “may be” imagined from the words in the Order when viewed in isolation. In fact, these words of hypothesis appear 87 times in the Motion for Reconsideration (and that does not count the “ifs”, “hints at”, and “to the extent”s).

The false supposition that permeates each of the Defendant’s examples, is the suggestion that the Order imposes “liability” on Defendant, beyond substantiating the

⁴ Despite having remained silent for 17 weeks between receiving the proposed order and entry of the Order by the Court on September 29, 2022.

unambiguous obligation in the Agreement to pay past and future commissions. To the contrary, the Order expressly states that the motion only “sought to have certain terms ... declared “unambiguous material terms,” and the Order instructs that “Plaintiffs’ Motion is GRANTED.” Similarly, the discussion in the Standard of Review section of the Order (pp. 5-6) only discusses determining the meaning of contractual language, with no discussion about imposing liability. Clearly, any hypothetical misconstruction of the isolated provisions in the Order would be apparent when the Order is read in whole with these overarching references of the appropriate scope of the Order.

Defendant’s tactic throughout Section I of the Motion for Reconsideration is exemplified in its first manipulated supposition that the Order “finds that Defendant was and is contractually obligated to pay Plaintiffs a commission of \$1.75 per tourniquet sold.” (Motion for Reconsideration, p. 2). The Order shows instead actually states: “[t]he terms within the four corners of the Contract unambiguously established that the “Defendant was and is ...” (emphasis added). Defendants argument here, and throughout this section of the Motion for Reconsideration, is like a shadow – once you turn a light on it, it disappears.

Another attempt to overstate the Order so Defendant can then say it goes too far is the conflation of contractual *obligation* with judicial *liability*. See Motion for Reconsideration, p. 3 (the “Order could be read as granting partial summary judgment on liability.”) (emphasis added). To equate contractual obligation with judicial liability would eliminate the entire concept of affirmative defenses. This non sequitur was addressed in the *Southern Recycling, LLC*, cited in the introduction, *supra*, where the USDC-SC District Judge found defendant was “obligated” to deliver goods to the port according to the

unambiguous terms of the contract, but that finding did not create judicial liability that eliminated affirmative defenses. Defendant's convenient confusion between contract obligation and judicial liability runs contrary to other common examples, such as declaratory judgments, or the UCC of Sales, where completely different sections relate to contract obligations (e.g., "battle of the forms") and judicial liability (e.g., "cover" or "acceptance of nonconforming goods"). These "could be" are peppered throughout the Defendant's Motion for Reconsideration and the exercise of the Court's broad discretion to ignore them should be sufficient to uphold the Order as written.

Much like it ignored the actual Order in discussing arbitrary "could be's", Defendant ignores the Order in discussing the Complaint and the hearings. The Order repeatedly states that it is ruling on the four corners of the Contract, and although South Carolina allows significant leeway in arguing the topic, that does not include changing the topic; i.e., it is a Motion for Reconsideration *of the Order*. As for the reference to the fact that the Complaint only seeks, *inter alia*, \$1.42/tourniquet as to orange tourniquets sold to a particular customer – so what? The Order deals with the Contract terms, not the course of dealing between the parties. *See e.g. Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 598 (4th Cir. 2004) (in applying South Carolina law, the Fourth Circuit refused to "look to the course of dealing between the parties" in "defining the parties' obligations under the [] Agreement.") (emphasis added).

One simple way to understand this is to imagine that Defendant is successful in presenting a course of dealing defense such that that Plaintiffs only get a judgment for past and future commissions based on judicial liability of \$1.42 per tourniquet for the orange

tourniquets sold to one customer, that judicial liability/judgment would not change the meaning of the 2005 written contract (which is all the Court was asked to do the motion/hearings). And to be clear, Defendant is not arguing that terms of the Contract come from anywhere other than the Contract. In addition, to its prior admissions in its Answer and otherwise, Defendant directly acknowledged to the Court that the Contract construed in the Order is the only source of terms of the parties' agreement. At the May 20, 2022 hearing, the Court directly asked if the 2005 Contract would be document comprising "the contract" the Court should look at. After Plaintiffs' counsel said, "Yes, your Honor," The Court turned to Mr. Klett and asked, "Okay, Do you disagree with that, Mr. Klett?" and he responded "No [i.e., doesn't disagree – so does agree], Your Honor, This is the agreement." May 4, 2022 Hearing Transcript, p. 53, line 7 through p. 54, line 2.

Similarly, the endless recitations to the statements made at the hearing(s) are additional red herrings on the issue before the Court – the Order. Two fundamental principles of legal interpretation show the disingenuous nature of the suggestion that statements at the hearings make the Order unclear. The first is *inclusio unius est exclusio alterius* – the inclusion of one thing presumes the exclusion of the other. If a point made at the hearing did not end up in the Order, then far from causing confusion that the Order could be read to include the point from the hearing, this canon of construction actually would dictate that the Order cannot be so misconstrued.

The second canon of legal construction is that a statement made in debate by *legislators* is a poor indication of what the *legislature* meant in passing a law. Defendant recitations to the hearings (akin to the *legislative history* of the Order) to try and cloud the

Order should similarly be disregarded. In South Carolina, “legislative history only can be resorted to for the purpose of solving doubt, not for the purpose of creating it.” *Timmons v. S.C. Tricentennial Comm’n*, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (emphasis added) (refusing to “resort to statements by members of a committee ... in construing a particular piece of legislation.”). Even when resolving doubt, the “plain meaning rule” precludes “resort to ... reports, hearings, and debates.” *United States v. Varbel*, 780 F.2d 758, 761 (9th Cir. 1986). *See also, Whitney v. Whitney*, 14 Mass. 88, 93 (1817) (observing that “[t]he most enlightened and experienced judges have for some time ...[held] it much the safer course to adhere to the words of the statute construed in their ordinary import, than to enter into any inquiry as to the supposed intention of the parties who framed the act.”).

These canons of construction help refocus the issue by prompting these questions: (1) If the hearing reference is not reflected in the Order, why are we talking about it at all?; and (2) If the hearing reference is reflected in the Order, why aren’t we talking about how it is referenced in the Order?

One such reference to the hearing reference that is reflected in the Order is the discussion of extrinsic evidence in Section II, beginning at page 15, and IV of the Motion for Reconsideration, beginning at page 19. The Order acknowledges that the Motion argues this alternative ground. Order, p. 4-5. The Order correctly references the legal standard that would allow the Court to grant summary judgment if external evidence excluded a genuine dispute about the meaning of a term in the Contract. Order, p. 6-7. However, the Court expressly stated that it was not granting relief based on the external

evidence. Order, p. 13 (“[a]lthough not the basis for granting the relief set forth in this Order...”) In fact, Defendant assuages its own overstated concern when it notes “the Order disavows any such intent” Motion for Reconsideration, p. 21. Clearly, Defendant’s raising this issue is intended to create doubt, not resolve it.

The inclusion of discussions not forming the basis of an Order or legal decision is known in the law as dictum. *Dennis v. S.C. Nat. Bank*, 299 S.C. 34, 39, 382 S.E.2d 237, 240 (Ct. App. 1988)(“[w]e construe the above as dictum, which is an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof.”)(citing, 21 C.J.S. Courts §190 (1940) (emphasis added). By its very definition it is not operative, and therefore cannot reasonably create any confusion requiring modification or clarification of the Order. If this Order is appealed, it can be affirmed on other sustaining grounds appearing in the record. More specifically:

The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case. It is within the appellate court's discretion whether to address any additional sustaining grounds.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

However, “the failure to present an additional sustaining ground to the lower court reduces the likelihood an appellate court will rely on it to affirm a judgment.” *Id.* at 724. Setting forth the other ground dicta in the Order is an appropriate way to mark it in the record. See e.g., *ACEquip Ltd. v. Am. Eng'g Corp.*, 315 F.3d 151, 155 (2d Cir. 2003) (noting that it is

well established that a Court may “affirm the district court's judgment on any ground appearing in the record, even if the ground is different from the one relied on by the district court.”). Whether or not the purpose of the Motion for Reconsideration is to cripple one of the legs that steady the Order against reversal, the impact would be to enhance the possibility of reversal (which would be further enhanced by the suggestion that the Court affirmatively disavowed the alternative ground by taking the dictum reference out of the Order). The Court should decline the invitation to weaken the Order if it were to become the subject of appellate review.

On the issue of the extrinsic evidence *dicta*, in Section II and Section IV Defendant takes issue with the statement that on page 15 in the Order that it filed no “counter” evidence to the extrinsic evidence presented by Plaintiffs, and complains that the Order did not also summarize extrinsic evidence referenced by Defendant. Granted, Defendant’s May 3, 2022 Opposition included 5 exhibits, such as a 2018 Patent, none of them “countered” the contract term evidence summarized on pages 13-15 of the Order. Certainly the 2018 Patent exhibit offers nothing contrary to Defendant’s request for admission Answers. That there might be a difference of opinion as to whether a thread of contradiction can be drawn between other evidence, seems irrelevant to whether the Order is defective. Defendant did not draw out the point, instead just assumes that since both parties submitted exhibits it must necessarily be contradictory. However, as the 2018 Patent exhibit makes clear, that is an invalid assumption.

With regard to external evidence points Defendant believes support their position not being mentioned in the *dicta* portion of the Order, it is worth remembering that the

Defendant remained silent for 17 weeks between receipt of the proposed order and entry of the Order. That these points are not in the Order does not make the Order wrong, confusing or defective. The Court should resist the temptation to add them for “what it’s worth.” First, they are already in the record, so their worth is already preserved if an appeal ensues over the Order. Secondly, revising the Order creates a new Order and a new opportunity to seek reconsideration to tweak the Order yet again and create another opportunity to seek reconsideration (similar to the successive revolving removal/remand process that this case has already endured). As noted in *Sears v. Sears*, a case cited in *Elam v. S.C. Dep't of Transp.*, 361 S.C. at 19–20:

“[S]uccessive written post-trial motion which repeats what was raised or could have been raised in first written motion is not authorized by rules and does not extend time for appeal; *20 losing litigant is not entitled to return to trial court indefinitely hoping for **778 change of heart or a more sympathetic judge, or string out arguments one at a time over months because “[t]here must be finality, a time when the case in the trial court is really over and the loser must appeal or give up”).

85 Ill.2d 253, 52 Ill.Dec. 608, 422 N.E.2d 610 (1981)

In Section V of the Motion for Reconsideration, beginning on page 24, Defendant complains that the Order does not “rule specifically” on four listed points raised by the Defendants in opposition to the MPSJ. However, immediately after acknowledging these four defense points, the Court states “having reviewed the papers submitted by the parties ... and the arguments made by counsel” the MPSJ is granted “for the reasons stated herein.” That is all that is required to deny Defendant’s requests. *Ballenger v. Bowen*, 313 S.C. 476, 478, n.1, 443 S.E.2d 379, 380, n.1 (1994) (“[w]e also take this opportunity to remind the

trial bench that it is unnecessary to make findings of fact and conclusions of law in denying motions for summary judgment.”) (emphasis added); *see also, supra, Skywaves*, 423 S.C. at 459 (Ct. App. 2018).

Nevertheless, the Order does specifically address Defendant’s points. For example, with regard to “the agreement [Contract] must be construed as a whole,” the Order expressly and specifically recites, in referencing the 2001 *Atkinson Warehouse* case, that “the court must ‘consider particular provisions in the context of the entire agreement.’” *See* Order, p. 12. In addition, in multiple statements in the Order, the Court finds terms unambiguous “within the four corners of the Contract.” *See* Order pp. 7 and 9. Thus, Defendant’s suggestion that the wholeness of the Contract was not taken into consideration is demonstratively incorrect.

With regard to Defendant’s claim that neither perpetuity nor its suggestion that the general Representative “termination clause” supersedes the express and specific extension of the tourniquet commission/profit provision in Annex C, p. 11 of the Contract (“to continue if for any reason the regular contract is discontinued”), are addressed in the Order calls into question whether the Defendant read the Order at all. For example, the Court very clearly stated: “[e]ven though the term “perpetual” has been used to describe this provision of the Contract, the provision is not perpetual because it terminates once the product stops being produced and sold.” Order, pp. 17-18. Similarly, the Court specifically found that “[t]he obligation to pay Tourniquet Commissions and Raw Material Profits survive the termination of the Contract.” Order, p. 8. Finally, in discussing other evidence, the Court noted that it:

“confirms that the Contract’s terms set forth in the four corners of the Contract support entry of partial summary judgment establishing that the Contract obligates Defendant to pay Plaintiff’s the Tourniquet Commissions and Raw Material Profit payments at the rate set forth on page 11 of the Contract during the term of the Contract, beginning in June 2005, extending beyond the termination of the sales representative relationship on August 31, 2018, and lasting for so long as the Combat Tourniquets are produced and sold.”

Order, p. 13.

Defendant next incorrectly claims that “Plaintiff’s reliance on extrinsic evidence means the Contract is ambiguous.” Motion to Reconsider, p. 24. First this is nonsensical. It is the equivalent of arguing that adding “suspenders” is an admission that your “belt” is defective. It is also helpful to the Court and appellate court. *See* discussion of “other sustaining grounds”, *supra*. As recently noted by the DC District Court: “[a]dmittedly, the panel went on to address in dicta why the [the Order was otherwise appropriate]. But the panel assuredly did not adopt that approach, and its belt-and-suspenders [] discussion does nothing to alter or undermine its fundamental holding.” *Jooce v. Food & Drug Admin.*, No. 18-CV-1615 (CRC), 2020 WL 680143, at *7 (D.D.C. Feb. 11, 2020), *aff’d*, 981 F.3d 26 (D.C. Cir. 2020), *cert. denied*, 210 L. Ed. 2d 961, 141 S. Ct. 2854 (2021). Second, what the Plaintiff allegedly (in fact, they did not) relied on, is irrelevant to a determination that must be made by the Court as a matter of law and one which the Defendant jointly requested in the Consent Scheduling Order. The Court expressly stated that the Order did not rely on extrinsic evidence. Order, p. 13 (“[a]lthough not the basis for granting the relief set forth in this Order ...”).

Defendants' final point on page 24 of the Motion for Reconsideration continues to build on the above misstatements, and disingenuously (again) conflates the continuation of the commission payments with the termination of the sales representative relationships. Interestingly, Defendant cannot even identify any term that this misstatement makes ambiguous ("as the terms for which Plaintiffs seek construction."). As already noted herein, the Order is very clear on the source, nature and extent of the continuing obligation. Because Defendant does not agree, does not make the Order in need of clarification.

The second part of the Section V of the Motion to for Reconsideration switches from Defendant's losing points specifically referenced in the Order, to losing points in Defendant's Opposition Memo allegedly not covered by the Order. *See* Motion for Reconsideration p. 25. Again, the Order needs to only set forth the basis for the relief included in the Order; it does not have to rebut every red-herring, shadow, or shade of each argument addressed.⁵ These additional points are summarized as: (1) that the extra-contractual/post-contractual fact about consolidating control over the production of tourniquets by acquiring the patents somehow negates the meaning of the terms entered in 2005; (2) the distinction between the Sales Representative relationship termination provision and the continuation of commission payments even "if for any reason the regular contract is discontinued;" (3) the ridiculous notion that in agreeing with Defense counsel that the Contract creates an Independent Contractor relationship (which it does by its express terms), but stating that he was driven in his commitment to the project like a

⁵ *Ballenger v. Bowen*, 313 S.C. at 478, n.1, holding that "it is unnecessary to make findings of fact and conclusions of law in denying motions for summary judgment."

partner, Plaintiff somehow poisoned the clear, unambiguous and uncontested (by either party) “independent contractor” term in the Contract; (4) the terms “regular contract” and “project” do not have plain ascertainable meanings, and apparently without a glossary for every word used in the Contract, therefore must be ambiguous; (5) Defendants’ Opposition Memo exhibits create ambiguity; and (6) the “cumulative effect” of this quantity of points overcomes the lack of sufficiency in each of them.

All of these points are covered in the Order, or they are irrelevant. For example, neither party contests the “independent contractor” term. Dan Cedrone’s testimony that it feels like more, does not make that Contract term ambiguous any more than my calling my wife “my best friend” somehow calls into question whether she is my wife. It is absurd.

With regard to the point about “regular contract” and “project” being beyond plain meaning interpretation, Defendant falls victim to its own argument. It begins Section V arguing that the Order cherry-picks isolated terms which should be read against the whole contract, and then comes full circle here by cherry-picking two terms and announcing they “have no obvious meaning.” To the contrary, far from being difficult to understand words, “regular” “contract” and “project” all appear in a Grade 4 National Reading Vocabulary of 900 words “students need to master by the end of Grade 4.” *See* TampaREADS.com and/or ReadingKEY.com.

The Order, especially on points on which it did not grant relief, is not required to discuss every exhibit attached to the Opposition Memo, and a Motion for Reconsideration should address itself to the Order, not extraneous documents. As noted above, the reasons for not granting relief as the summary judgment stage do not have to be explained in detail

by the Court. Nevertheless, the Order does address the opposition exhibits when it notes that it “reviewed the papers submitted by the parties” and the “arguments made by counsel.” The Order later, in *dicta*, describes them as not countering the extrinsic evidence of Plaintiffs. Defendant has a different opinion but merely calling it “antithetical” and “contrary” hardly establishes the point. For example, how does a 2018 Patent exhibit submitted by Defendant contravene the objective intent of the parties that is determinable from the plain meaning of the words used to express their agreement in the 2005 Contract? It does not. And the fact that Defendant does not take the time to explain how it does, should not require Plaintiffs to stab in the dark to respond and does not require the Court to reconsider its Order. Finally with regard to the cumulative impact of allowing quantity to overcome the requirement for sufficient grounds for reconsideration, suffice it to say that in bowling a left-side gutter ball and a right-side gutter ball do not average out to a strike.

Finally, in Section VI of the Motion for Reconsideration, the Defendant openly invites the Court to rehash its prior ruling “VI. The Court should reconsider its interpretation of Annex C ...” Granted, in South Carolina a disappointed litigant is allowed to beseech a court to voluntarily, if so inclined, retrace its own thinking underlying an order. Under the more stringent federal rule,⁶ proper grounds include (1) new evidence; (2) a recent change

⁶ Similar rules followed in Georgia (Rule 37, Georgia Rules of Appellate Courts), and North Carolina (*Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997) (“[Rule 59(e) motion] cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made.”)).

in the applicable law; (3) to correct a clear error of law; or (4) to prevent manifest injustice. *See Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017). Also under federal law, such motions should not “be used to raise new arguments or evidence that could have been raised previously.” *South Carolina v. United States*, 232 F. Supp. 3d 785, 793 (D.S.C. 2017). Although South Carolina law tolerates requesting a court to rehash its thinking, “a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the [trial] court prior to judgment, but did not.” *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014). The Federal (Georgia and North Carolina) rules are mentioned to highlight the point that Defendant is relying on the most lenient, totally voluntary, basis to beseech the court to consider its prior thinking. Anything beyond that is Defendant advancing recast arguments that it could have raised previously, but did not. For example, in its prior submissions it argued that the Contract was “indefinite”. In this Motion for Reconsideration, Defendant argues the opposite: “However, Annex C *is* subject to an interpretation that would render it definite.” Motion for Reconsideration, p. 32. (emphasis in the original).⁷

Probably the most telling sign that the Motion for Reconsideration is merely a rehashing of the prior tired arguments from the two previous submissions by Defendant (May 3, 2022 and May 13, 2022) and its counsel arguments at the two previous hearings,

⁷ This flip-flop occurred after Defendant retained “Pro Hac Counsel,” and is similar to the flip-flop under the recently filed Motion for Leave to Amend the Answer to raise an “advice of counsel” defense, which attached a sworn affidavit admitting that Defendant knowingly, purposefully, and against advice of counsel intentionally paid Poly-Tech \$17 Million in commissions, which in earlier sworn statements and counterclaim Defendant represented as inadvertent or erroneously paid.

is the fact that it includes 56 footnotes, that mostly reference the record previously before the Court. In comparing the Opposition Memo to the Motion to Compel, there are whole sections rehashing the failed “perpetual” contract rabbit-hole. See Opposition Memo, p. 11, *et seq.* (“perpetual contracts are disfavored in South Carolina.”) and Motion for Reconsideration, p. 30, *et. seq.* (“perpetual provision that is disfavored under South Carolina law.”).

Defendant cites a 2020 federal opinion by District Judge Joe Anderson for this general proposition. But in that case, Judge Anderson expressly notes his decision turns on the agreement not having a “life of the program” term, which the “parties specifically deleted” in drafting the contract. *Tower St. Cap. Mgmt. Inc. v. KnightBrook Ins. Co.*, No. 3:17-CV-01781-JFA, 2020 WL 13065453, at *7 (D.S.C. June 15, 2020).⁸ This stands in stark contrast to the present litigation where the Contract expressly states “for as long as the project continues,” and shows that Judge Anderson’s thinking on this subject is the exact same as this Court’s findings in the Order. Another issue in the *Tower St. Cap. Mgmt.* case, was the lack of a “mechanism by which [defendant]’s payments to [plaintiff] ever end.” That is not in issue in the present litigation as the mechanism to stop paying a commission on the sale of goods is self-evident – stop selling the related goods. On this point, a case dealing with the sale of goods would be more instructive on the issues before the Court. In *Fein v. Chirhoclin, Inc.*, the Maryland District Court recounted as controlling

⁸ It is instructive to note in August, 2020, Judge Anderson denied a motion for reconsideration of this partial summary judgment order, finding that the motion “merely rehashes [the] original arguments.” *Tower St. Cap. Mgmt. Inc. v. KnightBrook Ins. Co.*, No. 3:17-CV-01781-JFA, 2020 WL 13065448, at *4 (D.S.C. Aug. 5, 2020).

law a case that required the makers of Listerine to continue honoring a contract almost identical to the Contract in this litigation, even after 75 years. There the federal court held:

Maryland courts have made clear that a contract is not indefinite where an obligor's performance is conditioned on conduct that is within a party's control. *See, e.g., Boland v. Boland*, 423 Md. 296, 369 (2011); *Pumphrey*, 250 Md. at 665. In the context of royalty payments, *Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc.*, is instructive. *Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655 (S.D.N.Y. 1959), *aff'd*, 280 F.2d 197 (2d Cir. 1960). There, the manufacturer of Listerine was bound by a written contract to pay Listerine's developer and "his heirs executors & assigns" a fee of "six dollars on each & every gross of Listerine" manufactured or sold. *Id.* at 660. The contract contained no end date. *Id.* Seventy-five years later, the manufacturer wanted out of its payment obligation and made the argument that ChiRhoClin makes now, "invok[ing] the shade, if not the substance, of the traditional common law distaste for contractual rights and duties unbounded by definite limitations of time." *Id.* at 662. The *Listerine* court was not persuaded. First, it held that the contract remained in effect despite its lack of end date because the plain language of its provisions contemplated all of the contractual rights would pass to the developer's "heirs executors & assigns." *Id.* The court also noted the law's general distaste for "perpetual" contracts did not apply in this case because the royalty contract was not perpetual or indefinite. The manufacturer's obligation was conditional—on the continued manufacture of Listerine—and therefore the company could always "terminate its obligation to pay whenever in good faith it desires to cease the manufacture or sale of Listerine." *Id.* at 662–63.

No. CV PX 15-3709, 2017 WL 467743, at *6 (D. Md. Feb. 3, 2017).

Conclusion

Nothing in the Motion for Reconsideration warrants any modification of the Order.

Any new arguments contradict Defendant's prior arguments or could have been raised in

its two filings or at the two prior hearings. Defendant's invitation to voluntarily rethink the order based on its rehashed arguments should be resisted. Even the re-phrasing of an immaterial point should be resisted as it would inevitably lead to another motion for reconsideration. As noted in the *Elam* case, "[t]here must be finality, a time when the case in the trial court is really over and the loser must appeal or give up." 361 S.C. at 20.

For the foregoing reasons, individually and in total, Defendant's Motion for Reconsideration should be denied. Under Rule 59(f), SCRCP, the Court may deny the motion on the papers "filed by the parties without oral argument" or further delay. That is appropriate here and Plaintiffs are submitting a Proposed Order to that effect with this Opposition to the Motion for Reconsideration.

This the 26th day of October 2022.

Respectfully submitted,

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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.

**DEFENDANT’S REPLY IN SUPPORT OF
MOTION TO RECONSIDER, CLARIFY,
ALTER, OR AMEND ORDER
GRANTING PLAINTIFFS’ MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Defendant Composite Resources, Inc. (“CRI”) respectfully submits this reply in support of its Motion to Reconsider, Clarify, Alter, or Amend Order Granting Plaintiffs’ Motion for Partial Summary Judgment (the “Rule 59 Motion”) and to address Plaintiffs’ Response in Opposition to Defendant’s Motion to Reconsider, Clarify, Alter, or Amend Order Granting Plaintiffs’ Motion for partial Summary Judgment (the “Response”). Additionally, CRI objects to Plaintiffs’ Proposed Order Denying Defendant’s Motion for Reconsideration, submitted in connection with Plaintiffs’ Response, and CRI respectfully requests that the Court hear oral argument on its motion.

I. Rule 59, SCRCP, permits a party to seek reconsideration of an interlocutory order: (1) based on the belief that “the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue,” or (2) “to amend and clarify any misconceptions.”

Before reaching the substantive issues raised in the Response, CRI addresses the proper legal standard for the Rule 59 Motion. *Cf. State v. Brockman*, 339 S.C. 57, 62, 528 S.E.2d 661, 663 (2000) (“[B]efore reaching these substantive issues, we first consider the State’s contention that the Court of Appeals applied an erroneous standard of review.”).

In the Rule 59 Motion, CRI briefly discussed the applicable and familiar legal standards under Rule 59, SCRCP,¹ but in the Response’s “Legal Standard” discussion, Plaintiffs attempt to create the impression that reconsideration “is an extraordinary remedy which should be used sparingly.”² In doing so, Plaintiffs rely on the federal standard for reconsideration of a final judgment, rather than the standard for reconsideration of an interlocutory order, like the September 29 Order.³

Even under the federal standard, “[m]otions for reconsideration of interlocutory orders are not subject to the strict standards applicable to motions for reconsideration of a final judgment.” *Am. Canoe Ass’n v. Murphy Farms, Inc.*, 326 F.3d 505, 514 (4th Cir. 2003); *see also id.* at 516 (concluding “that the district court abused its discretion in denying the Farms’ reconsideration request”). A more lenient standard applies to reconsideration of an interlocutory order “because a district court retains the power to reconsider and modify its interlocutory judgments, including partial summary judgments, at any time prior to final judgment when such is warranted.” *Id.* at 514–15. Regardless, Plaintiffs ultimately concede that the South Carolina Rule 59 standard—which Plaintiffs criticize as “ill-conceived”—is even more “permissive.”⁴ *See generally Powell v. S.C. Dep’t of Transp.*, C.A. No. 2019-CP-40-03682, 2020 S.C. C.P. LEXIS 4797, at *3–4 (Richland Cnty. Mar. 2, 2020) (“A Rule 59(e) motion gives ‘a party one final chance not only to call the court’s attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument.’” (quoting *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 21 (2004))).

¹ Rule 59 Motion, 5–6 (when a party “believes, the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue” and “to amend and clarify any misconceptions”)

² Response, 5.

³ *See Pac. Ins. Co. v. Am. Nat. Fire Ins. Co.*, 148 F.3d 396, 402 (4th Cir. 1998) (addressing “Rule 59(e) motion to alter or amend the July 30, 1997 judgment entered in American National’s favor” (emphasis added)).

⁴ Response, 5.

II. Plaintiffs do not address the substance of CRI's request for reconsideration relating to Annex C's terms "account" and "project."

In Section VI of the Rule 59 Motion, CRI asked the Court to reconsider the interpretations of the terms "account" and "project" set forth in the September 29 Order:

- When the Agreement was signed in 2005, CRI manufactured tourniquets on behalf of client account Phil Durango LLC. Tourniquet commission was "commission for this account" — "Phil Durango LLC." When Phil Durango sold its IP, the Phil Durango LLC account ceased to exist. Phil Durango was then dissolved by its owner, Mark Esposito. Without the account, there is no "commission for this account."⁵
- CRI was manufacturing the C-A-T on behalf of Phil Durango, LLC. Poly-tech was being paid a commission "for convincing Phil Durango to use CRI to assemble and mass-produce" the C-A-T. The parties chose to use the term "project" a single time—within the Phil Durango, LLC "special account" provision. Therefore, Phil Durango, LLC's involvement is essential to the existence and continuation of the "project."⁶

Plaintiffs did not respond to CRI's "account" discussion. And Plaintiffs' only response to CRI's "project" discussion is that the term "appear[s] in a Grade 4 National Reading Vocabulary of 900 words students need to master by the end of Grade 4."⁷

Plaintiffs forget that they have defined "project" to mean "sale of tourniquets by Composite,"⁸ not "something that must be done that requires considerable effort," as the websites cited by Plaintiffs define that term. That a fourth grader should be able to read and comprehend the word "project" as "something that must be done that requires considerable effort," does not support Plaintiffs' interpretation of "project" in the last provision of Annex C as meaning the "sale of tourniquets by Composite."

⁵ Rule 59 Motion, 27–28.

⁶ *Id.* at 29.

⁷ Response, 17.

⁸ MPSJ, 2, 14.

“Project” in the Agreement is at best ambiguous, and it should be for the jury to interpret that term according to the intent of the parties and the context of the Agreement. *See Harbin v. Williams*, 429 S.C. 1, 5–6, 837 S.E.2d 491, 493–94 (Ct. App. 2019). To the extent the September 29 Order determines that CRI “is not taking the position that the Contract is ambiguous,” that is incorrect,⁹ and the September 29 Order should be revised accordingly.

III. CRI’s concerns that the September 29 Order includes liability determinations are well-founded, but they can be easily resolved by revising the September 29 Order to state that nothing therein shall be construed as a liability determination, particularly since Plaintiffs have clearly and unequivocally conceded that the September 29 Order as drafted does not impose liability on CRI.

Plaintiffs’ Response chides CRI, arguing that CRI is “infusing” a “false” and “manipulated supposition” that the September 29 Order “imposes ‘liability’ on Defendant.”¹⁰ **CRI accepts Plaintiffs’ clear and unequivocal concession that the September 29 Order does not impose liability on CRI.**¹¹ However, as Plaintiffs themselves emphasize in their Response, if reviewed, the September 29 Order will be interpreted “according to its unambiguous terms,”¹² not according to what the parties may or may not believe or agree that it means.

Additionally, Plaintiffs’ history of pursuing a liability determination through the MPSJ—expressly, by implication, or otherwise—is well-documented, including:

1. Plaintiffs’ abrupt pivot from the first 13 pages of their MPSJ (asking the Court to find “certain terms” unambiguous, and to interpret them as a matter of law) to the last page, where Plaintiffs claim entitlement to findings that CRI: (1) “is liable to Plaintiffs for payment of the \$1.75 commission on each tourniquet sold by [CRI],” and (2) “was and is obligated to pay Plaintiffs ‘\$1.75 per [C-A-T] sold,’ or which is sold into the future”¹³;

⁹ Rule 59 Motion, Section III, at 17–19.

¹⁰ Response, 6, 7.

¹¹ *Id.* at 6 (characterizing “the suggestion that the Order imposes ‘liability’ on Defendant” as “false”).

¹² *Id.* at 2.

¹³ PMSJ, 14.

2. Plaintiffs' multiple requests in the summary judgment hearings for a "find[ing] as a matter of law [CRI is] in breach," contrasted with their subsequent "pretty narrow" request for the Court to interpret "what the contract says,"¹⁴ after the Court resisted expanding the scope of their summary judgment motion;
3. The Court's June 8, 2022 e-mail restating and acknowledging Plaintiffs' summary judgment contention that "the defendant *is liable* to the plaintiffs for payment of \$1.75 per tourniquet beyond the termination date of August 31, 2018"¹⁵;
4. The liability-implicating language in Plaintiffs' proposed orders, including: (a) "was and is obligated to pay,"¹⁶ (b) "for which this amount has not already been paid,"¹⁷ (c) "for all Combat Tourniquets which are sold in the future,"¹⁸ and (d) "until the Combat Tourniquets stop being produced and sold"¹⁹; and
5. Plaintiffs' September 7, 2022 email response to CRI's objections to the proposed orders as "fixing liability," in which Plaintiffs: (a) did not dispute the presence of liability-fixing findings in their proposed orders; and (b) instead argued that: (i) the "Order does not include damages for which execution could be levied"; (ii) South Carolina law "prevents execution . . . until the counterclaim is fully adjudicated"²⁰; and (iii) CRI's Article II prior material breach defense "only operates *after liability is determined*," and thus "should not prohibit the entry of the proposed Order."²¹

That Plaintiffs have sought to add an unsupported liability determination to the summary judgment mix is not "supposition," or a "belief that something is true without any proof."²² In fact, in the very same document in which they now disclaim even "*the suggestion* that the Order imposes 'liability' on Defendant"²³ (the Response), Plaintiffs also contend that the only thing between the September 29 Order and "the dollar amount *of the judgment liability* for past and future commissions *is a mathematical calculation*."²⁴ That position cannot be squared with Plaintiffs' current

¹⁴ Rule 59 Motion, 5 (citing Hrg. Tr. 5/4/2022 at 34).

¹⁵ **Exhibit A** (emphasis added).

¹⁶ September 29 Order, 7, 18.

¹⁷ *Id.* at 18.

¹⁸ *Id.* at 18.

¹⁹ *Id.* at 7, 13, 17, 18.

²⁰ **Ex. A.**

²¹ *Id.* (emphasis added).

²² Available at <https://dictionary.cambridge.org/us/dictionary/english/supposition>.

²³ Response, 6 (emphasis added).

²⁴ *Id.* at 3 (emphasis added).

stance that only someone who has not “read the Order at all”²⁵ could suspect that it imposes liability.

Plaintiffs’ “obligation”/“liability” distinction is not helpful, since *Black’s Law Dictionary*—Plaintiff’s oft cited secondary resource—defines “obligation” as an “acknowledgment of a liability,” and “liability” as “the quality or state of being legally obligated.”²⁶

Similarly, *Southern Recycling, LLC v. Gibbs*—a UCC case—was neither “previously instructive on main motion,” nor is it instructive as to CRI’s Rule 59 Motion.²⁷ In that case, Plaintiff Southern Recycling contracted with Defendant Gibbs to purchase 500,000 pounds of scrap copper wire. *S. Recycling, LLC v. Gibbs Int’l, Inc.*, No. 7:13-CV-3125-BHH, 2016 WL 1258402, 2016 U.S. Dist. LEXIS 43365, at *1 (D.S.C. Mar. 31, 2016). “The purchase contract contained a delivery term stating: F.O.B., loaded in bulk into Buyer’s 20’ sea container at *Port of Manila, Philippines*.” *Id.* (emphasis added).

When the buyer’s containers arrived at their ultimate destination in Dallas, Texas, they contained worthless debris rather than copper wire, and it was believed that the substitution occurred prior to arrival of the containers at the Port of Manila. *See id.* at *2–3. The buyer, Southern Recycling, sought return of \$1.7 million it had paid to Gibbs. *Gibbs Int’l, Inc. v. ACE Am. Ins. Co.*, No. 7:15-CV-4568-BHH, 2018 WL 1566730, at *4 (D.S.C. Mar. 30, 2018). Southern Recycling moved for summary judgment “on a discre[te] legal issue,”—i.e., whether “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.” *S. Recycling*, 2016 WL 1258402, at *2 (emphasis added).

²⁵ *Id.* at 14.

²⁶ *Black’s Law Dictionary*, 932, 1104 (8th ed.)

²⁷ Response, 3–4.

The district court in *Gibbs* granted partial summary judgment based on *the UCC*'s "statutory meaning" of "F.O.B.":

[T]he term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods . . . and bear the expense and risk of putting them into the possession of the carrier. . . ."

Id. at *3–4 (citing S.C. Code Ann. § 36-2-319 (additional emphasis added)). The district court also noted that UCC Official Comments rejected the treatment of "an 'F.O.B.' term as 'merely a price term'" and required that "the risk of loss during handling and shipment passes to the buyer at the F.O.B. point." *Id.* at *3 (emphasis added). Accordingly, the district court granted partial summary judgment, finding 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 (emphasis added).

The "obligation" in *Gibbs* was the one-time delivery of copper wire to the Port of Manila, not a continuing obligation like the one the September 29 Order has decreed "was and is" ongoing, and which will continue "for as long as [CRI] is associated with the making and selling of C-A-T Tourniquets." Nor did the *Gibbs* court order that Gibbs "was and is obligated to pay Southern Recycling \$1.7 million, for which this amount has not already been paid," applying the language in the September 29 Order. In fact, contrary to the September 29 Order, the *Gibbs* summary judgment order expressly states that "the issue of damages was not raised by the motion for partial summary judgment, and is not before the Court at this time." *Id.*, at *10.

Even now, Plaintiffs contend that the only thing between the September 29 Order and “the dollar amount of the judgment liability for past and future commissions is a mathematical calculation.”²⁸ That position cannot be squared with Plaintiffs’ current contention that the September 29 Order’s language “was and is obligated to pay” does not impose liability, and *Gibbs* does not support it.

One of the Response’s most glaring examples of Plaintiffs’ failed reassurances that the September 29 Order does not determine liability is Plaintiffs’ insidious use of an ellipsis, highlighted below:

Defendant’s tactic throughout Section I of the Motion for Reconsideration is exemplified in its first manipulated supposition that the Order “finds that Defendant was and is contractually obligated to pay Plaintiffs a commission of \$1.75 per tourniquet sold.” (Motion for Reconsideration, p. 2). The Order shows instead actually states: “[t]he terms within the four corners of the Contract unambiguously established that the “Defendant was and is ...” (emphasis added). Defendants argument here, and throughout this section of the Motion for Reconsideration, is like a shadow – once you turn a light on it, it disappears.

Below in highlighting is the portion of the September 29 Order’s Finding of Fact No. 2 that Plaintiffs have omitted with the ellipses:

²⁸ Response, 3 (emphasis added).

2. The terms within the four corners of the Contract unambiguously establish that the Defendant was and is contractually obligated to pay Plaintiffs a commission of “\$1.75 per tourniquet sold” including after termination of the sales representative relationship on August 31, 2018, including on Combat Tourniquets Defendant produces and sells after the date of this Order, until the Combat Tourniquets stop being produced and sold (“Tourniquet Commissions”).

Thus, the language omitted by Plaintiffs demonstrates—even if based on the Agreement’s “four corners”—that the September 29 Order is easily read to fix CRI’s liability for past (“was”), present (“is”), and future (“until the Combat Tourniquets stop being produced and sold”) commissions.

Finally, Plaintiffs complain that CRI references the summary judgment hearings to demonstrate Plaintiffs’ attempts to include a liability determination in the order. CRI did not reference the summary judgment hearings as a tool of decretal interpretation. Rather, CRI cites the transcripts to aid the Court in recollecting the colloquy with counsel, for the Court’s consideration in determining whether the September 29 Order accurately reflects the Court’s intended rulings, “consistent with” the Court’s June 8, 2022 e-mail.²⁹

Regardless, courts routinely consult hearing transcripts in interpreting ambiguous language. *See, e.g., United States v. McIntosh*, 484 F.3d 832, 836 (6th Cir. 2007) (stating “in order to determine the scope of the whole agreement, we must also consider the plea hearing transcript”);

²⁹ Ex. A.

cf. Shepard v. United States, 544 U.S. 13, 16 (2005) (holding that in order to determine the character of the crime to which a defendant has pled guilty in a prior proceeding, the later court may look to sources such as the transcript of plea colloquy); *Patricia Grand Hotel, LLC v. MacGuire Enters., Inc.*, 372 S.C. 634, 642, 643 S.E.2d 692, 696 (Ct. App. 2007) (“The court reviewed the transcript of the hearing wherein the parties outlined the agreement, and the court ascertained that the parties were only focusing on competing sales at the pool bar and the Icee sales. We find no error with this interpretation of the agreement based on the parties’ expressed intentions at the hearing.”).

Notably, Plaintiffs have previously offered to “order the transcript and . . . give it to [the Court] if that helps,”³⁰ and the Court has indicated its openness to reviewing hearing transcripts:

I think it’s very wise that you do get that transcript because I like having those transcripts as well because, when I read them, it convinces me sometimes that people are not following my orders or not following my directives.³¹

IV. The September 29 Order should be revised to clarify whether the Court determined in the alternative that the extrinsic evidence supports Plaintiffs’ interpretation of the last provision of Annex C as a matter of law.

On one hand, Plaintiffs contend that the September 29 Order “expressly state[s] that it was not granting relief based on the external evidence.”³² On the other hand, Plaintiffs urge the Court not to revise the September 29 Order to “affirmatively disavow” reliance on extrinsic evidence, since that would “cripple one of the legs that steady the Order against reversal.”³³ Plaintiffs have thus admitted that they have attempted to insert “an additional sustaining ground” into the September 29 Order that is directly contrary to the Court’s June 8, 2022 “position and analysis.”³⁴

³⁰ Exhibit B, Hrg. Tr. 3/31/2022 at 94.

³¹ Exhibit C, Hrg. Tr. 4/22/2022 at 41.

³² Response, 10–11.

³³ *Id.* at 12.

³⁴ Ex. A.

Either the Court intended to grant summary judgment based on Plaintiffs' "alternative ground" that "the uncontroverted external evidence filed with the motion papers . . . eliminates the possibility of a genuine issue of material fact,"³⁵ or it did not. Respectfully, the Court's June 8, 2022 e-mail appears to indicate the latter:

[S]imply because this Court has looked at the supplemental materials, it has done so to confirm (further support) its view of the contract's terms from the four (4) corners of the document and from the facts that are actually uncontested (genuinely in dispute) in this litigation. Thus, because supplemental materials were reviewed, no inference should be drawn that the contested material terms were ambiguous and needed further factual development to determine the intent of the parties at the time the contract was agreed upon.³⁶

Plaintiffs recognize that the September 29 Order "acknowledges this alternative ground"³⁷ and "summarizes" the "extrinsic evidence presented by Plaintiffs" on "pages 13–15 of the Order." But they ignore that the September 29 Order also states that those three pages of extrinsic evidence "directly support[] Plaintiffs' Motion."³⁸ It is this language which arguably creates "an additional sustaining ground." The September 29 Order should either be revised to make clear it is not supported in the alternative by extrinsic evidence, or, if it is, to explain how CRI's "counter evidence"³⁹—described on pages 8, 10–11, 13, and 21–22 of the Rule 59 Motion—figures into the analysis.

V. Plaintiffs drafted the September 29 Order to incorrectly state that CRI filed no summary judgment evidence "counter" to Plaintiffs' summary judgment evidence.

The Court's June 8, 2022 e-mail did not state that "Defendant filed no counter evidence with its filings in opposition to the Motion," but that language appears in the September 29 Order.⁴⁰

³⁵ September 29 Order, 3–4.

³⁶ Ex. A (emphasis added).

³⁷ Response, 10.

³⁸ September 29 Order, 15.

³⁹ *Id.* Plaintiffs chose to draft the September 29 Order using the term "counter evidence."

⁴⁰ *Id.*

Plaintiffs do not dispute that they alone created that provision when they drafted their proposed order. Instead, Plaintiffs have persisted with their drafting overreach,⁴¹ arguing that none of CRI's extrinsic evidence "'countered' the contract term evidence summarized on pages 13–15 of the Order." That is demonstrably false.

In its June 8, 2022 email, the Court referenced "the testimony of Lisa Bennett to the effect that 'as long [as CRI] is making tourniquets Poly-Tech would get paid'" as the basis for "[t]he Court's view of the Defendant's position"—i.e., that "the last provision of Annex C is, as a matter of law, 'indefinite' and thus legally unenforceable"—as being "meritless."⁴² Importantly, the Court referenced that extrinsic evidence not to support a judicial determination that the last provision of Annex C means as a matter of law that CRI owes Plaintiffs commissions until the tourniquets stop being produced and sold, no matter what—as the September 29 Order was drafted to say. Instead, the Court simply referenced that evidence as a basis to reject CRI's argument that the last provision of Annex C is so indefinite as to be unenforceable.

Stated differently, the Court found that CRI's "indefiniteness" argument fails because, for example, Lisa Bennett offered an interpretation of Annex C that was consistent with Plaintiffs' interpretation, rendering it not fatally indefinite. The Court did not then also adopt that interpretation of the last provision of Annex C. And for good reason—Lisa Bennett's interpretation is that "competition" was also one "of the reasons it could be terminated."⁴³

⁴¹ See generally *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1268 (11th Cir. 2021) ("When such a practice [of delegating the drafting of orders to a party] is permitted, the drafting party has an 'overwhelming' 'temptation to overreach and exaggerate.'" (quoting *In re Colony Square Co.*, 819 F.2d 272, 275 (11th Cir. 1987))).

⁴² Ex. A.

⁴³ Rule 59 Motion, 10–11.

Plaintiffs seized on the Court's reference to a portion of Lisa Bennett's testimony to "present an additional sustaining ground" for the September 29 Order. However, to do that, Plaintiffs also drafted the September 29 Order to incorrectly recite that "Defendant filed no counter evidence with its filings in opposition to the Motion" and thus ignored Lisa Bennett's additional testimony in the summary judgment record that:

- The parties understood when the Agreement was negotiated that if Plaintiffs developed a competing tourniquet, "that would engage a breach" of the Agreement;
- the Agreement was never intended to be drafted such that CRI could never terminate it; and
- "competition" is a breach of the agreement and therefore "one of th[e] reasons" the Agreement "could be terminated earlier."⁴⁴

This summary judgment evidence is "counter" to Plaintiffs' extrinsic evidence detailed on pages 13–15 of the September 29 Order as:

[E]stablishing that the Contract obligates Defendant to pay Plaintiffs the Tourniquet Commissions and Raw Material Profit payments at the rate set forth on page 11 of the Contract during the term of the Contract, beginning in June 2005, extending beyond the termination of the sales representative relationship on August 31, 2018, and lasting for so long as the Combat Tourniquets are produced and sold.⁴⁵

If, as Lisa Bennett testified, competition is a breach of the Agreement, then such a breach would excuse further performance, including the commission obligations. Thus, evidence like the following is "counter" to a determination as a matter of law that the Agreement obligates CRI to pay Plaintiffs commissions "extending beyond the termination of the sales representative relationship on August 31, 2018, and lasting for so long as the Combat Tourniquets are produced and sold":

⁴⁴ *Id.*

⁴⁵ September 29 Order, 13.

- the February 5, 2019 patent for the competing “HALO” tourniquet, reflecting Plaintiff Cedrone as an “Applicant” and an application file-date of “March 7, 2018,” well prior to August 15, 2018 termination of the Agreement²²; and
- Plaintiff Poly-Tech’s deposition testimony admitting that the HALO tourniquet developed by it and Plaintiff Cedrone is a competing product to the CAT²³;

This excerpt is from page 13 of the Rule 59 Motion, and it demonstrates that CRI did in fact “take the time to explain” how “a 2018 Patent exhibit”⁴⁶ could counter Plaintiffs’ interpretation of CRI’s commission obligation as “extending beyond the termination of the sales representative relationship on August 31, 2018, and lasting for so long as the Combat Tourniquets are produced and sold.”

In sum, it is incorrect to say that “Defendant filed no counter evidence,” and the September 29 Order should be revised accordingly. But merely deleting the single sentence from page 15 of the September 29 Order does not fix the problem. There is clearly more than a scintilla of “counter evidence” in the summary judgment record, thus undermining the September 29 Order’s “alternative ground” that Plaintiffs are seeking to keep.

VI. The Court should reject Plaintiffs’ misleading attempt to downplay the significance of the undisputed error in the September 29 Order fixing CRI’s liability at \$1.75 per tourniquet sold, and CRI was not “silent for 17 weeks” after Plaintiffs submitted their proposed order.

As demonstrated above, Plaintiffs have vacillated wildly between seeking a liability determination and disavowing that they ever intended anything of the sort. Plaintiffs have taken the position that the September 29 Order is not based on an alternative extrinsic evidence ground, but they also resist revision of the September 29 Order to accurately state as much because they want

⁴⁶ Response, 18.

that “dicta” to be “another sustaining ground appearing from the record.”⁴⁷ In doing so, Plaintiffs ignore that when a determination is used as “another sustaining ground” that supports the decision, it ceases to be dicta. *See generally Nash v. Tindall Corp.*, 375 S.C. 36, 40, 650 S.E.2d 81, 83 (Ct. App. 2007) (“Judicial dicta is ‘not essential to the decision.’” (quoting *Black’s Law Dictionary* 465 (7th ed. 1999))).

Plaintiffs also drafted the September 29 Order to falsely state that CRI filed no controverting summary judgment evidence. And, as demonstrated below, they have made at least two other misleading statements in their Response in Opposition to CRI’s Rule 59 Motion.

A. The September 29 Order’s errors are not limited to “\$1.42/tourniquet as to orange tourniquets sold to a particular customer.”

First, Plaintiffs acknowledge that the September 29 Order is incorrect insofar as it orders that CRI “was and is obligated to pay ‘\$1.75 per [Combat] [T]ourniquet sold’”⁴⁸ because Plaintiffs agreed in May and August 2013 to downwardly modify Annex C’s “\$1.75 per tourniquet sold.”⁴⁹ However, in their attempt to downplay the significance of this error, Plaintiffs repeatedly characterize it as the difference between \$1.75 and “\$1.42/tourniquet as to orange tourniquets sold to a particular customer.”⁵⁰ That is false. Of the total number of tourniquets sold, only around seven percent (7%) are the “\$1.42/tourniquet as to orange tourniquets” referenced by Plaintiffs. For approximately 92% of the tourniquets sold, Plaintiffs have agreed to a reduced commission of \$1.25 per tourniquet.

⁴⁷ Response, 11.

⁴⁸ September 29 Order, 18 (emphasis added).

⁴⁹ Response, 3 (acknowledging that any ultimate commission calculation would be “mathematically different” from “\$1.75/tourniquet”).

⁵⁰ *Id.* at 8.

Moreover, Plaintiffs are incorrect in arguing “that the ultimate liability/judgment is mathematically different is not a basis to challenge this Order.”⁵¹ CRI had to raise this issue in the Rule 59 Motion or risk being deemed to have waived it. *Cf. Widman v. Widman*, 348 S.C. 97, 118, 557 S.E.2d 693, 704 (Ct. App. 2001) (“On appeal, Husband claims that the November 3, 1999 order . . . contains a mathematical mistake. . . . The errors complained of by Husband here are being raised for the first time on appeal. The family court has not had an opportunity to rule upon the issue and therefore, it is not preserved for appellate review.” (emphasis added)); *see also Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding an issue is not preserved where the trial court does not explicitly rule on an argument and the appellant fails to make a Rule 59(e), SCRPC, motion to alter or amend the judgment on that ground). CRI properly raised this issue in its motion so that the Court could modify the Order and make the necessary factual corrections.

Plaintiffs further mischaracterize their May and August 2013 modifications as based on “alleged course of dealing.”⁵² CRI has never argued that the May and August 2013 commission modifications are based on “course of conduct.” They are not. Rather, as set forth in the Rule 59 Motion, Plaintiffs have judicially admitted that they agreed to those modifications, and they do not dispute that in their Response.⁵³ And those judicially admitted agreed modifications are not “extra-contractual.”⁵⁴ The September 29 Order should thus be revised to omit references to “\$1.75 per tourniquet sold,” and to provide that any commission obligation is subject to any modification, defense, or counterclaims. For example, using the Court’s language from its June 8, 2022 e-mail, the September 29 Order could be revised to instead state that:

⁵¹ *Id.* at 3 (emphasis added).

⁵² *Id.*

⁵³ Rule 59 Motion, 2 n.4.

⁵⁴ Response, 3.

The last provision in Annex C obligates CRI to pay Poly-Tech the amounts reflected on page 11 of 11 of the Agreement past the termination date, subject to any modifications, defenses, or counterclaims that CRI might have.

B. Plaintiffs' representations to the Court that CRI "remained silent for 17 weeks" are incorrect.

On the first page of Plaintiffs' "Argument" section, Plaintiffs represent to the Court that CRI "remained silent for 17 weeks between receiving the proposed order and entry of the order by the Court."⁵⁵ Plaintiffs subsequently re-urge that "*it is worth remembering* that the Defendant remained silent for 17 weeks between receipt of the proposed order and entry of the order."⁵⁶ Unfortunately, Plaintiffs' representations are again remarkably and demonstrably false.

On September 7, 2022, in an e-mail to the Court and Plaintiffs, CRI advised that it took "issue with the proposed order on a number of grounds," including "that Plaintiffs' proposed order purports to . . . enter a finding of liability against Defendant."⁵⁷ CRI emphasized that Plaintiffs' breach of Article II's non-compete and no-conflict of interest provisions were both the subject of CRI's "fourth counterclaim" and an affirmative defense, which is a "a complete defense to the liability Plaintiffs request the Court to find in the order."⁵⁸

Contrary to its current position in the Response, Plaintiffs did not respond that they had not included a liability finding in the proposed order. Plaintiffs also did not respond that CRI's concern regarding a liability finding was "false" or the result of "conflation of contractual obligation with judicial liability."⁵⁹

⁵⁵ *Id.* at 6 n.4.

⁵⁶ *Id.* at 12–13 (emphasis added).

⁵⁷ Ex. A.

⁵⁸ *Id.*

⁵⁹ Response, 7 (emphasis original).

To the contrary, Plaintiffs did not dispute the proposed order’s liability finding, arguing instead that:

1. the “Order does not include damages for which execution could be levied”; and
2. CRI’s “concern about the proposed Order establishing a matter of liability that eviscerates the 4th Counterclaim is misguided” because South Carolina law “prevent[s] execution . . . until the counterclaim is fully adjudicated.”⁶⁰

Plaintiffs further argued—incorrectly—that CRI’s Article II prior breach defense “only operates *after liability is determined*,” and thus “should not prohibit the entry of the proposed Order.”⁶¹ This language demonstrates that Plaintiffs drafted the September 29 Order intending to fix liability. Plaintiffs were confirming that a liability finding would be the effect of entering their proposed order as drafted, but, according to them, would be completely appropriate despite the outstanding counterclaim because the counterclaim “only operates after liability is determined.”

On September 8, 2022, CRI replied, objecting again that the proposed order “would fix Defendant’s *ultimate liability*”:

Plaintiffs have submitted a proposed order which would fix Defendant’s *ultimate liability*: “for as long as [Defendant] is associated with the making and selling of C-A-T Tourniquets,” “Composite Resources was and is obligated to pay Plaintiffs ‘\$1.75 per [Combat] [T]ourniquet sold,’ for which this amount has not already been paid, and for all Combat Tourniquets which are sold in the future.”

CRI further explained that its pleaded defense of prior material breach was a defense “to a liability finding,”

based upon Plaintiffs’ improper efforts to compete in breach of the parties’ Sales Representative Agreement. That is the same Agreement that gives rise to Plaintiffs’ claims for commissions. If Plaintiffs committed a prior material breach of the

⁶⁰ Ex. A.

⁶¹ *Id.* (emphasis added).

Agreement, any obligation for Defendant to pay those commissions was discharged or excused, precluding a liability finding.⁶²

In the same email, CRI also cited authorities reversing summary judgments where defenses and counterclaims had not been ruled on.⁶³

Importantly, at no point prior to entry of the September 29 Order did Plaintiffs dispute that the proposed order fixed liability. And as demonstrated above, Plaintiffs repeatedly sought to have CRI's liability fixed.

The Court's June 8, 2022 e-mail's principal "finding"—with which Plaintiffs' "proposed formal order" was to be "consistent"—was that under the last provision of Annex C, **"the defendant is contractually obligated to pay plaintiffs the amounts reflect[ed] in the contract on page 11 of 11 past the termination date."**⁶⁴ When Plaintiffs drafted the proposed order's decretal language, the Court's finding became an order that:

[F]or as long as [CRI] is associated with the making and selling of C-A-T Tourniquets [CRI] was and is obligated to pay Plaintiffs "\$1.75 per [Combat] [T]ourniquet sold," for which this amount has not already been paid, and for all Combat Tourniquets which are sold in the future.⁶⁵

That language is nowhere to be found in the Court's e-mail, and CRI respectfully submits that it goes beyond the Court's June 8 e-mail.

Recognizing that once signed by the Court, the September 29 Order became the Court's order, CRI nonetheless respectfully suggests that an order with the following rulings would have more accurately reflected the Court's intent as expressed in its e-mail:

1. The last provision of Annex C created an obligation (for CRI to pay Plaintiffs commissions) that is not extinguished by termination of the Agreement under Art. IX;

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* (emphasis added).

⁶⁵ September 29 Order, 7, 18 (emphasis added).

2. The language of the last provision of Annex C creating that post-termination obligation is not so “indefinite” as to be “unenforceable”; and
3. The last provision of Annex C does not create a perpetual contract because “it terminates once the product stops being produced and sold.”

However, Plaintiffs drafted the proposed order to expand those determinations, such that the September 29 Order could be reasonably construed as making unqualified, absolute, liability-fixing determinations that:

1. Annex C’s commission obligation has survived post-August 2018;
2. CRI “was and is obligated to pay Plaintiffs \$1.75 per [C-A-T] sold”; and
3. CRI’s commission obligation will continue “for as long [CRI] is associated with the making and selling of C-A-T Tourniquets” and “for all [C-A-Ts] which are sold in the future.”

If what CRI suspects is correct, and the Court did not actually intend to fix liability—indeed, Plaintiffs themselves now claim the September 29 Order does *not* fix liability—then for clarity the September 29 Order should be vacated and a new order entered that accurately reflects the Court’s intended rulings.

In sum, and notwithstanding Plaintiffs’ references to “finality” concerns implicated by successive “post-trial” motions,⁶⁶ CRI has properly and timely filed a single Rule 59 Motion directed to an interlocutory, partial summary judgment order that was intended “to aid in the development of the case for trial.”⁶⁷ Obviously, even if entry of a revised order might “create an opportunity to seek reconsideration,”⁶⁸ that is not a sufficient reason to preserve an order that does not clearly and accurately reflect the Court’s intended rulings.

⁶⁶ Response, 13.

⁶⁷ Ex. A.

⁶⁸ Response, 13.

CONCLUSION

For the reasons set forth above and those set forth in Defendant's Rule 59 Motion, Defendant CRI respectfully requests that the Court reconsider, clarify, alter, or amend the September 29, 2022 Order Granting Plaintiffs' Motion for Partial Summary Judgment.

Respectfully submitted,

JOHN B. WHITE, JR. P.A.

By: /s/ John B. White, Jr.

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Admitted Pro Hac Vice

November 2, 2022

Spartanburg, South Carolina

Attorneys for Composite Resources, Inc.

EXHIBIT A

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

From: Harrill, Paul
Sent: Thursday, September 8, 2022 3:16 PM
To: 'Keith Munson' <keith.munson@rimonlaw.com>; 'Hayes, J. Mark Law Clerk (Zachary Turner)' <mhayeslc@sccourts.org>; Klett III, William <wklett@burr.com>; 'Montecalvo, Michael' <michael.montecalvo@wbd-us.com>; Still, John <John.Still@wbd-us.com>
Cc: 'Hayes, J. Mark' <mhayesj@sccourts.org>
Subject: RE: Poly-Tech v. Composite ; 2019CP4600051; Proposed Order - Updated

Judge Hayes,

Defendant apologizes for the email back and forth, however, affirmative defenses — if proven — preclude liability findings.

Plaintiffs have submitted a proposed order which would fix Defendant's ultimate liability: "for as long as [Defendant] is associated with the making and selling of C-A-T Tourniquets," "Composite Resources was and is obligated to pay Plaintiffs '\$1.75 per [Combat] [T]ourniquet sold,' for which this amount has not already been paid, and for all Combat Tourniquets which are sold in the future."

Prior material breach is an affirmative defense to a liability finding. Defendant has asserted an affirmative defense of prior breach and a fourth counterclaim for breach of contract, both based upon Plaintiffs improper efforts to compete in breach of the parties' Sales Representative Agreement. That is the same Agreement that gives rise to Plaintiffs' claims for commissions. If Plaintiffs committed a prior material breach of the Agreement, any obligation for Defendant to pay those commissions was discharged or excused, precluding a liability finding. See *Vaughn Coltrane & Assocs., Inc. v. LaM Distribution, LLC*, No. 2004-UP-309, 2004 WL 6330901, at *2 (S.C. Ct. App. May 7, 2004) ("[T]he legal consequences of one party's material breach is to relieve the other contracting party of its performance obligation."); see also *Monster Daddy, LLC v. Monster Cable Prod., Inc.*, 483 F. App'x 831, 835 (4th Cir. 2012) (recognizing that under South Carolina law, one party's breach of a contractual obligation discharges the other party's obligations that "were dependent upon the promises that the breaching party failed to perform").

The case cited by Mr. Munson - *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493 - does not change this analysis. In *Cox*, the South Carolina Supreme Court held that "when summary judgment for the plaintiff on its claim is otherwise appropriate, we view it as proper to grant the motion despite the presence of a meritorious counterclaim." *Id.* at 502. *Cox* does not address affirmative defenses (like prior material breach) at all, which would make summary judgment for the plaintiff inappropriate. See *Englert, Inc. v. LeafGuard USA, Inc.*, 377 S.C. 129, 133, 659 S.E.2d 496, 498 (2008) (holding that "trial court err[ed] in granting summary judgment where LeafGuard USA's defenses and counterclaims had not been ruled on"); see also *Griffin v. Arden Chase Homeowners' Ass'n, Inc.*, No. 2018-002028, 2022 WL 470992, at *3 (S.C. Ct. App. Feb. 16, 2022) (reversing summary judgment based on "issues of material fact that still need to be resolved by the circuit court," which "never ruled on the issue of whether the decision by the [Architectural Control Committee] was arbitrary").

If the Court would like any additional information or would like a more formal discussion of this issue, please let us know.

Best regards,

Paul

From: Keith Munson <keith.munson@rimonlaw.com>

Sent: Wednesday, September 7, 2022 1:20 PM

To: Harrill, Paul <PHarrill@burr.com>; 'Hayes, J. Mark Law Clerk (Zachary Turner)' <mhayeslc@sccourts.org>; Klett III, William <wklett@burr.com>; 'Montecalvo, Michael' <michael.montecalvo@wbd-us.com>; Still, John <John.Still@wbd-us.com>

Cc: 'Hayes, J. Mark' <mhayesj@sccourts.org>

Subject: RE: Poly-Tech v. Composite ; 2019CP4600051; Proposed Order - Updated

[EXTERNAL EMAIL]

Judge Hayes: The proposed Order for partial summary judgment does not include any damages, so Composite's concern about the proposed Order establishing a matter of liability that eviscerates its 4th Counterclaim is misguided and directly in opposition to a South Carolina Supreme Court decision on this issue in *SSI Med. Servs., Inc. v. Cox*.

"We decline to adopt this rule. Instead, when summary judgment for the plaintiff on its claim is otherwise appropriate, we view it as proper to grant the motion despite the presence of a meritorious counterclaim. However, in order to protect

the defendant, we follow those jurisdictions which prevent execution by the plaintiff on this judgment until the counterclaim is fully adjudicated. See, e.g., *Elliott-Lewis Corp. v. Graeff*, 11 N.J.Super. 567, 78 A.2d 591 (1951); *Farmers Co-op. Elevator Co., Panora v. Knapp*, 259 N.W.2d 762 (Iowa 1977). Hence, we reject Cox's contention that summary judgment for SSI was prevented by the presence of his counterclaim."

301 S.C. 493, 502, 392 S.E.2d 789, 794 (1990).

Mr. Harrill mentions the alleged breach in the 4th counterclaim as potentially being a "complete defense." If Composite raised "prior breach" or "setoff" as an affirmative defense, the analysis is the same. An affirmative defense "assumes all the allegations in the complaint are true." *Black's Law Dictionary*, p. 483 (9th Ed.). So, by its definition, it only operates after liability is determined (or assumed). So, the existence of unresolved affirmative defense should not prohibit the entry of the proposed Order, especially since the Order does not include damages for which execution could be levied.

Regarding dispositive motion deadline scheduling, September 15 still works for Plaintiffs.
Do you have any sense of when we might get a new trial date?

Kind regards, Keith.

Keith Munson | Partner

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keith.munson@rimonlaw.com

<https://rimonlaw.com/team/keith-munson>

From: Harrill, Paul <PHarrill@burr.com>

Sent: Wednesday, September 7, 2022 11:55 AM

To: 'Hayes, J. Mark Law Clerk (Zachary Turner)' <mhayeslc@sccourts.org>; Keith Munson <keith.munson@rimonlaw.com>; Klett III, William <wklett@burr.com>; 'Montecalvo, Michael' <michael.montecalvo@wbd-us.com>; Still, John <John.Still@wbd-us.com>

Cc: 'Hayes, J. Mark' <mhayesj@sccourts.org>

Subject: RE: Poly-Tech v. Composite ; 2019CP4600051; Proposed Order - Updated

Judge Hayes-

Defendant Composite Resources, Inc. can confirm that the mediation held on August 26 did not resolve the case. We see (in the below email) that Mr. Munson sent the Court his proposed order once again on August 31. While we take issue with the proposed order on a number of grounds, perhaps the most significant issue is that Plaintiffs' proposed order purports to, among other things, enter a finding of liability against Defendant. The Court is respectfully reminded that Composite Resources' fourth counterclaim asserts that Plaintiffs breached the noncompetition provision in the contract at issue. This breach by Plaintiffs, which is not mentioned in the proposed order, would provide a complete defense to the liability Plaintiffs request the Court to find in the order. Defendant believes any entry of liability would be premature prior to resolution of Defendant's counterclaims. Plaintiff filed a motion for summary judgment on its fourth counterclaim (relating to Plaintiffs' competition in breach of the agreement) on June 20, and that motion is still pending.

At the last hearing on June 27, the Court set a dispositive motions deadline of September 15, 2022. Defendant intends to file any additional dispositive motions by that date unless the court extends the deadline. I would appreciate the Court's instruction on the September 15 deadline for dispositive motions in light of the parties

agreeing, at Plaintiffs' request, to postpone all depositions scheduled for this week and last week.

Defendant Composite Resources also respectfully requests a hearing date on its pending motion.

Kindest regards,

Paul

Paul Harrill

Partner

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Columbia, South Carolina 29201

main 803-799-9800

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[Web](#)

The information contained in this email is intended for the individual or entity above. If you are not the intended recipient, please do not read, copy, use, forward or disclose this communication to others; also, please notify the sender by replying to this message, and then delete this message from your system. Thank you.

From: Keith Munson <keith.munson@rimonlaw.com>

Sent: Wednesday, August 31, 2022 1:14 PM

To: 'Hayes, J. Mark Law Clerk (Zachary Turner)' <mhayeslc@sccourts.org>; Harrill, Paul <PHarrill@burr.com>; Klett III, William <wklett@burr.com>; 'Montecalvo, Michael' <michael.montecalvo@wbd-us.com>

Cc: 'Hayes, J. Mark' <mhayesj@sccourts.org>

Subject: RE: Poly-Tech v. Composite ; 2019CP4600051; Proposed Order - Updated

[EXTERNAL EMAIL]

Dear Judge Hayes: The case did not settle at mediation on Friday (August 26), so I am attaching an updated version of the Proposed Partial Summary Judgment Order. It adjusts the date to September, fixes a typo or two, and adds a few clarifying words/changes. Attached should be a redlined version. There are only 7 changes, mostly, just a word here and there. If the redlines are not showing, I would be happy to send a PDF version.

Very truly yours, Keith Munson.

Keith Munson | Partner

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keith.munson@rimonlaw.com

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From: Keith Munson

Sent: Tuesday, June 14, 2022 11:38 AM

To: 'Hayes, J. Mark Law Clerk (Zachary Turner)' <mhayeslc@sccourts.org>; 'Harrill, Paul' <PHarrill@burr.com>; 'Klett III, William' <wklett@burr.com>; 'Montecalvo, Michael' <michael.montecalvo@wbd-us.com>

Cc: 'Hayes, J. Mark' <mhayesj@sccourts.org>

Subject: RE: Poly-Tech v. Composite ; 2019CP4600051; Proposed Order

Dear Judge Hayes: Attached is the Proposed Order on the Motion for Partial Summary Judgment. Composite ended up cancelling/postponing the mediation I referenced in my email below, but we did coordinate this morning to clarify one small point, but otherwise, they wanted me to let you know that "Defendant Composite Resources, Inc. had no input whatsoever in the drafting of the proposed order." If you need clarification on any point, please let us know.

Very truly yours, Keith Munson

P.S. If you prefer a different Word format, let me know.

Keith Munson | Partner

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Greenville, SC 29601
keith.munson@rimonlaw.com
<https://rimonlaw.com/team/keith-munson>

From: Keith Munson

Sent: Wednesday, June 8, 2022 3:17 PM

To: 'Hayes, J. Mark Law Clerk (Zachary Turner)' <mhayeslc@sccourts.org>; Harrill, Paul <PHarrill@burr.com>

Cc: Montecalvo, Michael <michael.montecalvo@wbd-us.com>; Klett III, William <wklett@burr.com>; Hayes, J. Mark <mhayesj@sccourts.org>

Subject: RE: Poly-Tech v. Composite ; 2019CP4600051; Proposed Order

Dear Judge Hayes: I will get to work on the proposed Order. In terms of coordinating the proposed Order with Defense counsel, we are going to mediate again on Monday and can discuss it with them there and get you a proposed Order on Tuesday. If you want a proposed Order before Tuesday, please let me know.

Very truly yours, Keith Munson.

Keith Munson | Partner

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<https://rimonlaw.com/team/keith-munson>

From: Hayes, J. Mark Law Clerk (Zachary Turner) <mhayeslc@sccourts.org>

Sent: Wednesday, June 8, 2022 12:11 PM

To: Keith Munson <keith.munson@rimonlaw.com>; Harrill, Paul <PHarrill@burr.com>

Cc: Montecalvo, Michael <michael.montecalvo@wbd-us.com>; Klett III, William <wklett@burr.com>; Hayes, J. Mark

<mhayesj@sccourts.org>

Subject: RE: Poly-Tech v. Composite ; 2019CP4600051;

Gentlemen

After reviewing the pleadings and materials and considering the arguments from our recent hearings, Mr. Munson is asked to prepare a proposed formal order for this Court's consideration. The proposed order should be prepared consistent with this email. However, this email should not be considered an exhaustive analysis of the legal foundation or factual background which forms the basis of this decision. The prepared order should contain a more thorough analysis. This Court will review Mr. Munson's proposed order and will edit it to reflect the Court's final decision. No ruling made by this Court is final until a formal ordered is signed by this Court and filed.

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

The defendant filed a memorandum in opposition to plaintiffs' motion asserting (1) the agreement (contract) must be construed as a whole and that the plaintiffs are picking and choosing a few terms that misconstrues the terms; (2) other provisions, including the termination clause, is contrary to plaintiffs' unreasonable construction which leads to the conclusion of an agreement that is perpetual in nature and never can be terminated; (3) that plaintiffs' reliance on extrinsic terms establishes that certain terms in the agreement are ambiguous establishes that the terms are unambiguous; and (4) if the agreement was not terminable as a matter of law pursuant to the Termination provision, then the agreement is, at best, ambiguous as to the terms for which Plaintiffs seek construction.

After conducting an initial hearing, this Court continued the matter to receive additional briefing and arguments. Prior to the second hearing, both sides filed additional memorandum in support of their respective positions. Both parties expanded discussion of the present matter by exploring in more detail the terms of the contract at issue in this case and the terms raised in the plaintiffs' motion. The defendant submitted its memorandum as a motion when submitting its memorandum to support its arguments for construction. No rule of civil procedure was referenced to the Court in the motion.

Based on the submissions and the arguments, Mr. Munson is asked to prepare an order granting his motion for partial summary judgment, finding that plaintiffs' have established, as a matter of law, that the defendant is contractually obligated to pay plaintiffs the amounts reflect in the contract on page 11 of 11 past the termination date. The termination of August 31, 2018, is uncontested. The date is most notably contained in the June 26, 2018, letter from Jonathan Bennett to Daniel Cedrone, President of Poly-Tech Industrials.

After the first hearing, the Defendant submitted its Motion and Memorandum For Contract Construction. After reviewing and considering the Defendant's memorandum and arguments, the most significant argument made by the Defendant that relates to this Court's present decision was that "Annex C" contains language that is "indefinite" and "unenforceable." The Defendant asserted that the terms "regular contract", "estate of Daniel P. Cedrone" and "project" are not defined within the written contract between the parties. Therefore, as asserted by the defendant, when a contract is indefinite and uncertain, it is unenforceable by a court. The defendant further asserted that when a contract term is indefinite, extrinsic evidence cannot supplement the description. Among other assertions, the defendant maintained that a court should not construe a contract where doing so the court would ascertaining the intentions of the parties by "mere guess and conjecture." The proposed order should state that this Court disagrees with the defendant's assertion that the language on page 11 of 11 is indefinite and unenforceable. The parties to the contract and lawsuit have an uncontested relationship of 20 years. The present contract is the only contract or agreement that has been offered to this Court that defined the relationship between these parties. The defendant's

argument isolates terms to avoid the parties' original intent by asserting these terms are "indefinite."

The proposed order should contain a brief discussion that SCRCR Rule 56 is the procedural vehicle by which the present motion has been presented to this Court. The standard of review should be discussed.

From an analytical position, this Court notes that the position advanced by the Defendant is that the last provision of Annex C is, as a matter of law, "indefinite" and thus legally unenforceable. Defendant's position is not that the provision is ambiguous and, thus subject to an alternative reasonable explanation of the parties' intent when the contract was formed. The Court views the defendant's position as meritless. This Court's view of the Defendant's position is supported by the testimony of Lisa Bennett to the effect that "as long Composite Resources is making the tourniquets Poly-Tech would get paid;" and other portions of her sworn testimony that it was the Defendant's intent that the plaintiffs would be paid as long as the product was produced, even if the plaintiffs did not sell the product. Even though the term "perpetual" has been used to describe this provision of the contract, the provision is not perpetual because it terminates once the product stops being produced and sold. This Court's role is not to determine whether the parties made wise business decisions when the contract was agreed upon. Notwithstanding, this provision as it is written does not make the provision unenforceable because it exists.

Nevertheless, simply because this Court has looked at the supplemental materials, it has done so to confirm (further support) its view of the contract's terms from the four (4) corners of the document and from the facts that are actually uncontested (genuinely in dispute) in this litigation. Thus, because supplemental materials were reviewed, no inference should be drawn that the contested material terms were ambiguous and needed further factual development to determine the intent of the parties at the time the contract was agreed upon.

The substantive law in the proposed order should reflect the general principles of Contract law as recited by both parties. These rules include the basic and cardinal rules that a court's role in interpreting a contract is to give legal effect to the intention of the parties with the primary objective to ascertain the parties' intent. Therefore, when reasonable, contracts should be construed so as to give effect and carry out the intentions of the parties. The Court's present decision is consistent with these foundational principles of contract interpretation.

Again, Mr. Munson is asked to prepare a proposed formal order. The present decision should not be as limiting Mr. Munson's ability to prepare an order that fully addresses this Court's decision. Given the approaching trial date, the Court is summarizing its position and analysis in an effort to aid in the development of the case for trial by the parties. The proposed order will be edited and revised once received. This email will be placed in form 4 for filing with the clerk's office. The form 4 filing is not a final decision. Again, this Court's decision is not final until the proposed order has been reviewed, edited and signed by this Court.

The Court looks forward to receiving the proposed expeditiously

Thank you all for your efforts and continued attention.

Mark Hayes

Zachary Turner
Judicial Law Clerk to the Honorable J. Mark Hayes II
180 Magnolia St.
Spartanburg, SC 29306
E-Mail: mhayeslc@sccourts.org
Phone: (864) 562-4146

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# EXHIBIT B

1 STATE OF SOUTH CAROLINA )  
2 COUNTY OF YORK ) COURT OF COMMON PLEAS NONJURY

3  
4 DANIEL P. CEDRONE AND POLY-TECH )  
INDUSTRIAL, INC. )  
5 ) TRANSCRIPT  
6 PLAINTIFFS, ) OF  
7 VS. ) RECORD  
8 COMPOSITE RESOURCES, INC., )  
9 DEFENDANT. ) 2019-CP-46-51

10 March 31<sup>st</sup>, 2022  
11 Spartanburg, South Carolina

12 B E F O R E:

13 THE HONORABLE J. MARK HAYES, II, JUDGE.  
14

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

16 KEITH MUNSON  
17 ESQ.  
Attorney for the Plaintiffs

18 PAUL D. HARRILL and WILLIAM Y. KLETT, III  
19 ESQ.  
20 Attorneys for the Defendant

21 PAMELA E. GREEN  
22 Circuit Court Reporter  
23  
24  
25

1 MR. MUNSON: January, yeah.

2 THE COURT: Any problem asking your client for emails  
3 on those?

4 MR. HARRILL: Only, only because I don't know what he  
5 said, Your Honor. I tried to listen. I don't know what all  
6 he's asking us to produce. I, I couldn't possibly write all  
7 that down. He talked for five minutes.

8 THE COURT: He did.

9 MR. HARRILL: Went in many different directions.

10 MR. MUNSON: Sorry.

11 I'll order the transcript and I'll, I'll give it to you  
12 if you -- if that helps.

13 THE COURT: Well, give us a nutshell of, of what -- of  
14 what it is that you're looking to obtain from the emails  
15 that involved Esposito, Bennett, and North American Rescue.  
16 Tell us once again.

17 MR. MUNSON: So for, for, for---

18 THE COURT: Okay. Let me ask it this way. Maybe this  
19 will be helpful.

20 Tell me what issues you believe those emails are gonna  
21 relate to that involve this litigation.

22 MR. MUNSON: Okay. They're gonna relate to whether or  
23 not my client did his job in terms of what he was asked for  
24 by Composite Resources as a sales representative by being  
25 involved with these individuals in product development,

## C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for York County, South Carolina, on the 31<sup>st</sup> day of March, 2022.

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

April 6<sup>th</sup>, 2022



PAMELA E. GREEN, Court Reporter

# EXHIBIT C



STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS

COUNTY OF YORK ) 2019-CP-46-00051

DANIEL P. CEDRONE AND  
POLY-TECH INDUSTRIAL,  
INC.,

Plaintiffs,

vs.

COMPOSITE ROUSOURCES,  
INC.

Defendants.

**Transcript of Record**  
(Virtual Motion Hearing)  
April 22, 2022

**B E F O R E:**

Honorable J. Mark Hayes  
York County, South Carolina

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

**VIA: WEBEX**

Keith Munson, Esquire  
Michael Montecalvo, Esquire  
**Attorneys for Plaintiff**

Paul Harrill, Esquire  
**Attorney for Defendant**

Kay H. Richardson  
**Circuit Court Reporter**

Cedrone, et al. v. Composite - 2019-CP-46-00051  
MOTIONS

41

1 how can you say discovery is not gonna take place when my  
2 prior rulings have not been complied with?

3 MR. MUNSON: When I get the prior statements of the  
4 witnesses, I'll begin to take depositions, Your Honor. You  
5 know, they tried -- they've been fighting -- they've been  
6 playing out the clock trying to cause us to take the  
7 depositions before we have the discovery responses. That's  
8 not the orderly fashion.

9 THE COURT: Your -- and your definition of prior  
10 statements or your definition of prior statements are the  
11 depositions given in the other litigation?

12 MR. MUNSON: Those would be -- and the trial testimony in  
13 those trials, and declarations that were provided, and any  
14 other -- I doubt they went around gathering written statements  
15 other than those, but, yes, Your Honor.

16 THE COURT: All right. Well, Mr. Harrill, he's got a  
17 substantial -- you've got to get those documents to him.

18 MR. HARRILL: Yes, sir. And we're doing that.

19 THE COURT: And I don't think you need to wait to order a  
20 transcript of what I say and what I rule during hearings as an  
21 excuse to delay efforts on getting that information to him. I  
22 think it's very wise that you do get that transcript because I  
23 like having those transcripts as well because, when I read  
24 them, it convinces me sometimes that people are not following  
25 my orders or not following my directives. And when I get

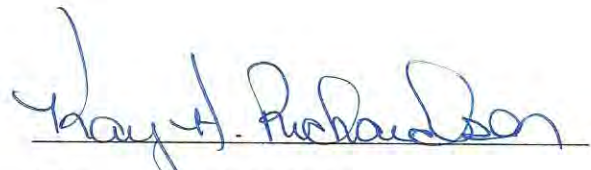
Cedrone, et al. v. Composite - 2019-CP-46-00051  
CERTIFICATE OF COURT REPORTER

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Daniel P. Cedrone, et al. v. Composite Resources, Inc., held virtually in the Court of Common Pleas for York County, on April 22, 2022.

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



Kay H. Richardson

Official Court Reporter

June 23, 2022.

# EXHIBIT A

Confidential Information to be submitted to  
Court in Connection with the Motion to Seal

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.

**DEFENDANT’S SUPPLEMENT IN  
SUPPORT OF MOTION TO  
RECONSIDER, CLARIFY, ALTER, OR  
AMEND ORDER GRANTING  
PLAINTIFFS’ MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Based on the recently taken November 4, 2022 deposition of Plaintiff Daniel P. Cedrone, Defendant Composite Resources, Inc. (“CRI”) respectfully submits this supplement in support of its Motion to Reconsider, Clarify, Alter, or Amend Order Granting Plaintiffs’ Motion for Partial Summary Judgment (the “Rule 59 Motion”).

**I. Cedrone’s November 4, 2022 deposition testimony reflects that the September 29 Order improperly accepted Plaintiffs’ interpretations of the “unambiguous” terms “account” and “project,” thus failing to give effect to “Phil Durango, L.L.C.”**

On October 10, 2022, CRI timely filed its Rule 59 Motion, asking the Court to reconsider the September 29, 2022 Order Granting Plaintiffs’ Motion for Partial Summary Judgment (the “September 29 Order”) on various grounds. Among other things, CRI’s Rule 59 Motion requested that the Court reconsider the rulings in the September 29 Order decreeing that CRI: (a) “was and is obligated to pay,”<sup>1</sup> (b) “for which this amount has not already been paid,”<sup>2</sup> (c) “for all Combat

<sup>1</sup> September 29 Order, 7, 18.

<sup>2</sup> *Id.* at 18.

Tourniquets which are sold in the future,”<sup>3</sup> and (d) “until the Combat Tourniquets stop being produced and sold.”<sup>4</sup> Plaintiff Daniel Cedrone’s deposition and his sworn testimony provide further support for CRI’s arguments that the Court should reconsider these determinations.

In making those rulings in the September 29 Order, the Court accepted Plaintiffs’ interpretation of the undefined terms “account” and “project” that appear in Annex C, subsection (C)(2):

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.

By ordering that CRI’s commission obligation continues “for as long as [CRI] is associated with the making and selling of C-A-T Tourniquets,” the Court accepted Plaintiffs’ interpretation as a matter of law that:

- “project” means the “sale of tourniquets by [CRI]”<sup>5</sup>; and
- “account” means “production project,” and that “if the production project continues, then the account continues,” even if Phil Durango, L.L.C. is no longer involved or associated with it.<sup>6</sup>

In the Rule 59 Motion briefing, CRI argued that “project” does not unambiguously mean the sale of C-A-T Tourniquets, **without regard to the involvement of Phil Durango, L.L.C.**, given the

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<sup>3</sup> *Id.* at 18.

<sup>4</sup> *Id.* at 7, 13, 17, 18.

<sup>5</sup> Pls.’ Mot. for Partial Summary Judgment as to Unambiguous Material Terms, 2, 14.

<sup>6</sup> Pls.’ Supp. Memo. in Support of Mot. for Partial Summary Judgment as to Unambiguous Material Terms, 9 (arguing that the “Phil Durango, L.L.C.” “account” continues even if “the owner of the intellectual property that controls the continuity of the project evolves, [or] a different name may be associated with the product”).

context of subsection (C)(2) being referenced under the “Phil Durango, L.L.C.” account and Plaintiffs’ admitted reason for the commissions—i.e., “for convincing Phil Durango to use CRI to assemble and mass-produce” the C-A-T.<sup>7</sup>

CRI further contended that Plaintiffs’ interpretation of “account”: (1) failed to give effect to “Phil Durango, L.L.C.”; and (2) ignored that commissions are only “for this account,” which is “Phil Durango, L.L.C.”<sup>8</sup> And since the “Phil Durango, L.L.C.” “account” ceased to exist in November 2014<sup>9</sup>—which is when CRI purchased the C-A-T IP from Phil Durango, L.L.C. for \$11 million and ceased assembling and mass producing the C-A-T for Phil Durango, L.L.C.—Poly-Tech had been entitled to no commission since that time.<sup>10</sup>

As CRI demonstrated in its Rule 59 Reply, Plaintiffs did not address the substance of CRI’s request for reconsideration relating to “account” and “project” in their response in opposition to the motion.<sup>11</sup> Most recently, in his November 4, 2022 deposition, Plaintiff Dan Cedrone made multiple dispositive admissions relating to how “account” and “project” were understood by the parties that support reconsideration of the September 29 Order and are the impetus for this supplement.

Cedrone’s recent testimony confirms that since 2004, and when the Agreement was signed in June 2005, CRI was: (1) manufacturing the C-A-T on behalf of Phil Durango, L.L.C., and (2)

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<sup>7</sup> Rule 59 Motion, 29–30 (“To determine that it is unambiguous that ‘project’ is the manufacture of tourniquets with or without the involvement of Phil Durango is to write ‘Phil Durango, L.L.C.,’ ‘special accounts,’ and ‘this account’ out of the Agreement.”).

<sup>8</sup> Rule 59 Motion, 27.

<sup>9</sup> Alternatively, Poly-Tech’s entitlement to commissions under Annex C, subsection (C)(2) ended when CRI paid off the \$11 million C-A-T IP purchase price in 2016.

<sup>10</sup> Rule 59 Motion, 27–28.

<sup>11</sup> Rule 59 Motion Reply, 3 (“Without the account, there is no ‘commission for this account.’”); (“Phil Durango, LLC’s involvement is essential to the existence and continuation of the ‘project.’”).

being paid by Phil Durango, L.L.C. for each C-A-T manufactured,<sup>12</sup> and Cedrone agreed that the Agreement had to be construed as of June 2005 (when the parties entered into it),<sup>13</sup> and that in June 2005 **there was no “project” without Phil Durango, L.L.C.:**

|    |                                      |
|----|--------------------------------------|
| 9  | Q. Without Phil Durango, there is no |
| 10 | tourniquet project --                |
| 11 | A. That would be true.               |
| 12 | Q. -- in June of 2005?               |
| 13 | A. Correct.                          |

Ex. A, 60.

Cedrone further agreed that in 2005, Poly-Tech could not manufacture, sell, or market the C-A-T without Phil Durango, L.L.C.:

Q. Poly-Tech had no—in 2005, Poly-tech had no right to manufacture, sell, or market the C-A-T tourniquet, correct?

A. Without Mark Esposito’s permission, yes.<sup>14</sup>

Cedrone also testified that: (1) it was “Phil Durango’s decision”—as the owner of the IP—who would be permitted to manufacture the C-A-T; (2) neither CRI nor Plaintiffs could manufacture the C-A-T without Phil Durango, L.L.C.’s approval; and (3) in 2005 it was Phil Durango, L.L.C.’s decision “alone” as to who could be involved in the manufacture and sale of the C-A-T<sup>15</sup>:

<sup>12</sup> **Exhibit A**, Daniel P. Cedrone Nov. 4, 2022 Depo. Tr. at 52.

<sup>13</sup> Ex. A, 28–29 (agreeing that contracts are to be interpreted “given the intentions of the parties at the time that they’re signed” and “the context in which the contract is signed”); *id.* at 57 (“Interpreted at the time it was signed, yes.”).

<sup>14</sup> *Id.* at 30.

<sup>15</sup> *Id.* at 33.



3           Q.    That's right.  It was at all times  
4           Mark Esposito's decision, Phil Durango's decision,  
5           who was going to manufacture the C-A-T tourniquet,  
6           correct?

7           A.    Yes.

8           Q.    Okay.  When this contract was signed  
9           in 2005, Composite Resources had no right -- no  
10          legal right to manufacture the C-A-T tourniquet,  
11          correct?

12          A.    Correct.

13          Q.    In 2005, when this contract was  
14          signed, neither you nor Poly-Tech nor Composite  
15          Resources had any ability or right to manufacture  
16          the tourniquet without Phil Durango's approval,  
17          correct?

18          A.    Correct.

19          Q.    It was Phil Durango and Phil  
20          Durango's -- alone's decision who was going to  
21          make money off of the C-A-T tourniquet in June of  
22          2005, correct?

23          A.    Yes.

As for the term “account,” Cedrone testified that in 2005, he was already selling CRI’s “manufacturing and design capabilities” to companies “that had a product they wanted to be made.”<sup>16</sup> Cedrone agreed that “if [CRI] and that company were able to come to an arrangement whereby that product would get made, then that company would become an account of [CRI].”<sup>17</sup> In fact, in 2005, Cedrone had been a sales representative bringing “accounts” to CRI for at least four years, long before he brought CRI the “Phil Durango, L.L.C.” account.

For example, Cedrone testified that when he “got” a company called “NIITEK” to use CRI to manufacture a military shield, what Cedrone “got was the NIITEK account,” and he was “paid a commission on that account.”<sup>18</sup> Likewise, Cedrone testified that he “brought the Phil Durango account to [CRI],” and then CRI “worked out a deal with Phil Durango for the manufacture of the tourniquets.”<sup>19</sup>

Importantly, Cedrone agreed that as of 2005, “when this contract was signed”<sup>20</sup>:

- “the project was [CRI] manufacturing tourniquets on behalf of Phil Durango”<sup>21</sup>;
- Poly-Tech was “getting paid a commission for having convinced Phil Durango to use CRI to assemble and mass produce the tourniquets”<sup>22</sup>;
- Plaintiffs and CRI “understood . . . that if Phil Durango at any time wanted to stop using CRI to manufacture the tourniquets, Phil Durango had every right to do that”<sup>23</sup>;
- “if Phil Durango decided in June of 2005 or June of 2006 or June of 2008 that Phil Durango wanted to take its manufacturing of the C-A-T tourniquet somewhere else,

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<sup>16</sup> *Id.* at 47-48.

<sup>17</sup> *Id.* at 48 (emphasis added).

<sup>18</sup> *Id.* at 49 (emphasis added).

<sup>19</sup> *Id.* at 49-50 (emphasis added).

<sup>20</sup> *Id.* at 47.

<sup>21</sup> *Id.* at 52 (emphasis added).

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> *Id.* (emphasis added).

that CRI and Poly-Tech would no longer be entitled to any money from the C-A-T tourniquet”<sup>24</sup>; and

- “if Mark Esposito had caused Phil Durango to stop being a customer account of [CRI] anytime prior to 2014, the Phil Durango tourniquet project would have been over.”<sup>25</sup>

Most importantly, Cedrone specifically agreed that Phil Durango, L.L.C. was a “necessary party” to the “project”<sup>26</sup>:

|    |                                                |
|----|------------------------------------------------|
| 14 | Q. That's right. And so, like I said,          |
| 15 | Phil Durango was a necessary party to the Phil |
| 16 | Durango tourniquet project, correct?           |
| 17 | A. I would say yes.                            |

Cedrone acknowledged that “[t]he tourniquet project necessarily involved Phil Durango in June of 2005.”<sup>27</sup>

Crucially, Cedrone admitted that as of 2005 when the parties entered into the Agreement, it was “never contemplated” that Plaintiffs would still be entitled to commissions under subsection (C)(2) if “the intellectual property of Phil Durango” was purchased and “somehow [the parties would] get to manufacture this tourniquet without Phil Durango.”<sup>28</sup> When asked whether the parties had ever had a conversation in which they had agreed that Plaintiffs would continue to be paid commissions even if the tourniquets were manufactured without Phil Durango’s involvement, Cedrone unequivocally stated, “In 2005 that was not contemplated”:

<sup>24</sup> *Id.* at 53 (emphasis added).

<sup>25</sup> *Id.* at 54 (emphasis added).

<sup>26</sup> *Id.* at 54.

<sup>27</sup> *Id.* at 55 (emphasis added).

<sup>28</sup> *Id.* at 55–56 (emphasis added).

Q. There was no conversation that said, “If, somehow, we get to manufacture this tourniquet without Phil Durango, I’m still going to get a commission”?

A. In 2005, that was not contemplated.<sup>29</sup>

Because it was not contemplated, it could not have been the intent of the parties in 2005 that Plaintiffs would continue to be entitled to commissions even if Phil Durango were no longer involved.

Cedrone further admitted that Phil Durango, L.L.C. was “the account” and “the project”<sup>30</sup>:

|    |                                        |
|----|----------------------------------------|
| 18 | Q. They were the account?              |
| 19 | A. Yes.                                |
| 20 | Q. It was Phil Durango's right to have |
| 21 | the tourniquets manufactured or not?   |
| 22 | A. They were the project, yes.         |

To continue manufacturing the C-A-T tourniquet, in 2014 CRI had to purchase the intellectual property from Phil Durango. Plaintiffs were not involved in facilitating that sale in any way—in fact, they knew nothing of it. And after CRI’s purchase of the C-A-T IP from Phil Durango, L.L.C. in 2014 for \$11 million, Cedrone admitted that Plaintiffs were no longer convincing Phil Durango, L.L.C. to use CRI to mass-produce and assemble the C-A-T, and in fact “weren’t involved at all” in the purchase or sale of the IP or in CRI being able to continue manufacturing the C-A-T:

Q. And you have been being paid a commission for having convinced Phil Durango to use CRI to assemble and mass produce the tourniquet, correct?

A. Yes.

---

<sup>29</sup> *Id.* at 55–56.

<sup>30</sup> *Id.* at 63.

Q. In 2014, you did not convince Phil Durango to continue to use CRI to mass produce and assemble the tourniquet, correct?

A. I had no idea that that was happening.

Q. That's right, sir. But you weren't involved at all. That's my point. Right?

A. That's correct.<sup>31</sup>

According to Cedrone, after Phil Durango, L.L.C. sold the C-A-T IP to CRI, Phil Durango, L.L.C. “exited the scene.”<sup>32</sup> Accordingly, after CRI purchased the C-A-T IP, Plaintiffs were “no longer convincing Phil Durango of anything,” and the “project” was over:

|    |                                                    |
|----|----------------------------------------------------|
| 9  | Q. Mark Esposito was no longer making              |
| 10 | decisions about who was going to manufacture the   |
| 11 | tourniquet, and you were no longer convincing Phil |
| 12 | Durango of anything, correct?                      |
| 13 | A. At that point, I would agree.                   |

Cedrone's deposition testimony conclusively establishes that Phil Durango, L.L.C. was essential to the “project” because without Phil Durango there would be no project:

Q. We know that as of the date the contract was signed, Phil Durango—without Phil Durango, there were no tourniquets, correct?

A. If there were no tourniquets, there'd be no project.<sup>33</sup>

In sum, Annex C, subsections (C)(1) & (2) identify two special accounts as exceptions to the regular commission rates otherwise provided for in the 2005 agreement. One of the special

<sup>31</sup> *Id.* at 111-12 (emphasis added).

<sup>32</sup> *Id.* at 113.

<sup>33</sup> *Id.* at 222 (emphasis added).

accounts is “Phil Durango, L.L.C.” And “Commission for this account is to continue . . . for as long as project continues.” When CRI purchased the C-A-T IP from Phil Durango L.L.C. for \$11 million, Phil Durango L.L.C. was dissolved, and there was no more “Phil Durango L.L.C.” account. The “project” ended, as did the commission obligation.

Cedrone’s recent deposition testimony demonstrates that in 2005 when the Agreement was signed, “Phil Durango L.L.C.” was the “account,” and that without Phil Durango, L.L.C., there was no “project,” but the September 29 Order fails to account for the fact that Phil Durango L.L.C. is essential to a proper construction of those terms. At minimum, Cedrone’s recent deposition testimony constitutes more than a scintilla of evidence and provides additional support for CRI’s arguments that:

1. “account” cannot be interpreted as a matter of law in a vacuum as a “production project” without reference to Phil Durango, L.L.C.; and
2. “project” cannot be interpreted as a matter of law simply as the “sale of tourniquets by [CRI],” when the parties undisputedly considered Phil Durango L.L.C. to be a necessary part of the “project,” and without whom there would be no “project.”

**II. Cedrone’s testimony also confirms that liability cannot be appropriately fixed by the September 29 Order because Plaintiffs collected \$7 million in C-A-T commissions notwithstanding their breaches of the Agreement’s Article II conflict-of-interest and competition provisions by developing, patenting, and marketing a competing tourniquet.**

The September 29 Order decrees that “for as long as [CRI] is associated with the making and selling of C-A-T Tourniquets, [CRI] was and is obligated to pay” Annex C, subsection (C)(2) commissions. Importantly, and as referenced in CRI’s Rule 59 Motion briefing, these appear to be unqualified, absolute, liability-fixing determinations<sup>34</sup> that are not subject to or conditioned upon any modifications, defenses, or counterclaims.

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<sup>34</sup> Reply, 20.

In the Rule 59 Motion, CRI cited the “no conflict of interest” and non-compete obligations imposed by Article II of the Agreement.<sup>35</sup> CRI explained that Plaintiffs’ *pre-August 2018 termination* breaches of Article II by developing, patenting, and marketing a competing tourniquet called the “HALO” excused any further performance by CRI as to its obligations under Annex C, subsection (C)(2).<sup>36</sup> Thus, Plaintiffs’ prior material breaches rendered erroneous the September 29 Order’s unconditional decrees that CRI “was and is obligated to pay” Plaintiffs commissions, and that the obligation will continue “for as long [CRI] is associated with the making and selling of C-A-T Tourniquets” and “for all [C-A-Ts] which are sold in the future.”<sup>37</sup>

In his recent deposition, Cedrone made several admissions that support CRI’s arguments regarding Plaintiffs’ prior material breaches. Cedrone admitted that:

- The Agreement’s provision that his appointment as a CRI sales representative was “on the terms and conditions hereinafter set forth” means that the following “terms and conditions” were “like prerequisites to the contract”<sup>38</sup>;
- “those conditions became an obligation” of Plaintiffs<sup>39</sup> when the Agreement was signed;
- If Plaintiffs violated those conditions, “then you’re not complying with the Agreement,” and that would be “a breach”<sup>40</sup>;
- The Agreement’s “first condition” was Article II’s “Acceptance of Appointment provision where it says that Poly-Tech may not have a conflict of interest with CRI”<sup>41</sup>;
- If Poly-Tech had disclosed a conflict of interest prior to June 2005, “there’s no way this contract would have been signed” because Article II “was a prerequisite, a condition”<sup>42</sup>;

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<sup>35</sup> Rule 59 Motion, 9, 11–13.

<sup>36</sup> *Id.* at 12.

<sup>37</sup> September 29 Order, 18–19 (emphasis added).

<sup>38</sup> Ex. A, 25–26.

<sup>39</sup> *Id.* at 26.

<sup>40</sup> *Id.* at 26.

<sup>41</sup> *Id.* at 26–27.

<sup>42</sup> *Id.* at 28.

- “anytime after this contract was signed, if Poly-Tech would have developed a conflict of interest . . . then Poly-Tech wouldn’t have been in compliance with the Agreement”<sup>43</sup>;
- CRI’s “interest” was “to manufacture and sell . . . as many tourniquets as it could”<sup>44</sup>;
- It would not be in CRI’s interest to have “any alternative to the C-A-T tourniquet available”<sup>45</sup>;
- “developing a competing tourniquet to the C-A-T tourniquet would be a conflict of interest with [CRI]”<sup>46</sup>;
- Plaintiffs “having a trademark on an alternative tourniquet” would not be in CRI’s interest<sup>47</sup>;
- Plaintiffs “[m]arketing a tourniquet other than the C-A-T tourniquet is not in [CRI]’s interest” and would be “a conflict of interest”<sup>48</sup>;
- Plaintiffs “market[ing] a tourniquet that is meant to unseat the C-A-T tourniquet” would “be a conflict of interest”<sup>49</sup>;
- Phil Durango’s owner Mark Esposito “wouldn’t have let [Plaintiffs] anywhere near the C-A-T tourniquet” had he known Plaintiffs were “going to go patent a different tourniquet as an alternative”<sup>50</sup>; and
- “[I]f [CRI] would have known that [Plaintiffs] had patented an alternative tourniquet, trademarked an alternative tourniquet, tried to market an alternative tourniquet, [CRI] would not have paid [Plaintiffs] anymore because [Plaintiffs would] have been not in compliance with this agreement.”<sup>51</sup>

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<sup>43</sup> *Id.* at 28

<sup>44</sup> *Id.* at 9, 21 (Cedrone agreeing that it “was indeed [CRI]’s intention and it was Phil Durango’s intention” to “[m]ake and sell as many of the [C-A-T] tourniquets as they could”).

<sup>45</sup> *Id.* at 22.

<sup>46</sup> *Id.* at 17.

<sup>47</sup> *Id.* at 18–19.

<sup>48</sup> *Id.* at 19.

<sup>49</sup> *Id.* at 19 (emphasis added).

<sup>50</sup> *Id.* at 67.

<sup>51</sup> *Id.* at 68.



Cedrone further admitted that he and his “partners in the HALO”—a competing tourniquet—knew “how much” the “different distributors” of the C-A-T paid for it<sup>52</sup> because Cedrone told them<sup>53</sup>:

|    |                                                   |
|----|---------------------------------------------------|
| 9  | Q. Right. So what Poly-Tech did is                |
| 10 | Poly-Tech took the information that they got from |
| 11 | CRI, gave it to Dan Cedrone, and then Dan Cedrone |
| 12 | passed that information along to William Cannon   |
| 13 | and William Carson, correct? And the HALO folks,  |
| 14 | right?                                            |
| 15 | A. I suppose so.                                  |

When asked whether that constituted a conflict of interest for Poly-Tech while it was receiving C-A-T commissions, Cedrone “disagree[d].”<sup>54</sup> However, Cedrone subsequently acknowledged that CRI would not “want [Plaintiffs] to be making another tourniquet to take up the—whatever sales might go to CRI.”<sup>55</sup>

After acknowledging that Poly-Tech “makes the HALO tourniquet,”<sup>56</sup> Cedrone was confronted with e-mail correspondence from March 11, 2018—i.e., pre-August 2018 termination of

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<sup>52</sup> *Id.* at 100

<sup>53</sup> *Id.* at 104.

<sup>54</sup> *Id.* at 104.

<sup>55</sup> *Id.* at 189.

<sup>56</sup> *Id.* at 190.

*the 2005 Agreement*—between himself and his “partners in the HALO,” William Carson and William Cannon.<sup>57</sup> In that correspondence, one of Cedrone’s HALO partners stated the “goal” of the HALO—to “unseat” the C-A-T<sup>58</sup> and make the HALO “a household name”<sup>59</sup>:

|    |                                                         |
|----|---------------------------------------------------------|
| 15 | Q. Sir, your partner in HALO is saying he               |
| 16 | wants to <b>unseat</b> such well-entrenched tourniquets |
| 17 | as the C-A-T, right?                                    |
| 18 | A. He says: Appealing to a civilian                     |
| 19 | market represents a viable alternative.                 |
| 20 | Q. If we are unable to <b>unseat</b> the C-A-T.         |
| 21 | <b>Which is his goal. He says it right</b>              |
| 22 | <b>there --</b>                                         |
| 23 | A. <b>Right.</b>                                        |

In his deposition, Cedrone tried to place the blame for these obvious conflicts of interest and improper C-A-T competition on his HALO partners, but Cedrone’s April 18, 2018 e-mail correspondence showed his active participation in breaching Article II.

First, contrary to his prior insistence in his deposition that the HALO did not compete with the C-A-T, Cedrone was forced to admit that he specifically referenced the C-A-T as a “competitive product”<sup>60</sup> to his HALO partners in 2018 while being paid C-A-T commissions:

<sup>57</sup> *Id.* at 191–92; **Exhibit B**, March 11, 2018 e-mail from Will Cannon.

<sup>58</sup> Ex. A, 193; Ex. B.

<sup>59</sup> Ex. A, 194; Ex. B.

<sup>60</sup> Ex. A, 197; **Exhibit C**, April 18, 2018 e-mail from D. Cedrone.

9 Q. And when you say "competitive  
10 products," you were talking about the C-A-T  
11 because those are the dollar amounts that you put  
12 below. They're C-A-T dollar amounts.

13 A. Yes.

14 Q. And so every time in this deposition  
15 when you told us it's not a competing product, you  
16 used words on April 18th, 2018, that were exactly  
17 the opposite of that.

18 You said it was a competitive product,  
19 right? That's what you wrote?

20 A. By "competitive," I meant that it --  
21 it's not a viable tourniquet for the military.  
22 It's not approved. It was designed to occlude  
23 blood flow, and it competes with all tourniquets.

Cedrone's feeble attempt to parse his own use of the term "competitive" failed:

Q. The C-A-T was a competitive product for the HALO. You wrote it right there, correct?

A. Uh-huh.<sup>61</sup>

In addition to admitting that the HALO competed with the C-A-T, Cedrone admitted that he appropriated CRI's distributor pricing information that he "wouldn't have known" if he was

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<sup>61</sup> *Id.* at 197–98.

not “associated with the C-A-T”<sup>62</sup> in order to make his own, alternative tourniquet competitive to the C-A-T. And when Cedrone was asked whether his HALO partner Will Cannon’s question—“Would the U.S. military pay less for the HALO compared to the C-A-T under this model?”—was a conflict of interest, Cedrone responded: “I don’t know.”<sup>63</sup> But then Cedrone himself responded to Cannon: “We will assure that the military gets a better deal than their current one,” which Cedrone admitted meant “the HALO compared to the C-A-T.”<sup>64</sup>

Cedrone further admitted that while he was continuing to receive C-A-T commissions from CRI, he sent a HALO marketing representative to an NRA dinner with Poly-Tech manufactured prototypes of the HALO, all to promote the HALO<sup>65</sup>:

|    |                                                  |
|----|--------------------------------------------------|
| 14 | Q. Sir, you wanted to market the HALO to         |
| 15 | the people at the NRA so that people would want  |
| 16 | the HALO, right?                                 |
| 17 | A. He wanted to show them.                       |
| 18 | Q. And you wanted it to be shown. That's         |
| 19 | why you gave it to him?                          |
| 20 | A. I gave him some samples, yes.                 |
| 21 | Q. Because you wanted it shown at the            |
| 22 | NRA. I don't need to go through the emails with  |
| 23 | you to show you asking him to take it to the NRA |
| 24 | so that you can show it, do I?                   |
| 25 | A. He wanted to, yes.                            |
| 1  | Q. And you wanted him to?                        |
| 2  | A. Yes.                                          |

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<sup>62</sup> *Id.* at 198.

<sup>63</sup> *Id.* at 199.

<sup>64</sup> *Id.* at 199–200; Ex. C.

<sup>65</sup> *Id.* at 202–03.

In fact, in May 2018—again, while receiving millions of dollars in C-A-T commissions from CRI—Cedrone was engaged with third parties in developing a “distribution and marketing strategy” for the HALO as “the logical successor to the world’s leading tourniquet system, the C-A-T”<sup>66</sup>.

|    |                                                    |
|----|----------------------------------------------------|
| 1  | Q. Okay. What it says under "Background            |
| 2  | and Challenge" is it says: HALO is the logical     |
| 3  | successor to the world's leading tourniquet        |
| 4  | system, the C-A-T, and is also developed by the    |
| 5  | original C-A-T engineer, Dan Cedrone.              |
| 6  | That's what they wrote after talking               |
| 7  | to you, right?                                     |
| 8  | A. Well, they -- they talked to me just            |
| 9  | to the point where they found out that a HALO --   |
| 10 | the HALO was in development, but he created all of |
| 11 | this on his own without my participation.          |
| 12 | Q. Sir, you talked to him about the HALO,          |
| 13 | right?                                             |
| 14 | A. Yes.                                            |
| 15 | Q. Yes. And after you talked to him                |
| 16 | about the HALO, what he wrote was: HALO is the     |
| 17 | logical successor to the world's leading           |
| 18 | tourniquet system, the C-A-T, and is also          |
| 19 | developed by the original C-A-T engineer, Dan      |
| 20 | Cedrone.                                           |
| 21 | Right?                                             |
| 22 | A. That's what he wrote.                           |

---

<sup>66</sup> *Id.* at 207–08.

In fact, those same HALO distribution and marketing materials touted “the benefit of over a decade and a half of learning since the C-A-T was first introduced” as contributing to the HALO’s “significantly improved functionality, efficiency, and ‘time to tourniquet.’”<sup>67</sup> Cedrone admitted that he even went so far as to prepare a video presentation “that showed the HALO competing with the C-A-T in time-to-tourniquet.”<sup>68</sup>

According to Cedrone, at least as early as August 3, 2017, when he contacted his soon-to-be HALO partners, he had decided to have an alternative tourniquet to the C-A-T.<sup>69</sup> But Cedrone and his HALO partner Carson—who had previously toured CRI C-A-T manufacturing subject to a CRI non-disclosure agreement—had already been talking about an alternative tourniquet “for years.”<sup>70</sup>

Cedrone admitted that he and Poly-Tech were “participants” in the “idea” to “come up with a tourniquet that would beat or unseat the C-A-T,”<sup>71</sup> using Poly-Tech employees, Poly-Tech resources, Poly-Tech’s building, and Poly-Tech’s machinery.<sup>72</sup> And all the while, Plaintiffs were receiving millions of dollars in C-A-T commissions pursuant to the Agreement<sup>73</sup>:

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<sup>67</sup> *Id.* at 208–09.

<sup>68</sup> *Id.* at 209.

<sup>69</sup> *Id.* at 212–13.

<sup>70</sup> *Id.* at 213.

<sup>71</sup> *Id.* at 214.

<sup>72</sup> *Id.* at 215.

<sup>73</sup> *Id.* at 216.

12                   Q.    Sir, there was a contract in place  
13                   that you were under and getting paid under,  
14                   correct?

15                   A.    Yes.

16                   Q.    You got paid \$7 million.  And during  
17                   the period of time that you were being paid  
18                   \$7 million, you designed an alternative  
19                   tourniquet, correct?

20                   A.    Yes.

From August 2017 to August 2018, while being paid \$7 million in C-A-T commissions under the Agreement in just that year, Cedrone and Poly-Tech:

- “got a trademark on an alternative tourniquet”;
- “filed a patent for an alternative tourniquet”;
- “made prototypes for . . . the tourniquet that was going to unseat the C-A-T”;
- “made bulletins, for example, that showed the HALO tourniquet next to the C-A-T tourniquet”;
- “gave the C-A-T distribution pricing” to their HALO partners to “come up with a competitive price to the C-A-T”; and
- “made training videos of how to use a competitive tourniquet.”<sup>74</sup>

Crucially, Cedrone admitted that certainly as of the time of his November 4, 2022 deposition, “there’s no question that right now Poly-Tech is manufacturing HALO tourniquets, marketing

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<sup>74</sup> *Id.*, 216–19.



HALO tourniquets on its website, [and] trying to sell HALO tourniquets in competition to the C-A-T.”<sup>75</sup>

In sum, Cedrone admitted that: (1) Article II’s non-compete and no-conflict-of-interest provisions are “prerequisites” or “conditions” to the Agreement; and (2) he and Poly-Tech were actively participating in developing, patenting, and marketing a competing tourniquet while they continued to receive \$7 million in C-A-T commissions. Moreover, Cedrone admitted that in 2005, Article II’s no conflict-of-interest provision and Annex C, subsection (C)(2) were added to the Agreement *at the same time*:

Q. [T]here was a trade, right? You—right? There was a trade?

A. Explain “trade” to me.

Q. Well, you wanted this, Annex C. You wanted this written down.

A. Yeah.

\*\*\*\*\*

Q. You do see how the 2005 contract is different than the 2001 contract with respect to Article II, right?

A. Yes.

Q. Okay. Excuse me.

So when you went to Composite and said, “I want my commission written down,” what [CRI] did was they changed Article II to add all this stuff about conflict of interest and you not competing with their core products, correct?

A. I see the difference in text, yes.

Q. Yes, sir. And these two things happened at the same time, right?

A. Yes.<sup>76</sup>

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<sup>75</sup> *Id.* at 220.

<sup>76</sup> *Id.* at 59–61.



Cedrone’s admissions in his deposition testimony provide further support that Article I, Article II, and Annex C of the Agreement should be read together and are consistent with the structure and language of the Agreement.

*First*, Article I provides for the “appointment” of Poly-Tech as CRI’s “Representative,” to be paid “at the commission rates defined in Annex C (hereinafter called ‘Commissions’) on the terms and conditions hereinafter set forth.” (emphasis added).

*Second*, Article II sets forth the “Acceptance of Appointment” terms and conditions that immediately follow Article I, and it expressly 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 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.

(emphasis added).

*Finally*, Annex C, entitled “Commissions,” provides in subsection (c)(2) that Commissions for the “Phil Durango L.L.C.” “special account” are to be paid at “[a] Commission rate of \$1.75 per tourniquet sold,” and that “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.”

Accordingly, one of the—if not the primary—“terms and conditions” that were requisite to Poly-Tech’s entitlement to “Commissions” at the “rates defined in Annex C” is that Poly-Tech refrain from “any activity or business transaction . . . which”:

1. “in any way competes with any operation of [CRI]”;

2. “may result in a conflict of interest”; or
3. “would otherwise adversely affect the proper discharge of [Poly-Tech’s] duties . . . , including, but not limited to the soliciting of orders for, or representing, or dealing in, any goods competing with any core products handled by [CRI].”

Importantly, subsection (c)(2) of Annex C includes two references to capital-C “Commissions,” defined in Article I and made payable on “the terms and conditions hereinafter set forth” in Article II. Thus, a “term and condition” to Poly-Tech’s entitlement to “Commissions” under subsection (c)(2) is that it “refrain from”: (1) competing with CRI, (2) having a conflict of interest with CRI, or (3) “soliciting . . . orders for, or representing, or dealing in, any goods competing with any core products handled by [CRI].”

The plain language of these three provisions in the Agreement, along with the parties’ intent, the nature of the circumstances surrounding the Agreement, and now Cedrone’s deposition testimony, all indicate that these promises were bargained-for exchanges such that Plaintiffs’ breach of Article II would excuse further performance by CRI as to its obligations under Annex C, subsection (c)(2). As a term and condition to Commissions under Annex C, subsection (c)(2), Plaintiffs agreed to refrain from competing with CRI, having a conflict of interest with CRI, or dealing in any goods competing with CRI’s core products—i.e., the C-A-T.

Even assuming that CRI breached the Agreement by lowering Plaintiffs’ C-A-T commissions in 2017 (and ignoring Cedrone’s April 17, 2027 written agreement to that reduction and subsequent acceptance of 16 months’ worth of commissions), Plaintiffs then had a choice: (a) keep performing Article II—by refraining from competing or having a conflict-of-interest with the C-A-T—and sue for commissions that would continue to accrue by CRI’s alleged breach, or (b) “call the whole deal off,” halting their own performance—by no longer refraining from competing or having a conflict-of-interest—and suing for damages incurred up to that point. *See* 13 R. Lord,

Williston on Contracts § 39:32, pp. 701–702 (4th ed. 2013) (“[W]hen a contract is breached in the course of performance, the injured party may elect to continue the contract or refuse to perform further”).

It is undisputed that Plaintiffs did not “call the whole deal off.” Instead, they elected to continue to receive \$7 million in commissions. But that meant Plaintiffs then had to keep performing under the Agreement—which required them to not have a conflict of interest or compete with CRI. Cedrone’s deposition testimony conclusively establishes Plaintiffs did have a conflict of interest. And because Plaintiffs stopped performing Article II of the Agreement no later than August 2017, they were not entitled to commissions under the Agreement after that point. And, because Plaintiffs wrongfully received those commissions by concealing their Article II breaches from CRI, CRI is entitled to recover those commissions.

### **CONCLUSION**

For the reasons set forth above and those set forth in Defendant’s Rule 59 Motion, Defendant CRI respectfully requests that the Court reconsider, clarify, alter, or amend the September 29, 2022 Order Granting Plaintiffs’ Motion for Partial Summary Judgment.

*Signature Page Follows*

Respectfully submitted,

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*Attorneys for Composite Resources, Inc.*

November 15, 2022

## **Exhibit A to Defendant's Supplement**

1 STATE OF SOUTH CAROLINA  
2 COUNTY OF YORK C.A. No. 2019-CP-046-00051  
3  
4 DANIEL P. CEDRONE AND :  
5 POLY-TECH INDUSTRIAL, INC., :  
6 Plaintiffs, :  
7 vs. :  
8 COMPOSITE RESOURCES, INC., :  
9 Defendant. :  
10  
11  
12

13 VIDEOTAPED DEPOSITION OF DANIEL P. CEDRONE

14 DATE TAKEN: Friday, November 4, 2022  
15 TIME BEGAN: 10:04 a.m.  
16 TIME ENDED: 3:53 p.m.  
17 LOCATION: Womble Bond Dickinson LLP  
18 One Wells Fargo Center  
19 301 South College Street, Suite 3500  
20 Charlotte, North Carolina 28202  
21 REPORTED BY: Cindy A. Hayden, RMR-CRR  
22 EVERYWORD, INC.  
23 P.O. Box 1459  
24 Columbia, South Carolina 29202  
25 803-212-0012

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1                   Q.    Okay.  So tell the members of the jury  
2                   what it means for a sales representative to have a  
3                   conflict of interest with the company that it  
4                   represents.

5                   A.    I guess it would mean that you would  
6                   be planning to hurt the company by doing something  
7                   that is designed to hurt them.

8                   Q.    Well, let's talk about it for a  
9                   second.

10                               What are the interests of Composite  
11                   Resources with respect to the manufacturing and  
12                   sale and distribution of tourniquets?

13                   A.    What is the interest?

14                   Q.    Yes.

15                   A.    Manufacture and sell tourniquets.  And  
16                   the interest would be to make money.

17                   Q.    Okay.  Would you agree that in 2005,  
18                   when this contract was signed, that it was  
19                   Composite Resources' interest to manufacture and  
20                   sell through distributors as many tourniquets as  
21                   it could?

22                   A.    In 2005, yes.

23                   Q.    Yeah.  And, really, every year,  
24                   correct?

25                   A.    I would imagine so, yes.



1       sir?

2               A.    No.  Is there good criticism?

3               Q.    I don't think so, sir.

4               A.    I think my dad has given me plenty of  
5       good criticism over my lifetime.

6               Q.    All right, sir.  Back to the question.

7               A.    Okay.

8               Q.    Public criticism of the C-A-T  
9       tourniquet is not in Composite Resources' interest  
10      in 2005, correct?

11              A.    If it was negative, I would agree.

12              Q.    Okay.  And talking about problems with  
13      the C-A-T tourniquet in 2005 or 2022 is not in the  
14      interest of Composite Resources, correct?

15              A.    I assume so.  I don't know how to  
16      answer that question.

17              Q.    Okay.  So because we now understand  
18      what the interests of Composite Resources were, we  
19      can agree, can't we, that developing a competing  
20      tourniquet to the C-A-T tourniquet would be a  
21      conflict of interest with Composite Resources,  
22      correct?

23              A.    If it competed.

24              Q.    Criticizing the C-A-T tourniquet would  
25      be -- negative criticism of the C-A-T tourniquet

1 would be a conflict of interest with -- with CRI,  
2 correct?

3 A. If the criticism wasn't true or  
4 wasn't bad.

5 Q. Well, any criticism that's going --  
6 that has the potential, even, to decrease the  
7 market share of the C-A-T tourniquet or to cause  
8 somebody to buy a different tourniquet is a  
9 conflict of interest with Composite Resources,  
10 correct?

11 A. I don't -- I don't know.

12 Q. We agreed, didn't we, sir, that just  
13 having more tourniquets on the market is a  
14 conflict of interest with Composite Resources,  
15 correct?

16 A. If it competed with them, yeah.

17 Q. Regardless of whether it competed with  
18 them, just having people know that there are  
19 alternatives that they could choose is a threat to  
20 the C-A-T tourniquet? It's a -- it's a conflict  
21 of interest with Composite Resources, correct?

22 A. If it competed.

23 Q. Having an alternative trademark or  
24 having a trademark on an alternative tourniquet,  
25 that's not in Composite Resources' interest,

1 correct?

2 A. I would guess not.

3 Q. Yeah. Marketing a tourniquet other  
4 than the C-A-T tourniquet is not in Composite  
5 Resources' interest? It's a conflict of interest,  
6 correct?

7 A. If it competed.

8 Q. Regardless if it competed, sir. Is it  
9 your position that unless -- well, let's try it  
10 this way.

11 If -- if someone markets a tourniquet  
12 that is meant to unseat the C-A-T tourniquet, for  
13 example, that that's the intention, that is or is  
14 not a conflict of interest with Composite  
15 Resources' interest?

16 A. If it was meant to unseat the C-A-T, I  
17 would assume that it would be a conflict of  
18 interest, yes.

19 Q. Okay. And if someone were to market a  
20 tourniquet that they intended to be an alternative  
21 to the C-A-T tourni -- tourniquet, that would be a  
22 conflict of interest with Composite Resources'  
23 interests, correct?

24 A. If it competed.

25 Q. What do you think "competed" means

1                   If I'm making a product and I want to  
2       sell and -- I want to market and sell, manufacture  
3       as many of them as I can, there being an  
4       alternative means that there's a possibility that  
5       somebody could make a decision to buy a different  
6       tourniquet, correct?

7           A.     If that was your intention, yes.

8           Q.     Yes.   And we understand -- we've  
9       agreed that that was indeed Composite Resources'  
10      intention and it was Phil Durango's intention,  
11      correct?

12          A.     Uh-huh.

13          Q.     Make and sell as many of the  
14      tourniquets as they could, right?

15          A.     Uh-huh.

16          Q.     Because they believed that it was the  
17      best tourniquet in the world, correct?

18          A.     I don't know that.

19          Q.     You don't know that Phil Durango --  
20      Mark Esposito thought his tourniquet was the best  
21      tourniquet that existed?

22          A.     You said "they," and now you're  
23      switching to Mark Esposito.

24          Q.     Well, let's --

25          A.     I would assume --

1 Q. I'm going to take them one at a time.

2 A. Okay.

3 Q. Okay. You don't know that Mark  
4 Esposito thought that the C-A-T tourniquet was the  
5 best tourniquet in the world?

6 A. He acted like that, yeah.

7 Q. Yes. And you know that Composite  
8 Resources believed that the C-A-T tourniquet was  
9 the best tourniquet in the world, correct?

10 A. I've never heard them say that. But  
11 yes, I would guess so.

12 Q. Okay. So, now, having any alternative  
13 to the C-A-T tourniquet available so that somebody  
14 could make an alternative choice is not in  
15 Composite Resources' interest, correct?

16 A. I would say yes to that.

17 Q. All right. And so marketing an  
18 alternative tourniquet, whether it competes or  
19 not, whatever your definition of "competition" is,  
20 having an alternative is not in the interest of  
21 Composite Resources, correct?

22 A. If they didn't have the opportunity to  
23 use it, I guess so.

24 Q. What does it mean for a provision of a  
25 sales representative agreement to be a condition

1 Q. Okay.

2 MR. KAESKE: Would you do me a favor?

3 And I'm told that I have one for you.

4 THE REPORTER: Okay.

5 MR. MUNSON: Do you have one for me?

6 MR. KAESKE: Yes, I do.

7 BY MR. KAESKE:

8 Q. Okay. Sir --

9 MR. KAESKE: Oops. Sorry, Cindy.

10 BY MR. KAESKE:

11 Q. Okay. We're looking at the June 1st,  
12 2005, sales representative agreement between  
13 Poly-Tech Industrial and Composite Resources,  
14 correct?

15 A. Uh-huh.

16 Q. And it's got your signature on it from  
17 June 8th, correct?

18 A. Yeah.

19 Q. Okay. And you see under I,  
20 "Appointment of Nonexclusive Sales  
21 Representative," where it says there that the  
22 representative is appointed, and then the last two  
23 lines: On the terms and conditions hereinafter  
24 set forth?

25 A. Uh-huh.

1 Q. Okay.

2 A. Uh-huh.

3 Q. That means that the terms and the  
4 conditions that are set forth hereinafter, those  
5 are like prerequisites to the contract, right?

6 A. Okay.

7 Q. Do you agree?

8 A. I got that, yeah.

9 Q. Okay. And -- and a condition that's a  
10 prerequisite to the contract means that if you  
11 don't satisfy that condition when you sign the  
12 contract, then you -- you don't get to have the  
13 contract, correct?

14 A. Because both parties would agree to  
15 that?

16 Q. Yes. And then once you have signed  
17 the contract, those conditions become an  
18 obligation, correct?

19 A. Yes.

20 Q. And if you violate the condition, then  
21 you're not complying with the agreement, correct?

22 A. I would agree with that.

23 Q. And we call that a breach, right?

24 A. Yeah.

25 Q. Okay. The first condition that's

1 listed there is the acceptance of appointment,  
2 right?

3 A. Yeah.

4 Q. And it's in the Acceptance of  
5 Appointment provision where it says that Poly-Tech  
6 may not have a conflict of interest with CRI,  
7 correct?

8 A. Yeah.

9 Q. Okay. And so if Poly-Tech had a  
10 conflict of interest with CRI prior to signing  
11 this agreement, the agreement would not have been  
12 signed? Nobody would have agreed if it was known  
13 that Poly-Tech had a conflict of interest,  
14 correct?

15 A. Well, my business already existed. I  
16 had customers, and there were several clients that  
17 we had in mutuality. So I don't know that there  
18 were certain relationships that I had prior to  
19 this agreement that may -- that it was signed  
20 anyway.

21 Q. So are you saying -- are you saying  
22 that Poly-Tech had a conflict of interest with  
23 Composite Resources when it signed this agreement?

24 A. No. I'm just saying that we had -- I  
25 had customers prior to this.



1 Q. Okay. But I'm asking you about  
2 conflicts of interest, sir.

3 A. Not to my knowledge.

4 Q. Okay. So if -- if Poly-Tech would  
5 have had a conflict of interest that it disclosed  
6 that everybody knew about --

7 A. Uh-huh.

8 Q. -- there's no way this contract would  
9 have been signed?

10 A. Sure.

11 Q. Because that was a prerequisite, a  
12 condition, correct?

13 A. Okay.

14 Q. And any time after this contract was  
15 signed, if Poly-Tech would have developed a  
16 conflict of interest and anybody would have found  
17 out about it, then Poly-Tech wouldn't have been in  
18 compliance with the agreement, correct?

19 A. True.

20 Q. All right. Now, the way that this  
21 contract came about was in 2005 -- hold on. Let  
22 me -- let me start over.

23 You probably understand by now in this  
24 lawsuit that the way contracts are interpreted is  
25 given the intentions of the parties at the time

1           that they're signed --

2           A.     Uh-huh.

3           Q.     -- and the context in which the  
4           contract is signed, correct?

5           A.     Uh-huh.

6           Q.     Please answer out loud.  Yes?

7           A.     Yes.

8           Q.     Thank you.  Just because, you know,  
9           she's typing it down.

10          A.     Okay.

11          Q.     Okay.  Let's talk a little bit about  
12          the intention in the context of the signing of  
13          this contract, okay?

14          A.     Okay.

15          Q.     All right.  When this contract was  
16          signed in June of 2005, Phil Durango, Mark  
17          Esposito, owned the intellectual property and the  
18          rights to the C-A-T tourniquet, correct?

19          A.     Correct.

20          Q.     Poly-Tech had no interest and no  
21          rights in the intellectual property of the C-A-T  
22          tourniquet, correct?

23          A.     Correct.

24          Q.     Poly-Tech had no ability to  
25          manufacture, market or sale -- sell the Phil

1 Durango C-A-T tourniquet in June of 2005, correct?

2 A. No.

3 Q. "No," not correct? Or "no," you

4 didn't?

5 A. I had the ability. I chose not to.

6 Q. I understand. Poly-Tech had no -- in

7 2005, Poly-Tech had no right to manufacture, sell,

8 or market the C-A-T tourniquet, correct?

9 A. Without Mark Esposito's permission,

10 yes.

11 Q. Correct. And the same is true for

12 Composite Resources. In June of 2005, Composite

13 Resources had no interest in the intellectual

14 property of the C-A-T tourniquet, correct?

15 A. We didn't even know about it.

16 Q. In June of 2005, sir?

17 A. Oh, yes, we did. I'm sorry. Yes.

18 Q. Okay.

19 A. Yeah.

20 Q. All of my questions right now are

21 going to be about June of 2005.

22 A. Okay.

23 Q. In June of 2005, Composite Resources

24 had no interest in the intellectual property of

25 the C-A-T tourniquet, correct?

1 the tourniquet, correct?

2 A. He would not have been obligated, no.

3 Q. That's right. It was at all times  
4 Mark Esposito's decision, Phil Durango's decision,  
5 who was going to manufacture the C-A-T tourniquet,  
6 correct?

7 A. Yes.

8 Q. Okay. When this contract was signed  
9 in 2005, Composite Resources had no right -- no  
10 legal right to manufacture the C-A-T tourniquet,  
11 correct?

12 A. Correct.

13 Q. In 2005, when this contract was  
14 signed, neither you nor Poly-Tech nor Composite  
15 Resources had any ability or right to manufacture  
16 the tourniquet without Phil Durango's approval,  
17 correct?

18 A. Correct.

19 Q. It was Phil Durango and Phil  
20 Durango's -- alone's decision who was going to  
21 make money off of the C-A-T tourniquet in June of  
22 2005, correct?

23 A. Yes.

24 Q. In June of 2005, you, sir, had no  
25 legal right to any compensation associated with

1 Q. Let me see if I can chase it.

2 The context of the relationship  
3 between you and Composite Resources in June of  
4 2005 when this contract was signed was that you  
5 were -- you were already a sales rep for Composite  
6 Resources, correct?

7 A. Yes, sir.

8 Q. And in your capacity as a sales rep  
9 for Composite Resources, what you did was you sold  
10 Composite Resources, correct?

11 A. I sold products that they were able to  
12 make, yes. I didn't sell Composite Resources.

13 Q. Well, to be fair, what you did was you  
14 sold to potential customers the idea that  
15 Composite Resources, a manufacturer, could  
16 manufacture their product --

17 A. Yes.

18 Q. -- that they wanted to have designed  
19 and manufactured, correct?

20 A. Yes.

21 Q. And so, in that way, what you were  
22 doing wasn't selling products. You were selling  
23 the manufacturing capabilities of Composite  
24 Resources, correct?

25 A. I was selling their capabilities --

1 manufacturing and design capabilities, yes.

2 Q. Yes. And -- and you were selling them  
3 to a -- to a company that had a product they  
4 wanted to be made, right?

5 A. Yes.

6 Q. And then if Composite Resources and  
7 that company were able to come to an arrangement  
8 whereby that product would get made, then that  
9 company would become an account of Composite  
10 Resources, correct?

11 A. Yes.

12 Q. And then Composite Resources would  
13 manufacture products on behalf of that company,  
14 right?

15 A. Correct.

16 Q. And then you would get paid a  
17 commission not for actually selling the product  
18 but for Composite Resources manufacturing the  
19 products on behalf of the customer account,  
20 correct?

21 A. I -- I not only sold their  
22 manufacturing and design capability, but I also  
23 participated in the sales of their product at  
24 times.

25 Q. But that wasn't your primary job.

1       There might have been some times when you promoted  
2       the products. There might have even been some  
3       times when you took orders for the products. But  
4       really your job was to get accounts for Composite  
5       Resources?

6             A.    It was one of the things, yeah.

7             Q.    Yeah. And like, for example, if you  
8       take the NIITEK account, they're the ones that  
9       made -- that got Composite to make the shield for  
10      the IED searcher?

11            A.    I got them to.

12            Q.    Right?

13            A.    I got them, yes.

14            Q.    Yes. And so what -- what you got was  
15      the NIITEK account, right?

16            A.    Yes.

17            Q.    And then you got paid a commission on  
18      that account, right?

19            A.    Correct.

20            Q.    And, likewise, what you got Composite  
21      Resources was the Phil Durango account, right?

22            A.    Along with helping them design it,  
23      yes.

24            Q.    You -- you got -- you brought the Phil  
25      Durango account to Composite Resources, correct?

1 A. Yes.

2 Q. And then Composite Resources worked  
3 out a deal with Phil Durango for the manufacture  
4 of the tourniquets, correct?

5 A. With my participation, yes.

6 Q. And -- and you got paid a commission  
7 for the account, correct?

8 A. For as long as they were associated  
9 with making tourniquets, yes.

10 Q. For as long as Phil Durango was  
11 associated with making tourniquets, correct?

12 A. Composite Resources.

13 Q. Okay. Let's -- let's start back  
14 further.

15 MR. KAESKE: Object as nonresponsive.

16 BY MR. KAESKE:

17 Q. You got paid a commission for the Phil  
18 Durango account, correct?

19 A. I got paid a commission for Composite  
20 Resources making tourniquets.

21 MR. KAESKE: Object as nonresponsive.

22 BY MR. KAESKE:

23 Q. You got paid a commission according to  
24 a contract after June of 2005, correct?

25 A. Yes.



1 A. Correct.

2 Q. And the account is listed right there,  
3 Phil Durango, LLC. It's underlined, correct?

4 A. Yes.

5 Q. Yes. And what it says is that the  
6 commission for the account will be paid as long as  
7 the project continues, correct?

8 A. Uh-huh.

9 Q. Please answer out loud.

10 A. Yes.

11 Q. Okay. Now, in June of 2005, when this  
12 contract was signed, the project was Composite  
13 Resources manufacturing tourniquets on behalf of  
14 Phil Durango, correct?

15 A. Yes.

16 Q. With Poly-Tech getting paid a  
17 commission for having convinced Phil Durango to  
18 use CRI to assemble and mass produce the  
19 tourniquets, correct?

20 A. Yes.

21 Q. And what was understood by both  
22 Poly-Tech and CRI in June of 2005 was that if Phil  
23 Durango at any time wanted to stop using CRI to  
24 manufacture the tourniquets, Phil Durango had  
25 every right to do that, correct?

1 A. Yes.

2 Q. And if Phil Durango decided in June of  
3 2005 or June of 2006 or June of 2008 that Phil  
4 Durango wanted to take its manufacturing of the  
5 C-A-T tourniquet somewhere else, that CRI and  
6 Poly-Tech would no longer be entitled to any money  
7 from the C-A-T tourniquet, correct?

8 A. I would assume that to be the case,  
9 yes.

10 Q. Phil Durango, at all times, because --  
11 at all times prior to 2014, Phil Durango was a  
12 necessary part of this project, correct?

13 A. What do you mean by "necessary"?

14 Q. Without Phil Durango prior to 2014,  
15 there was no Phil Durango tourniquet project,  
16 correct?

17 A. Well, Mark Esposito, if that's what  
18 you mean. I don't understand what you're saying.

19 Q. Where are we not understanding each  
20 other? Mark Esposito is --

21 A. Phil Durango.

22 Q. Yes, sir. And Phil Durango owned the  
23 intellectual property, right? You know this.

24 A. I -- I guess so. I --

25 Q. Yeah.

1 A. Mark or Phil. I don't know.

2 Q. Yeah. And so either way, if Mark  
3 Esposito had caused Phil Durango to stop being a  
4 customer account of Composite Resources anytime  
5 prior to 2014, the Phil Durango tourniquet project  
6 would have been over, correct?

7 A. I guess that would be true.

8 Q. Yeah. Prior to 2014, without Phil  
9 Durango, there were no tourniquets for Poly-Tech  
10 or Composite Resources, correct?

11 A. I don't know what 2014 has to do with  
12 it. But if Mark decided he wanted them made  
13 elsewhere, he could have.

14 Q. That's right. And so, like I said,  
15 Phil Durango was a necessary party to the Phil  
16 Durango tourniquet project, correct?

17 A. I would say yes.

18 Q. And so the understanding of the  
19 parties and the context of the parties when the  
20 agreement was signed on June 8th of 2005 was that  
21 if there was no Phil Durango, there would be no  
22 tourniquets, correct?

23 A. The understanding at the signing of  
24 2005 was that as long as Composite Resources is  
25 making tourniquets and associated with making

1           tourniquets that I would get a commission.

2                       MR. KAESKE: Object as nonresponsive.

3           BY MR. KAESKE:

4                       Q.    Sir, you didn't answer my question.

5                       The tourniquet project necessarily  
6 involved Phil Durango in June of 2005, correct?

7                       A.    Yes.

8                       Q.    All right. You never had a  
9 conversation with anyone from CRI that said --  
10 where you said or they said, "Even if, somehow, we  
11 get to keep manufacturing this tourniquet without  
12 Phil Durango, you're going to still pay me a  
13 commission"? That conversation never took place  
14 like that, correct?

15                      A.    Not just like that. But yes, it  
16 did -- it did.

17                      Q.    Sir, you -- you've testified  
18 previously under oath that it was never  
19 contemplated that anybody would buy the  
20 intellectual property of Phil Durango, correct?

21                      A.    It was not contemplated. That's  
22 right.

23                      Q.    That's right. And because it wasn't  
24 contemplated, it wasn't on anybody's mind.

25                      There was no conversation that said,

1 "If, somehow, we get to manufacture this  
2 tourniquet without Phil Durango, I'm still going  
3 to get a commission"?

4 A. In 2005, that was not contemplated.

5 Q. That's right. And what the agreement  
6 says is that the commissions are going to continue  
7 for as long as the project continues, correct?

8 A. The "project" being the manufacture of  
9 tourniquets.

10 Q. No, sir. The "project" being --  
11 "project" being manufacturing of tourniquets on  
12 behalf of Phil Durango --

13 A. That's your --

14 Q. -- with Poly-Tech --

15 A. That's your interpretation.

16 Q. Well, sir -- and it was your  
17 interpretation at the time, too, right?

18 A. "As long as the project continues" was  
19 as long as they are making tourniquets, I get a  
20 commission, dead or alive.

21 MR. KAESKE: Objection.

22 Nonresponsive.

23 BY MR. KAESKE:

24 Q. Okay. Now, you wanted the -- sorry.

25 You're familiar with the 2001 contract

1       it, correct?

2               A.    Well, it's a signed contract by both  
3 parties.

4               Q.    Yes, sir.   And -- and there was a  
5 trade, right?   You -- right?   There was a trade?

6               A.    Explain "trade" to me.

7               Q.    Well, you wanted this, Annex C.   You  
8 wanted this written down?

9               A.    Yeah.

10              Q.    That's what you asked for, correct?

11              A.    We both asked for it.   We both  
12 negotiated that.

13              Q.    Sir, you may have both negotiated it,  
14 but you didn't both ask for it.   You asked for it,  
15 correct?

16              A.    Initially, yes.

17              Q.    Yes.   You wanted this written down.

18                     Jon didn't come to you, Lisa didn't  
19 come to you, CRI didn't come to you and say, "You  
20 know what we really need, Mr. Cedrone?   We need  
21 the -- your commission for the C-A-T tourniquet  
22 written down."

23                     They didn't -- they didn't do that.  
24 That was you.

25              A.    I don't -- I don't remember.   But it

1 was -- it's designed for the benefit of both.

2 They got to make it, and I got a commission and  
3 they got profit from it.

4 Q. Yes, sir. But it wasn't this  
5 agreement that gave them the ability to make the  
6 tourniquet. It was Phil Durango that gave them  
7 the ability to make the tourniquet, right?

8 A. I don't know.

9 Q. Without Phil Durango, there is no  
10 tourniquet project --

11 A. That would be true.

12 Q. -- in June of 2005?

13 A. Correct.

14 Q. All right. Now, so when -- when you  
15 got this Annex C that benefits you, CRI got this  
16 Article Number II that says "acceptance of  
17 appointment," correct?

18 A. What contract are you on?

19 Q. I'm looking at the 2005 contract.

20 A. Okay.

21 Q. And you see how it's different from  
22 the 2001 contract --

23 A. Yes.

24 Q. -- with respect to Article II?

25 A. Okay.

1 Q. You do see how the 2005 contract is  
2 different than the 2001 contract with respect to  
3 Article II, right?

4 A. Yes.

5 Q. Okay. Excuse me.

6 So when you went to Composite and  
7 said, "I want my commission written down," what  
8 Composite did was they changed Article II to add  
9 all this stuff about conflict of interest and you  
10 not competing with their core products, correct?

11 A. I see the difference in text, yes.

12 Q. Yes, sir. And those two things  
13 happened at the same time, right?

14 A. Yes.

15 Q. And -- and that, Article II,  
16 Acceptance of Appointment, that benefited everyone  
17 in the project?

18 Well, maybe not you. But it  
19 benefitted Phil Durango and it benefitted CRI,  
20 correct?

21 A. I don't know.

22 Q. Well, let's think about it.

23 We already talked about what CRI's  
24 interests were, correct? Make as many tourniquets  
25 as possible, not have competition to the extent



1 A. You talked about that, yes.

2 Q. And you agreed with me, correct?

3 A. For the most part.

4 Q. Yes. If -- still on the context of  
5 June of 2005, in June of 2005, do you know how  
6 many tourniquets had been -- CRI had made on  
7 behalf of Phil Durango?

8 A. I don't know about on behalf of Phil  
9 Durango, and I do not know how many they made at  
10 that time.

11 Q. Well, CRI was manufacturing  
12 tourniquets on behalf of Phil Durango, right?

13 A. They were making tourniquets for Phil  
14 Durango, yes.

15 Q. Yes.

16 A. I don't know what you mean by "on  
17 behalf of." But they were the client, yes.

18 Q. They were the account?

19 A. Yes.

20 Q. It was Phil Durango's right to have  
21 the tourniquets manufactured or not?

22 A. They were the project, yes.

23 Q. And Phil Durango -- do -- so do you  
24 know how many tourniquets had been manufactured  
25 for the Phil Durango project as of June of 2005?

1 the knowledge you had about that C-A-T tourniquet,  
2 and you'd have said, "You know what, I've got a  
3 better idea. I'm going to go patent a different  
4 tourniquet as an alternative," and Mark Esposito  
5 found out about it, he wouldn't have let you get  
6 anywhere near the C-A-T tourniquet, correct?

7 A. That's probably true.

8 Q. Yes. And if you would have gone and  
9 you would have trademarked another tourniquet,  
10 Mark Esposito wouldn't have let you get anywhere  
11 near the C-A-T tourniquet?

12 A. 2005, that's true.

13 Q. Or 2006 or 2008, right?

14 A. He would not have been -- he would not  
15 have approved that.

16 Q. That's right.

17 And, by the way, he would have  
18 also if -- if you had an agreement with -- let's  
19 say it's 2008 and you had an agreement with  
20 Composite Resources, and then you would have gone  
21 out and patented an alternative tourniquet or you  
22 would have gone out and trademarked an alternative  
23 tourniquet.

24 Mark Esposito would have probably told  
25 Composite Resources, "You're not paying Dan

1 Esposito -- Dan Cedrone or Poly-Tech, or I'm not  
2 letting you manufacture my tourniquet anymore,"  
3 right?

4 A. That sounds reasonable.

5 Q. Yeah. And, likewise, whether it be  
6 2005 or 2008, if Composite Resources would have  
7 known that you had patented an alternative  
8 tourniquet, trademarked an alternative tourniquet,  
9 tried to market an alternative tourniquet, they  
10 would not have paid you anymore because you'd have  
11 been not in compliance with this agreement,  
12 correct?

13 A. It didn't happen, so I can't really  
14 speculate on that. But, hypothetically, correct.

15 Q. Back a little bit on Mark Esposito.  
16 When you met Mark Esposito, you met  
17 Mark Esposito as Poly-Tech, correct?

18 A. Yes.

19 Q. Mark Esposito came to you over the  
20 Poly-Tech website, right?

21 A. What do you mean by "came" to me?

22 Q. I don't know. That's the way you  
23 first -- that's the way you were first introduced  
24 to Mark Esposito was over the Poly-Tech website,  
25 right?

1       tourniquet or any other tourniquet, you didn't get  
2       it from your commission reports, correct?

3               A.     Correct.

4               Q.     Now, the information that's on your  
5       commission reports, which is how much NAR pays for  
6       the tourniquets, that is not publicly available  
7       information, is it?

8               A.     I don't know.

9               Q.     That's private proprietary,  
10      confidential information, isn't it?

11              A.     I didn't consider it that. I  
12      considered it my pay stub.

13              Q.     Yes, sir. You -- you may not have  
14      considered it that, but the amount of money that  
15      any manufacturer pays its distributor is a  
16      confidential amount for almost any manufacturer,  
17      correct?

18              A.     I don't know that to be true.

19              Q.     You -- you know that -- from your  
20      confidential pay stubs, you know that CRI charged  
21      different distributors different amounts of money,  
22      correct?

23              A.     My pay stubs, I told you, I didn't  
24      consider confidential. I even had what they were  
25      paying Mark Esposito. His information was on my

1       it would be okay that you disclosed that  
2       information?

3               A.     No.

4               Q.     No.  And, by the way, you said, "It  
5       was on my pay stub."

6                     When you say "my pay stub," you mean  
7       Poly-Tech's pay stub, right?

8               A.     Yes.

9               Q.     Right.  So what Poly-Tech did is  
10       Poly-Tech took the information that they got from  
11       CRI, gave it to Dan Cedrone, and then Dan Cedrone  
12       passed that information along to William Cannon  
13       and William Carson, correct?  And the HALO folks,  
14       right?

15              A.     I suppose so.

16              Q.     Yeah.  And that's -- and that's  
17       Poly-Tech failing to comply with its  
18       nonconflict-of-interest obligations under the  
19       contract that it was getting paid some \$500,000 a  
20       month for, correct?

21              A.     I disagree.

22              Q.     Okay.  Now, where were we?  Oh.

23                     In 2012, when the price of the  
24       tourniquet was reduced, it was reduced by -- do  
25       you remember how much it was?  \$2.50?

1 A. Yes.

2 Q. -- right?

3 And Mr. Esposito agreed as well,  
4 correct?

5 A. Yes.

6 Q. Okay. And that's how things happened,  
7 right?

8 A. On -- on that occasion, yes.

9 Q. Okay. Now, in 2014, Mr. Esposito  
10 decided that, frankly, he'd made enough money off  
11 the tourniquet, and he was not adding anything  
12 additional to the tourniquet project and he was  
13 going to sell the tourniquet, correct?

14 A. I did not know that at the time.

15 Q. But that's -- but you know now that  
16 that's what happened?

17 A. Today, yeah.

18 Q. Yeah. And -- and you were not offered  
19 the opportunity to purchase the tourniquet --

20 A. That's correct.

21 Q. -- right?

22 Now, at that point, CRI had been  
23 manufacturing the tourniquet for 10 years, right?

24 A. Yes.

25 Q. And you had been being paid a

1 commission for having convinced Phil Durango to  
2 use CRI to assemble and mass produce the  
3 tourniquet, correct?

4 A. Yes.

5 Q. In 2014, you did not convince Phil  
6 Durango to continue to use CRI to mass produce and  
7 assemble the tourniquet, correct?

8 A. I had no idea that that was happening.

9 Q. That's right, sir. But you weren't  
10 involved at all. That's my point. Right?

11 A. That's correct.

12 Q. Yeah. And, as a matter of fact, in  
13 order to continue mass producing and assembling  
14 the tourniquet, CRI had to pay \$11 million, right?

15 A. I have no idea.

16 Q. You've been involved in this lawsuit,  
17 right?

18 A. Yeah. But that was not information  
19 that I had access to.

20 Q. Until this moment that I just told  
21 you?

22 A. I did not know that.

23 Q. Okay. Now you know.

24 A. Another tidbit. Thank you.

25 Q. You, sir -- that was the end of you

1 convincing Phil Durango to use CRI to assemble and  
2 mass produce the tourniquet, correct?

3 A. If he sold the company to -- the IP to  
4 Jonathan, yeah, he exited -- he exited the scene.

5 Q. Yeah. Phil Durango was no longer part  
6 of the project, correct?

7 A. Mark Esposito was no longer part of  
8 the project.

9 Q. Yeah. And Phil Durango was no longer  
10 part of the project?

11 A. Well, on my published commission  
12 reports, it still had Phil Durango as the account.

13 Q. Until the intellectual property was  
14 paid off?

15 A. I don't know.

16 Q. Huh? That's what I didn't --

17 A. It had "PD" all the way down.

18 Q. What?

19 A. It had "PD" all the way down as the  
20 account.

21 Q. Until when?

22 A. I don't know. I didn't --

23 Q. Until 2016, when the -- when the  
24 intellectual property was owned, correct?

25 A. I don't remember.



1 A. I didn't say that.

2 Q. Well, the only reason it would have to  
3 be secret is because, for some reason, the HALO  
4 interests and the Composite Resources interests  
5 are in conflict --

6 MR. MUNSON: Objection.

7 BY MR. KAESKE:

8 Q. -- right? Otherwise, Composite  
9 Resources would get to see it all. Right?

10 MR. MUNSON: Objection.

11 BY MR. KAESKE:

12 Q. Right?

13 A. I'm not sure.

14 Q. You and the HALO folks have  
15 conflicting interests with CRI when it comes to  
16 tourniquets; isn't that right?

17 A. I don't believe that's the case.

18 Q. You think that CRI wants you to be  
19 making another tourniquet to take up the --  
20 whatever sales might go to CRI?

21 A. No.

22 Q. Yeah. So there's no question that as  
23 of today and as of whenever those emails are that  
24 you're -- you've exchanged to each other that have  
25 to be highly confidential, attorneys' eyes only,

1 Poly-Tech and you have a conflict --

2 MR. MUNSON: Objection.

3 BY MR. KAESKE:

4 Q. -- with CRI, correct?

5 A. Poly-Tech doesn't.

6 Q. Poly-Tech makes the HALO tourniquet,  
7 doesn't it?

8 A. Poly -- yes.

9 Q. Yeah. And Poly-Tech gave you the  
10 information, like the proprietary sales dollars  
11 numbers to distributors, that you gave to Carson  
12 and Cannon, right?

13 A. That was my personal information.

14 Q. No, it was Poly-Tech's information.  
15 The checks went to Poly-Tech.

16 A. It was Poly-Tech's published receipt  
17 for their money.

18 Q. Yes. That you then gave -- that you  
19 then gave to Dan Cedrone that Dan Cedrone then  
20 gave to Carson and Cannon, correct? Right?

21 A. Yes.

22 Q. Poly-Tech paid for "Modern Marvels,"  
23 right?

24 A. Yes.

25 Q. "Modern Marvels" is a marketing piece

1           that promotes the HALO tourniquet, right?

2           A.    It promoted Poly-Tech.

3           Q.    It -- even better.  It promotes  
4 Poly-Tech with respect to the HALO tourniquet,  
5 right?

6           A.    It was just showing its manufacturing  
7 capability.

8           Q.    Yes.  And it's manufacturing a  
9 tourniquet that's meant to compete with and,  
10 frankly, unseat the C-A-T tourniquet, correct?

11          A.    Absolutely not.

12          Q.    That's not what Mr. Cannon said in his  
13 email to you, is it?

14          A.    I don't know what he -- I forget what  
15 he said.  I don't know what he said.

16          Q.    Well, let me show it to you.  And then  
17 we'll take your break.

18                   (CEDRONE EXHIBIT 9, Emails, top one  
19 dated 3/12/18, Subject:  Options, Bates  
20 PolyTech 006641-43, was marked for  
21 identification.)

22 BY MR. KAESKE:

23          Q.    I've marked as Exhibit Number 9 a set  
24 of emails.  The first one on the top is from you,  
25 Dan Cedrone, on March 12th, 2018, to William

1 Cannon and copying Dr. Carson.

2 Do you see that?

3 A. Uh-huh.

4 Q. And you see the email from March 11th,  
5 2018, from Mr. Cannon --

6 A. Uh-huh.

7 Q. -- writing to: Gentlemen? That's you  
8 and Dr. Carson, correct?

9 A. Yes.

10 Q. And you see, in the first thick  
11 paragraph under the "MAHEM," where it says: I  
12 think appealing to a civilian market represents a  
13 viable alternative to the military?

14 And when he's saying "viable  
15 alternative to the military," he means as an  
16 alternative to the C-A-T, right?

17 A. I don't see the word "C-A-T" in here.

18 Actually, "such as C-A-T and SOF-T."

19 Q. Yeah. All you have to do is keep  
20 reading.

21 When he says "viable alternative to  
22 the military," he means viable alternative to the  
23 C-A-T, right?

24 A. That's his opinion, yeah.

25 Q. Well -- yeah. He's HALO, right?

1           A.    He's a partner, yes.

2           Q.    Yeah.  And what he's saying is:  I  
3    think appealing to a civilian market represents a  
4    viable alternative to the military if we're unable  
5    to seat -- unseat such well-entrenched tourniquets  
6    as the C-A-T.

7                   Right?

8           A.    That's what it says.

9           Q.    That's your partner's goal.  That's  
10   HALO's goal, correct?  Right?

11          A.    The HALO was developed to contribute  
12   to a faster method by which to occlude bleeding.

13                   MR. KAESKE:  Object as nonresponsive.

14   BY MR. KAESKE:

15          Q.    Sir, your partner in HALO is saying he  
16   wants to unseat such well-entrenched tourniquets  
17   as the C-A-T, right?

18          A.    He says:  Appealing to a civilian  
19   market represents a viable alternative.

20          Q.    If we are unable to unseat the C-A-T.  
21                   Which is his goal.  He says it right  
22   there --

23          A.    Right.

24          Q.    -- right?

25                   And then he goes on to say:  If we can

1 make our product a household name.

2 That's what the HALO goal is, to make  
3 that tourniquet a household name, right?

4 A. That's what he wrote.

5 Q. And in the month that he wrote that to  
6 you, you were paid \$526,000 by the C-A-T, right?

7 A. I don't know.

8 Q. Sir, how is this going to go for you?  
9 Were you going to just keep taking \$500,000 a  
10 month from the C-A-T while you tried to unseat it  
11 and make your new tourniquet a household name?

12 A. It doesn't compete with the C-A-T.

13 Q. Sir, were you going to keep taking  
14 money from C-A-T while you were trying to unseat  
15 it as long as you could?

16 A. I wasn't trying to unseat it.

17 Q. You were in a partnership that was  
18 trying to unseat it. You, sir, yourself said: We  
19 will assure that the military gets a better deal  
20 than the one they're getting now.

21 And that was the C-A-T, wasn't it?

22 Sir? Please answer my question.

23 A. Could you repeat it?

24 Q. You were in a partnership that was  
25 trying to unseat the C-A-T. And you yourself,

1 A. Off my published sheet.

2 Q. It wasn't published anywhere. It was  
3 given to you, sir, in confidence by CRI, correct?

4 A. No. It was my receipt of pay.

5 Q. It was Poly-Tech's receipt of pay that  
6 Poly-Tech is now giving to William Carson and  
7 William Cannon, right?

8 A. Yes.

9 Q. And when you say "competitive  
10 products," you were talking about the C-A-T  
11 because those are the dollar amounts that you put  
12 below. They're C-A-T dollar amounts.

13 A. Yes.

14 Q. And so every time in this deposition  
15 when you told us it's not a competing product, you  
16 used words on April 18th, 2018, that were exactly  
17 the opposite of that.

18 You said it was a competitive product,  
19 right? That's what you wrote?

20 A. By "competitive," I meant that it --  
21 it's not a viable tourniquet for the military.  
22 It's not approved. It was designed to occlude  
23 blood flow, and it competes with all tourniquets.

24 Q. The C-A-T was a competitive product  
25 for the HALO. You wrote it right there, correct?

1 A. Uh-huh.

2 Q. Yes. And then when you list -- what  
3 you list here is you list three different  
4 distributors. These are the C-A-T distributors?

5 A. Uh-huh.

6 Q. Fenton U.K., you wouldn't have known  
7 that information without being associated with the  
8 C-A-T, right?

9 A. True. Well, actually, that's not  
10 true. It's on their website.

11 Q. How much they pay for the --

12 A. No, the distributor.

13 Q. No. But you wouldn't have known the  
14 dollar amounts?

15 A. True.

16 Q. And Promoteq, you wouldn't have known  
17 those dollars amounts if you weren't associated  
18 with the C-A-T, right?

19 A. True.

20 Q. And -- and one thing that's probably  
21 true as well is that Fenton and Promoteq, they  
22 don't know these prices for the other, right?

23 A. Probably true. I don't know.

24 Q. And so if William Cannon or William  
25 Carson were to take this information and go give



1       it to Promoteq or give it to Fenton, now Fenton  
2       knows what the C-A-T is getting paid to a  
3       different distributor. That's not in the C-A-T's  
4       interest, is it?

5             A.    It's a hypothetical situation.

6             Q.    It's a conflict of interest is what it  
7       is, isn't it, sir? Correct?

8             A.    Well, I considered it nonconfidential  
9       information, so...

10            Q.    This information -- this is -- this  
11       email is Poly-Tech taking CRI's confidential  
12       information, giving it to someone else so that  
13       they can price a competitive product. And that's  
14       a conflict of interest, right?

15            A.    I disagree.

16            Q.    Right. And what happened is Will  
17       Cannon responded that evening saying: This looks  
18       reasonable. Would the U.S. military pay less for  
19       the HALO compared to the C-A-T under this model?

20                    Do you see that?

21            A.    Uh-huh.

22            Q.    That's a conflict of interest, right?

23            A.    I don't know.

24            Q.    Because your response is: We will  
25       assure that the military gets a better deal than

1           their current one.

2                       Correct?

3           A.    That's what I wrote.

4           Q.    And that's your response to the  
5           question about the U.S. military paying less for  
6           the HALO compared to the C-A-T, correct?

7           A.    Yes.

8           Q.    And that's a conflict of interest,  
9           correct?

10          A.    Well, at this time I don't believe  
11          that's the case because the contract had already  
12          been breached.

13                       MR. KAESKE:  Objection.

14                       Nonresponsive.

15          BY MR. KAESKE:

16          Q.    We'll get to that in a second, sir.  
17          Answer this question first:  Is it a conflict of  
18          interest?

19                       You saying that you'll be sure -- "We  
20          will assure that the military gets a better deal  
21          than their current one" is a -- in response to the  
22          question of would the U.S. military pay less for  
23          the HALO compared to the C-A-T, that is a conflict  
24          of interest with CRI, correct?

25          A.    I'm not sure about that.  I don't

1 know.

2 Q. And that month, April of 2018, you,  
3 sir, were paid \$311,000 on sales of the C-A-T,  
4 right?

5 A. Okay.

6 MR. KAESKE: You asked for a break.

7 Let's go ahead and take it.

8 THE VIDEOGRAPHER: Off record at  
9 2:57 p.m.

10 \* \* \*

11 (Whereupon, there was a recess in the  
12 proceedings from 2:57 p.m. to 3:13 p.m.)

13 \* \* \*

14 THE VIDEOGRAPHER: On record at  
15 3:13 p.m.

16 BY MR. KAESKE:

17 Q. Sir, it was and is your and your  
18 partners' goal with HALO to compete with the C-A-T  
19 tourniquet, correct?

20 A. It was -- no, it's not correct.

21 Q. I'm going to show you -- well, first  
22 I'm going to ask you: Who's Myrmidon Partners?

23 A. That is an individual. I believe  
24 Andrew Whitney --

25 Q. And --

1 A. -- is his name.

2 Q. And Andrew Whitney, that's the guy you  
3 engaged -- "you," Dan Cedrone, "you,"  
4 Poly-Tech engaged Andrew Whitney to act on behalf  
5 of the HALO tourniquet, correct?

6 A. I did not.

7 Q. You sent, for example, Andrew Whitney  
8 to the NRA dinner carrying a bunch of C-A-Ts [sic]  
9 with him, right?

10 A. His aunt is the vice president of the  
11 NRA. He was going there on his own.

12 Q. Yeah. And you sent him there with  
13 the -- with the HALO tourniquets so that he could  
14 show it -- show it off to people at the NRA,  
15 right?

16 A. I don't remember that, but I may have  
17 sent him some prototypes.

18 Q. Yeah. Prototypes that Poly-Tech  
19 made -- correct?

20 A. Yes.

21 Q. -- were given to Andrew Whitney so  
22 that he could go to the NRA dinner and show --  
23 promote the HALO tourniquet, right?

24 A. To get feedback on it, yeah.

25 Q. Yeah. In the hopes that people would

1 buy it, right?

2 A. Yes.

3 Q. Market it, right?

4 A. He wanted to get feedback on it.

5 Q. Well, yeah. And you wanted him to get  
6 the feedback, right?

7 A. Yes.

8 Q. Yeah, you and your partners. That's  
9 part of the conflict of interest with CRI. You  
10 wanted to market the HALO to the people at the  
11 NRA?

12 A. We were just trying to get feedback as  
13 to efficiency and -- it wasn't even a product yet.

14 Q. Sir, you wanted to market the HALO to  
15 the people at the NRA so that people would want  
16 the HALO, right?

17 A. He wanted to show them.

18 Q. And you wanted it to be shown. That's  
19 why you gave it to him?

20 A. I gave him some samples, yes.

21 Q. Because you wanted it shown at the  
22 NRA. I don't need to go through the emails with  
23 you to show you asking him to take it to the NRA  
24 so that you can show it, do I?

25 A. He wanted to, yes.

1           Number 11.

2                       Prior to receiving this email on  
3           May 18th from Chris Burton, which is a HALO  
4           proposal for distribution and marketing strategy,  
5           you, Dan Cedrone, had conversations with either  
6           Mr. Burton or Mr. Whitney about the HALO, correct?

7                       A.    Yes.

8                       Q.    Yes.  And based on those  
9           conversations, they made a proposal to you for the  
10          distribution and marketing of the HALO, correct?

11                      A.    Correct.

12                      Q.    And in those conversations, what you  
13          told Mr. Burton and Mr. Whitney was that you  
14          wanted to have the HALO directly compete with the  
15          C-A-T tourniquet, correct?

16                      A.    Not to my knowledge.

17                      Q.    All right.  And you also told them  
18          that you were the engineer behind the C-A-T  
19          tourniquet, correct?

20                      A.    I did not.

21                      Q.    All right.  So let's look at this --  
22          this overview of distribution and marketing  
23          strategy.

24                               Do you see this?

25                      A.    Yes.

1           Q.    Okay.  What it says under "Background  
2           and Challenge" is it says:  HALO is the logical  
3           successor to the world's leading tourniquet  
4           system, the C-A-T, and is also developed by the  
5           original C-A-T engineer, Dan Cedrone.

6                     That's what they wrote after talking  
7           to you, right?

8           A.    Well, they -- they talked to me just  
9           to the point where they found out that a HALO --  
10          the HALO was in development, but he created all of  
11          this on his own without my participation.

12          Q.    Sir, you talked to him about the HALO,  
13          right?

14          A.    Yes.

15          Q.    Yes.  And after you talked to him  
16          about the HALO, what he wrote was:  HALO is the  
17          logical successor to the world's leading  
18          tourniquet system, the C-A-T, and is also  
19          developed by the original C-A-T engineer, Dan  
20          Cedrone.

21                     Right?

22          A.    That's what he wrote.

23          Q.    And he also wrote:  With the benefit  
24          of over a decade and a half of learning since the  
25          C-A-T was first introduced, HALO introduces

1 significantly improved functionality, efficiency  
2 and "time to tourniquet."

3 Right?

4 A. That's what he wrote.

5 Q. And then what you did, Poly-Tech, was  
6 a year or two later you made a video that showed  
7 the HALO competing with the C-A-T in  
8 time-to-tourniquet, right?

9 A. In -- in regard to efficiency, it  
10 is -- it is a competitive device.

11 Q. You had no question. You developed  
12 the HALO to be a competitor to the C-A-T. That's  
13 what it says right here, right?

14 A. For efficiency.

15 Well, this is not my writing.

16 Q. Yes, sir. You took this writing and  
17 you passed it along to your partners, didn't you?

18 A. Yes.

19 Q. And you said: Buckle up. Right?

20 A. Because it's ridiculous.

21 Q. No. You had --

22 A. Yes.

23 Q. Sir, you said "buckle it up" --  
24 "buckle up" before you'd ever even read it.

25 A. Because he is dramatic and



1 answer my question.

2 My question was: When did you decide  
3 that it was in your interest to develop an  
4 alternative tourniquet to the C-A-T?

5 A. I don't know that I ever --

6 Q. Simple question.

7 A. -- made that -- I know it's a simple  
8 question, but it's a -- it's a thought that I did  
9 not contemplate. Alls I did was want to protect  
10 the idea that was in development.

11 So the HALO proved itself to be more  
12 efficient in the manner of putting it on and  
13 saving lives. So with that in mind, we decided to  
14 patent it.

15 MR. KAESKE: Object as nonresponsive.

16 BY MR. KAESKE:

17 Q. When did you decide it was in your  
18 interest to have an alternative tourniquet to the  
19 C-A-T?

20 A. I'd say in and around the time that we  
21 filed for the patent.

22 Q. Well, it must have been sooner than  
23 that because in August -- on August 3rd of 2017,  
24 you called together Mr. Cannon and Mr. Carson and  
25 said you've got an opportunity for them, right?

1 A. Yes.

2 Q. Okay. So it was at least as early as  
3 August 3rd, 2017, you had an idea for an  
4 opportunity. And that opportunity was an  
5 alternative tourniquet to the C-A-T, right?

6 A. It was a -- it was an alternative  
7 tourniquet, yes.

8 Q. Yes. And -- and what -- and that  
9 decision, August 3rd, 2017, was preceded, meaning  
10 it happened before, that Mr. Cannon came to you  
11 and said, "Hey, let's make our own tourniquet,"  
12 right?

13 A. He asked me to make a more slimline  
14 tourniquet because the FBI wanted a more slimline  
15 tourniquet.

16 Q. Yes, sir, he did. And when did he do  
17 that?

18 A. I forget.

19 Q. But when he came and asked you,  
20 Dr. Carson had already been talking to you about  
21 making a new tourniquet, right?

22 A. For years, yeah.

23 Q. Yeah. And so then when Mr. --  
24 Dr. Carson was telling you to make a tourniquet  
25 that was an alternative to the C-A-T, Mr. Cannon

1        was telling you to make a tourniquet that was  
2        alternative to the C-A-T, and you decided you were  
3        going to have a tourniquet that was alternative to  
4        the C-A-T. And so you called them all together,  
5        right?

6                A.    To see if we could come up with a --  
7        with a more efficient tourniquet, yes.

8                Q.    Yeah. More efficient than the C-A-T.  
9        You were going to compete with the C-A-T?

10              A.    On the level of saving lives, yes.

11              Q.    On the -- on the level of selling  
12        tourniquets, right?

13              A.    It was just an idea back then. There  
14        was no product back then. It was just a group of  
15        ideas.

16                      MR. KAESKE: Object as nonresponsive.

17        BY MR. KAESKE:

18              Q.    And your idea was to come up with a  
19        tourniquet that would beat or unseat the C-A-T,  
20        correct?

21              A.    Not my words.

22              Q.    But your idea?

23              A.    I was a participant in it -- in the  
24        development of it, yes.

25              Q.    That's right. And Poly-Tech was, too.

1 Poly-Tech participated in the development of it?

2 A. Yes.

3 Q. Poly-Tech employees did?

4 A. Yes.

5 Q. Poly-Tech resources and the building  
6 and the machinery participated in it?

7 A. Yes.

8 Q. Yeah. As a matter of fact, from  
9 August 3rd of 2017 until August 31st of 2018, all  
10 the while that you were developing, prototyping,  
11 marketing the HALO tourniquet, Poly-Tech was paid  
12 \$7 million on the C-A-T, right?

13 A. I'm not sure.

14 Q. You don't know how much you were paid?

15 A. I don't know off the top of my head.

16 Q. You didn't have to do anything. You  
17 just had to not compete. You had to not have a  
18 conflict of interest. And you got paid \$7 million  
19 in one year, correct?

20 A. I did not think it was a conflict of  
21 interest.

22 Q. To go patent a different tourniquet  
23 that was designed to compete with the C-A-T, to be  
24 more efficient than the C-A-T, you didn't think  
25 that was a conflict of interest? Jon would have

1       been just fine with that, right?

2               A.     Jon was unresponsive and not returning  
3       any phone calls and trying to cancel orders.

4               MR. KAESKE:   Object as nonresponsive.

5       BY MR. KAESKE:

6               Q.     Sir, that's not what I asked you.  
7               You were under contract.   There was a  
8       contract.

9               A.     That he breached.

10              MR. KAESKE:   Object as nonresponsive.

11       BY MR. KAESKE:

12              Q.     Sir, there was a contract in place  
13       that you were under and getting paid under,  
14       correct?

15              A.     Yes.

16              Q.     You got paid \$7 million.   And during  
17       the period of time that you were being paid  
18       \$7 million, you designed an alternative  
19       tourniquet, correct?

20              A.     Yes.

21              Q.     You got a trademark on an alternative  
22       tourniquet, correct?

23              A.     Yes.

24              Q.     You filed for a patent on an  
25       alternative tourniquet, correct?

1 A. Yes.

2 Q. And while getting paid \$7 million, you  
3 went and got partners for an alternative  
4 tourniquet to unseat the C-A-T, saying -- says so  
5 your partners, right?

6 A. Says my partners.

7 Q. You -- Poly-Tech made prototypes for  
8 the -- while being paid \$7 million for the  
9 tourniquet that was going to unseat the C-A-T,  
10 correct?

11 A. Yes.

12 Q. Poly-Tech and you went and did  
13 marketing? You made bulletins, for example, that  
14 showed the HALO tourniquet next to the C-A-T  
15 tourniquet while you were being paid \$7 million  
16 under contract with the C-A-T, right?

17 A. I believe so, yes.

18 Q. You made -- "you," Poly-Tech, "you,"  
19 Dan Cedrone, gave out samples of the HALO to,  
20 like, 30 Marines so that they could go use it  
21 while you were getting paid \$7 million for the  
22 C-A-T, right?

23 A. I don't know about 30 Marines. Where  
24 did you come up with 30 Marines?

25 Q. You don't remember when the lieutenant

1 colonel from the Marines was going on the training  
2 expedition with 30 Marines, and they wanted  
3 samples of the HALO?

4 A. Yes.

5 Q. Yeah. You did that. You -- Poly-Tech  
6 made prototypes so that they could be given away  
7 to Marines, the number one source of purchases of  
8 the C-A-T, right?

9 A. No. It's Army, actually.

10 Q. It's the Department of Defense.

11 A. Okay.

12 Q. Right? Right?

13 A. Yes.

14 Q. Yes. While you were being paid by the  
15 C-A-T, right?

16 A. I don't know when we sampled those for  
17 testing.

18 Q. You gave the C-A-T distribution  
19 pricing to your partners so that you could come up  
20 with a competitive price to the C-A-T while you  
21 were being paid for the C-A-T, right?

22 A. I used my information, yes.

23 Q. You made training videos of how to use  
24 a competitive tourniquet while you were being paid  
25 by the C-A-T, right?

1 A. Yes.

2 Q. You personally went to the federal law  
3 enforcement training center to go show off the  
4 C-A-T -- I'm sorry -- to go show off the HALO, who  
5 had been using the C-A-T, right?

6 A. I don't remember that.

7 Q. You don't remember?

8 A. Law enforcement training center?

9 Q. Yeah. You went to the federal. You  
10 asked your partners, "Hey, do you think this is a  
11 good idea that I go to the federal law enforcement  
12 training center," folks that had been using the  
13 C-A-T, to show them the HALO tourniquet while you  
14 were being paid for the C-A-T?

15 A. I don't remember that.

16 Q. You -- in April of 2018, you sent  
17 Andrew Whitney to the NRA dinner with samples to  
18 show people of the HALO while you were being paid  
19 for the C-A-T, right?

20 A. I don't know the dates.

21 Q. You went and got a domain name and a  
22 website for a competing tourniquet while you were  
23 getting paid for the C-A-T, right?

24 A. No. The C-A-T -- the HALO did not  
25 compete --



1 Q. It was designed --

2 A. -- does not compete.

3 Q. It's designed to compete. That's what  
4 all your emails say.

5 A. It doesn't compete with it.

6 Q. Sir, we looked at Exhibit Number 11,  
7 where you said: Here's the pricing on competitive  
8 products.

9 That's what it means, to compete,  
10 right?

11 A. I understand that. But when you  
12 design something, you -- you don't design  
13 something that costs four or five times more than  
14 any other product in the same family class. So  
15 cost to manufacture is part of your design  
16 process.

17 MR. KAESKE: Object as nonresponsive.

18 BY MR. KAESKE:

19 Q. And there's no question that right now  
20 Poly-Tech is manufacturing HALO tourniquets,  
21 marketing HALO tourniquets on its website, trying  
22 to sell HALO tourniquets in competition to the  
23 C-A-T, correct?

24 A. That is correct.

25 Q. So we looked at the temporary

1 Q. We know that as of the date the  
2 contract was signed, Phil Durango -- without Phil  
3 Durango, there were no tourniquets, correct?

4 A. If there were no tourniquets, there'd  
5 be no project.

6 Q. Exactly. But without Phil Durango  
7 tourniquets, there's no tourniquets.

8 The project wasn't just making  
9 tourniquets. The project was making tourniquets  
10 for Phil Durango, correct?

11 It's okay. You can say it.

12 A. No.

13 Q. Yes. There was no --

14 MR. MUNSON: Objection.

15 BY MR. KAESKE:

16 Q. There was -- sir, there was no  
17 tourniquet other than the Phil Durango tourniquet,  
18 was there --

19 A. That's true.

20 Q. -- in 2005?

21 A. The project is for -- for as long as  
22 Composite Resources is associated with making  
23 tourniquets. That was the project, making  
24 tourniquets.

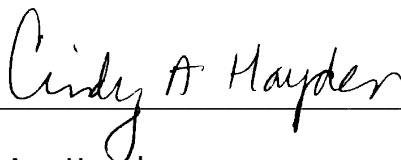
25 MR. KAESKE: Object as nonresponsive.

## 1 CERTIFICATE OF REPORTER

2 I, Cindy A. Hayden, Registered Merit  
3 Reporter and Notary Public for the State of North  
4 Carolina at Large, do hereby certify:

5 That the foregoing deposition was taken  
6 before me on the date and at the time and location  
7 stated on Page 1 of this transcript; that the  
8 deponent was duly sworn to testify to the truth,  
9 the whole truth and nothing but the truth; that  
10 the testimony of the deponent and all objections  
11 made at the time of the examination were recorded  
12 stenographically by me and were thereafter  
13 transcribed; that the foregoing deposition as  
14 typed is a true, accurate and complete record of  
15 the testimony of the deponent and of all  
16 objections made at the time of the examination to  
17 the best of my ability.

18 I further certify that I am neither  
19 related to nor counsel for any party to the cause  
20 pending or interested in the events thereof.  
21 Witness my hand, this 7th of November, 2022, at  
22 Concord, Cabarrus County, North Carolina.

23  
24  
25  


Cindy A. Hayden,  
Registered Merit Reporter  
Notary Public  
State of North Carolina at Large  
My Commission expires:  
April 7, 2027

## **Exhibit B to Defendant's Supplement**

## Message

**From:** Dan Cedrone [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A97A253F3CCC43EF818B507947FD0D03-DANC]  
**Sent:** 3/12/2018 11:08:05 AM  
**To:** Will Cannon [will.cannon@hotmail.com]  
**CC:** Dr. Carson [billyraycarson@yahoo.com]  
**Subject:** Re: Options

Going to try for halo first if that fails will step back a punt

Dan Cedrone  
 Poly-Tech industrial Inc.  
 13728 Statesville Road  
 Huntersville, NC 28078  
[Polytechindustrial.com](http://Polytechindustrial.com)

On Mar 11, 2018, at 22:38, Will Cannon <[will.cannon@hotmail.com](mailto:will.cannon@hotmail.com)> wrote:

Gentlemen,

First of all I am very excited and thankful to be at this point! Well done. We all need to get together and have a face to face soon. I apologize my schedule had been so inflexible.

Names of our invention:

I like HALO and if necessary Talon or BOA (nice Dan!) I also have some other suggestions for your consideration.

LIFE-Tourniquet  
 (Lever Initiated Field Expedient)

SAVE- Tourniquet  
 (Stop Arterial/Venus Exsanguination)

SABER-Tourniquet  
 (Stop All Bleeding from Extremity Rapidly)

And perhaps my favorite,

MAHEM- Tourniquet (pronounced mayhem)  
 (Mitigate All Hemorrhage) or  
 MAEHM (Mitigate All Extremity Hemorrhage )

I think appealing to a civilian market represents a viable alternative to the military if we are unable to unseat such well entrenched tourniquets such as the CAT and SOF-T While I certainly want our product in the hands of our brothers saving American service members all over the world, this would be a tall hill to climb.

If we can make our product a household name, un-intimidating and affordable to be in home first aid kits, active shooter kits, industrial kits etc we can grab a presently unsaturated market niche.

Agreed we need to set up our LLC sooner than later. What about "Trinity Products" since we all serve the Father, Son and Holy Spirit and, well there are three of us as well.

As far as our business plan goes I figure this will be a thing we will need to discuss ad nauseam given the



plethora of options, opportunities, factors etc. I can say that from my perspective I don't intent to quit my new gig as an SBI Agent for a while so my contributions to any future company will have to be more part time like and I don't want to ever misrepresent my intentions.

In the beginning I suggest we contract Poly-tech to produce our first batches and see where we go. While this will decrease our personal return, it also minimizes our personal risk and out of pocket overhead while we are in our infancy of a new tourniquet.

Once we start selling this product by the millions, I love the idea of our company putting veterans to work (disabled and otherwise) an build a mechanism to really impact our small part of the world in a meaningful way.

Many more thoughts to come.

Respectfully,

Will

Sent from my iPhone

On Mar 11, 2018, at 8:24 PM, Dan Cedrone <[DanC@polytechindustrial.com](mailto:DanC@polytechindustrial.com)> wrote:

Hi Guys,

Here are a few ideas to think about while we are away next week.

First; Names if we don't get HALO:

HALO: Hemorrhage Arresting Lever Operated

TALON:

BOA: Battlefield Occlusion Apparatus

We need to set up an LLC.

We need a name like: Bravo Products LLC

At that point we have options.

Option 1.

License the Halo out to an existing company.

Option 2.

Have it made by one company and sell them through another.

Option 3.

Have it made and sold by the same company.

Like Poly-Tech

Option 4.

Have it made and the sell them through distribution.

Like made at Poly-Tech and sold through a series of distributors.

Option 5.

We buy the raw materials through the LLC, supply them to an assembly company.

Could be a disabled vet assembly house.

Let's discuss all of our options.

*Thank You,*

*Dan*

*Dan Cedrone*

13728 Statesville Road  
Huntersville, NC 28078  
P: 704-992-8102  
[www.polytechindustrial.com](http://www.polytechindustrial.com)

*Our mission is to contribute to client success through our knowledge of manufacturing technologies, materials; specifications and capabilities along with an innovative approach to solving problems.*

Polytech now offers precision 3D Printing!

## **Exhibit C to Defendant's Supplement**



## Message

**From:** William Carson [billyraycarson@yahoo.com]  
**Sent:** 4/20/2018 6:37:05 PM  
**To:** Dan Cedrone [DanC@polytechindustrial.com]; Will Cannon [will.cannon@hotmail.com]  
**Subject:** Re: Pricing / Distributor / Discount Schedule

All good stuff. I want to look at this spreadsheet together. We don't want to undercut too much.

---

**From:** Dan Cedrone <DanC@polytechindustrial.com>  
**To:** Will Cannon <will.cannon@hotmail.com>  
**Cc:** Dr. Carson <billyraycarson@yahoo.com>  
**Sent:** Wednesday, April 18, 2018 9:14 PM  
**Subject:** RE: Pricing / Distributor / Discount Schedule

All Good discussion.

We will assure that the military gets a better deal than their current one.  
 These are just numbers for thought and discussion.

I don't think we can mandate distributor prices, just recommend a retail price.

I Still think that Reps can get \$.50 ea. For Distribution. Which is where we should concentrate.

Dan

---

**From:** Will Cannon [mailto:will.cannon@hotmail.com]  
**Sent:** Wednesday, April 18, 2018 6:44 PM  
**To:** Dan Cedrone  
**Cc:** Dr. Carson  
**Subject:** Re: Pricing / Distributor / Discount Schedule

This looks reasonable. Would the US military pay less for the HALO compared to the CAT under this model?

I defer to your superior experience regarding the pricing. Would we mandate the post distributor pricing? The discounts for example.

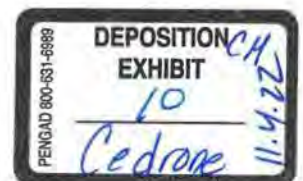
What do we want to do about reps?

Sent from my iPhone

On Apr 18, 2018, at 10:49 AM, Dan Cedrone <DanC@polytechindustrial.com> wrote:

**Here are my thoughts on pricing; Please Comment and/or Approve.**  
**I have reviewed the pricing structure on competitive products regarding distributorships.**  
**Here are some examples:**

**NAR: (Lowest price of any distributor)**  
 Black Red Tips: \$14.10 ea. (Avg 1 million per year)  
 Blue Trainers: \$18.90 ea. (Avg 10,000 per year)  
 Orange Civilian: \$14.10 ea. (Avg 400,000 per year)



## ROA 932

### **Fenton: UK (Low Priced Distributor)**

Black Red Tips: \$15.50 ea. (Avg 100,000 per year)

Blue Trainers: \$18.90 ea. (Avg 10,000 per year)

Orange Civilian: \$16.45 ea. (Avg 40,000 per year)

### **Promoteq: (Average Priced Distributor)**

Black Red Tips: \$16.95 ea. (Avg 80,000 per year)

Blue Trainers: \$18.90 ea. (Avg 5,000 per year)

Orange Civilian: \$18.80 ea. (Avg 3,000 per year)

So my suggestion would be the following:

**Firm retail price: No Discount / Sell for \$29.99.**

(end user buying 1 at a time)

**Veterans: Discount of 10% @ \$26.99 ea.**

**Law Enforcement: Discount of 20% @ \$23.99 ea.**

**Fire Departments: Discount of 20% @ \$23.99 ea.**

**Schools: Discount of 20% @ \$23.99 ea.**

**U.S. Military: Discount of % 25 @ \$22.49 ea.**

### **Distribution Pricing: Volume discount Schedule**

(100 piece minimum purchase every order):

(AQP + Annual Quantity Purchased / Quantity Purchased in the last 12 Months)

**Level 1: 100 – 999 (AQP): @ \$18.50 ea. (38% Discount)**

**Level 2: 1,000 - 9,999 (AQP) : @ \$17.95 ea. (40% Discount)**

**Level 3: 10,000 - 99,999 (AQP): @ \$16.95 ea. (44% Discount)**

**Level 4: 100,000 - 499,999 (AQP): @ \$16.25 ea. (46% Discount)**

**Level 5: 500,000 - 999,999 (AQP): @ \$15.48 ea. (48% Discount)**

**Master: 1 million + (AQP): @ \$14.95 ea. (50% Discount)**

These prices are in line with / Slightly under the CAT.

*Thank You,*

*Dan*

STATE OF SOUTH CAROLINA

COUNTY OF YORK

DANIEL P. CEDRONE AND POLY-  
TECH INDUSTRIAL, INC.

PLAINTIFFS,

V.

COMPOSITE RESOURCES, INC.,

DEFENDANT.

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Case No. 2019-CP-46-00051

**PLAINTIFFS' RESPONSE IN  
OPPOSITION TO DEFENDANT'S  
SUPPLEMENT TO MOTION TO  
RECONSIDER, CLARIFY, ALTER, OR  
AMEND ORDER GRANTING  
PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Poly-Tech Industrial, Inc. (“**Poly-Tech**”) and Daniel P. Cedrone (“**Cedrone**”) (“**Plaintiffs**”), respond to Defendant Composite Resources, Inc.’s (“**Composite**” or “**Defendant**”) Supplement in Support of Motion to Reconsider, Clarify, Alter, or Amend Order Granting Plaintiffs’ Motion for Partial Summary Judgment (“**Second Motion for Reconsideration**”). This case principally involves express contractual claims for unpaid commissions and other remunerations under a written 2005 Sales Representative Agreement (“**Agreement**” or “**Contract**”) (which Defendant admitted “speaks for itself”). Lacking grounds to flip the summary judgment Order that Composite, itself, expressly provided for in the consent scheduling order, it has instead embarked on a “death by a thousand cuts” strategy by just flooding the Court with new counsel, new arguments, new strategies, new defenses, and now “new” evidence. This Second Motion for Reconsideration should be ignored by the Court in denying the pending motion for reconsideration. Specifically, (1) it should be ignored as an untimely second motion; (2) it

should be ignored as unavailable; (3) it should be ignored as waived; (4) it should be ignored as irrelevant; and (5) it should be ignored as unpersuasive.

### **INTRODUCTION**

Nothing in the September 29, 2022 Order Granting Plaintiffs' Motion for Partial Summary Judgment (the "**Order**") is controversial or unexpected. The Agreement, related to a patented combat tourniquet product (the "**C-A-T Tourniquet**"), must first be interpreted as a matter of law by the trial court, irrespective of the parties' intent. *Travelers Indem. Co. v. Bailey*: 557 U.S. 137, 150–51 (2009) (noting that "it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent") (citing 11 R. Lord, Williston on Contracts § 30:4 (4th ed.1999)); *Green v. Biddle*, 5 L. Ed. 547 (1823) ("for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements").

Composite's Second Motion for Reconsideration fails to acknowledge that on November 16, 2021, Composite submitted a proposed Consent Scheduling Order, which expressly provided:

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

See Scheduling Order, November 17, 2021, Paragraph 4. Both sides availed themselves of this opportunity. The Order of September 29, 2022 found the Agreement unambiguous, and therefore parol evidence is irrelevant. Composite's 95-page filing merely re-re-hashes earlier failed arguments (e.g., p. 3, "[as] CRI demonstrated in its Rule 59 Reply, ...") or dwells on alleged new parol evidence; both of which are inappropriate.

### **LEGAL STANDARD**

Rule 59 motions for reconsideration are disfavored. *Patterson v. United States*, No. 7:00-2546-24, 2002 WL 32079233, at \*3 (D.S.C. May 8, 2002). A circuit court's ruling on a Rule 59(e) motion is reviewed pursuant to an abuse of discretion standard. *Pollard v. Cnty. of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994). In this context, an abuse of discretion "arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007). As the Rule 59(e) motion relates to a summary judgment Order, it would not be an abuse of discretion to deny the motions for reconsideration where no real genuine issue exists. *Grimsley v. S.C. L. Enft Div.*, 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015) (holding that "to survive a motion for summary judgment, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" (internal quotation omitted); *Barrett v. Craven Cnty. Bd. of Ed.*, 70 F.R.D. 466, 478 (E.D.N.C. 1976) (granting summary judgment and noting that "immaterial and imaginary issues of fact may be found in any case, and if a motion for summary judgment



is to serve any useful purpose, the court must unhesitatingly grant it when careful consideration of the facts reveals no real genuine issue of fact involved”). (citation omitted). This is especially true of the unambiguous reading of a contract issue which is reserved to the court as a matter of law.

The Court has broad discretion to deny a motion for reconsideration, including denying the motion on the papers “filed by the parties without oral argument.” Rule 59(f), SCRCP.

### **ARGUMENT**

#### **A. Composite’s Second Motion for Reconsideration is untimely.**

A motion under Rule 59(e) is untimely if it is not served within ten days after receipt of written notice of the entry of the order. *Coward Hund Constr. Co. v. Ball Corp.*, 336 S.C. 1, 3, 518 S.E.2d 56, 57 (Ct. App. 1999). The Order was issued on September 29, 2022. This Second Motion for Reconsideration was filed November 15, 2022 (more than 45 days later). Composite’s first Motion for Reconsideration sought relief on the alleged basis of clear error of law. Composite’s Second Motion for Reconsideration seeks relief based on alleged “new” evidence.<sup>1</sup> These are distinct. *see e.g. Brinkley v. S.C. Dep’t of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009) (noting that Rule 59(e) “decision will not

---

<sup>1</sup> Composite attached 3 exhibits. Two email exhibits of emails produced 9 months before the summary judgment Order, and the deposition of Cedrone whose **testimony was known to exist since at least March 3, 2021 when Composite stated in the Federal Rule 26(f) Report that “Defendant’s Witnesses” included “ Daniel P. Cedrone – Cedrone is familiar with the contract at issue in this case, the rights and obligations of the parties under that agreement, and the termination of that agreement.”**. See DE 17, p. 20, Civ. Action 0:21-cv-00284-MGL, of which this Court may take judicial notice.

be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.) (emphasis added). As such, it does not “supplement” the first motion for reconsideration, but instead presents a second, untimely, motion for reconsideration. *Davis v. Parkview Apartments*, 409 S.C. 266, 279, 762 S.E.2d 535, 542 (2014) (noting that circuit denied “an untimely Rule 59(e) motion disguised as a Rule 26(c) motion.”). Equally dispositive of Composite’s post-Order filing of additional information to try and avoid summary judgment is that it is also untimely under Rule 56(c), which requires that opposing evidence be filed “not later than two days before the hearing.”

Composite arguments in its most recent filing are untimely and should be denied on that basis alone. *See e.g. Ralphs v. Trexler*, No. 2005-UP-219, 2005 WL 7083860, at \*1 (S.C. Ct. App. Mar. 24, 2005) (noting that “Judge Lockemy denied the motion pursuant to Rule 59, finding it was not timely...”). If Composite files a “reply” to this opposition, that would confirm that even Composite knows its most recent filing is a new motion and not a supplement (which is unsuited for replies).

**B. Composite’s Second Motion for Reconsideration is procedurally unavailable.**

Composite’s alleged supplemental evidence does not qualify as new under Rule 59(e) for the purposes of justifying reconsideration or reversal of a previously entered partial summary judgment. For example, each email in the five pages of emails attached to the Second Motion for Reconsideration was produced to Composite more than 9 months before the Order, on December 21, 2021. The Fourth Circuit has held that the district court properly refused to consider evidence presented for the first time in connection with a post-judgment motions to reconsider. *Hughes v. Bedsole*, 48 F.3d 1376, 1382 (4th Cir.), *cert.*

*denied*, 516 U.S. 870, 116 S.Ct. 190, 133 L.Ed.2d 126 (1995). In *RGI, Inc. v. Unified Indus., Inc.*, the court expanded this analysis:

The supplemental affidavit was not submitted for Rule 56(e) consideration but was submitted with a Rule 59(e) motion to “alter or amend the judgment.” ...The district court refused to consider the supplemental affidavit, however, on the ground that RGI had failed to provide a legitimate justification for not presenting it during the summary judgment proceedings.

...The Rule 56(e) language on which RGI relies, however, allows the trial court in its discretion to receive supplemental material ... before ruling on the motion. It strikes us that the underlying purpose of the rule is to assist the court in its deliberation on the summary judgment motion. That purpose would be undercut if the rule were construed to require the court to accept further affidavits after it had already ruled on the motion for summary judgment.

963 F.2d 658, 661–62 (4th Cir. 1992) (emphasis added). South Carolina law is in accord. *Mozingo ex rel. Est. of Stewart v. Ford Motor Co.*, No. 2009-UP-282, 2009 WL 9528979, at \*1 (S.C. Ct. App. June 4, 2009) (“a party cannot use Rule 59(e) to present new evidence to the court”) (affirming summary judgment).

The inappropriateness of using Rule 59(e) motions to present additional information against previously entered summary judgment motions applies equally to after acquired deposition testimony from long known witnesses (in this case, one of the Plaintiffs, known to Composite since the Complaint was filed nearly four years ago). *Gower v. Grundy Cnty., Tennessee*, No. 4:05-CV-104, 2008 WL 11430019, at \*3–4 (E.D. Tenn. Mar. 4, 2008), *aff’d sub nom. Gower v. Grundy Cnty., Tenn.*, 318 F. App’x 369 (6th Cir. 2009) (refusing to consider subsequent deposition testimony on a motion to reconsider summary judgment, holding that “[t]he depositions of these two witnesses are not ‘newly discovered evidence’



merely because they were taken at a later date.”); *Brailsford v. Brailsford*, 380 S.C. 443, 448, 669 S.E.2d 342, 344–45 (Ct. App. 2008) (noting that generally “[a] party cannot use a motion ... to alter or amend a judgment to present an issue that could have been raised prior to judgment but was not.”) (internal citation omitted); *U.S. v. Dalide*, 316 F.3d 611, 622 (6th Cir.2003) (testimony is not “newly discovered evidence” merely because it was after acquired when, with due diligence, it could have been discovered prior to judgment); *Kaneohe Bay Cruises, Inc. v. Hirata*, 75 Haw. 250, 257–58, 861 P.2d 1, 5–6 (1993) (denying motion for reconsideration of the order granting summary judgment pursuant to Rule 59(e), stating that the additional deposition testimony being offered “did not qualify as new evidence.”).

The inescapable conclusion here is that, irrespective of the lack of relevance or substance, nothing in the Second Motion for Reconsideration is competent under SCRCP 59(e), and therefore Composite’s supplemental filing should be disregarded by the Court in denying the original motion for reconsideration.

**C. Composite’s Second Motion for Reconsideration was waived.**

Implicit in Composite’s supplemental filing to submit additional evidence is a request that it be allowed to garner and submit additional information for consideration in granting summary judgment. The South Carolina Rules of Civil Procedure have a specific rule for this, SCRCP 56(f), and Composite waived this relief by not raising it, or meeting its requirements, before entry of the Order in September. *See e.g. Vill. W. Horizontal Prop. Regime v. Int’l Sales & Mktg. Grp.*, No. 2007-UP-111, 2007 WL 8326688, at \*3 (S.C. Ct. App. Mar. 7, 2007) (Defendant “argues the circuit court erred by prematurely granting

summary judgment. ... A party cannot for the first time raise an issue by way of a Rule 59(e) motion.”) (internal quotation omitted); *Wilson v. Baucom*, No. 1:20-CV-311-RP, 2022 WL 1308827, at \*6 (W.D. Tex. May 2, 2022) (“if a party seeks reconsideration of a summary judgment order based on the argument that additional discovery would have defeated the motion for summary judgment, the motion for reconsideration is procedurally improper unless the party sought a continuance pursuant to Rule 56(f) before the summary judgment ruling.”).

Composite made the strategic decision to move forward with cross-motions for partial summary judgment on the unambiguous terms of the Agreement, in language that is equally unambiguous: “Any party may move the court at any time for any order construing the ambiguity/non-ambiguity of the Contract by identifying terms and phrases in the Contract that should be considered ambiguous or unambiguous by the Court as a matter of law by way of a motion of partial summary judgment as to contract interpretation.” See Scheduling Order, November 17, 2021, paragraph 4. Composite affirmatively sought to have the Court enter summary judgment in its favor, and it should be estopped from now arguing, in the wake of an unfavorable order, that the Court should not have moved forward on summary judgment without additional information. Composite waived this possibility when it moved forward hoping to achieve a favorable order without filing the required affidavit or making the required request under SCRCP 56(f). To allow Composite to have the fruits of SCRCP 56(f) after things didn’t go its way, and without filing an affidavit setting forth the discovery needed to obtain the “facts essential to justify

his opposition”, would turn the rule on its head and reward practitioners who leverage the rules as a device to hedge against an unsuccessful litigation strategy.

The courts that have been presented with this opportunity to dilute their jurisdiction’s summary judgment rule have refused. For example, in *Gower v. Grundy Cnty., Tennessee*, No. 4:05-CV-104, 2008 WL 11430019, (E.D. Tenn. Mar. 4, 2008), *aff’d sub nom. Gower v. Grundy Cnty., Tenn.*, 318 F. App’x 369 (6th Cir. 2009), the court held that:

[I]f Plaintiff wanted the Court to consider the depositions of Scissom and Dooley in its ruling on summary judgment, Plaintiff could have filed a Rule 56(f) motion asking the Court to withhold judgment until after these depositions were taken by the Defendants. ... Rule 56(f) is carefully crafted to accommodate a party's need for discovery prior to entry of summary judgment, and we therefore caution that in most instances, a post-judgment motion asserting a need for discovery will be too little, too late.” Plaintiff had ample opportunity to partake in discovery prior to the Court's ruling on summary judgment or move under Rule 56(f) for more time. A Rule 59(e) motion is not the proper vehicle for second guessing prior strategical legal decisions. ...

Accordingly, the Court **REFUSES** to consider the deposition of Billy Scissom or the deposition of Barry Dooley in reconsideration of its prior ruling on summary judgment.

*Id.* at \*3–4 (internal quotations omitted). *See also Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 732–33 (10th Cir. 2006) (request to submit additional discovery filed with a “motion for reconsideration, which was filed following the district court's grant of summary judgment, is ineffectual because it was untimely. A nonmoving party wishing to invoke the protections of Rule 56(f) must attempt to do so by submitting an affidavit in direct response to a motion for summary judgment, not following the district court's

disposition of that motion.”); *Fanning v. Metro. Transit Auth. of Harris Cnty., Tex.*, 141 F. App'x 311, 314–15 (5th Cir. 2005) (“our court has foreclosed a party's contention on appeal that it had inadequate time to marshal evidence to defend against summary judgment when the party did not seek Rule 56(f) relief before the summary judgment ruling”); *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002) (holding that a “Rule 56(f) motion must be brought before the summary judgment hearing. ... [t]he facts supporting a Rule 56(f) motion must be set forth in an accompanying affidavit. ... [f]ailure to comply with these requirements is a proper ground for denying relief.”) (internal citations omitted); *Massachusetts Sch. of L. at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 44 (1st Cir. 1998) (holding that “[t]o savor the balm of Rule 56(f), a party must act in a timely fashion. ... [m]oreover, the moving papers must contain a proffer which, at a bare minimum, articulates a plausible basis for the movant's belief that previously undisclosed or undocumented facts exist, that those facts can be secured by further discovery, and that, if obtained, there is some credible prospect that the new evidence will create a trial worthy issue. ... [f]inally, the motion must set forth good cause to explain the movant's failure to have conducted the desired discovery at an earlier date.”) (internal citations omitted).

Composite’s supplemental request for the court to take into consideration information obtained after the Order from sources known to Composite since January 2019 is a poorly disguised after-the-fact, unverified and incomplete Rule 56(f) request. For this reason alone, Composite’s supplemental filing should be given no consideration in denying the motion for reconsideration as it is improper, procedurally defective and waived by Composite’s prior conduct and strategic litigation decisions.

**D. Composite's Second Motion for Reconsideration is irrelevant.**

In issuing the underlying Order granting partial summary judgment as to the unambiguous terms of the Agreement, the Court expressly stated that the Order did not rely on extrinsic evidence. Order, p. 13, and that the Court finds the terms unambiguous “within the four corners of the Contract.” Order pp. 7 and 9. *See Mansoor v. Trank*, 319 F.3d 133, 138 (4th Cir. 2003) (“since there is no ambiguity in the terms of the [contract], [Plaintiff]'s oral statements are irrelevant to its interpretation”).

Composite's 95-page filing boils down to a disingenuous suggestion that after almost four years of steadfast proclamations that the Agreement obligated Composite to pay commissions for as long as the project of making CAT Tourniquets continues, Mr. Cedrone's testimony that Phil Durango – combined with Mr. Cedrone's efforts -- was necessary to start the project somehow equals a party admission that the project necessarily ended when Phil Durango left the scene (despite the uncontroverted fact that the underlying intellectual property has continually supported the project to this very day). The fallacies in this argument are numerous.

First, even considering Composite's ungrounded factual invention for the sake of argument, for an admission of intent to impact the meaning of a contract that has been found to unambiguous, the admission must be an admission of a party to the contract, not just a party to the litigation. 32A C.J.S. Evidence § 1507 (2008) (“Evidence of the practical construction given to an instrument of writing by the parties thereto may be admissible to explain its meaning, when explanation is necessary.”) (emphasis added). Dan Cedrone is

not a party to the Agreement, he is an express third-party beneficiary. Complaint, paragraph 18 and Exhibit A.

The deposition of Poly-Tech (the contracting party) was taken almost 2 years ago (beginning on December 11, 2020) on two separate days and included the noticed topics of: “[a]ll aspects of the Sales Representative Agreement ... including ... negotiations of the terms ... Poly-Tech’s understanding of the terms ... the termination of the Agreement ... [and t]he relationship between Poly-Tech and/or Dan Cedrone and Phil Durango, LLC”. Nothing in that deposition of the counterparty to the contract (Poly-Tech) remotely supports Composite’s Second Motion for Reconsideration. In fact it unequivocally proclaimed the opposite. (e.g., *Q: ... Do you consider this commission agreement and the special account for Phil Durango, LLC to be a perpetual obligation to pay Poly-Tech commissions? A: Yes, sir*). Poly-Tech’s representative had to endure essentially this same question repeatedly over the two days of deposition questioning on December 11, 2020 and January 7, 2021 of the Poly-Tech Rule 30(b)(6) deposition. This included:

Page 121:

Q : ... do you disagree that that's the case and that there are substantial sales of CATs that you were responsible for in the last five years?

A : As far as I'm concerned, I'm responsible for all the sales because I started the project.

Page 122:

Q: Okay. Mr. Cedrone, when you say you started the whole project, what does that mean? What do you mean by that?

A: It means that the tourniquet project was designed to be a perpetual partnership between Poly-Tech and Composite Resources. And when I brought Mark Esposito to them, we all had that same understanding, so subsequently, any sale that resulted from that was borne of that instance. That's what I mean.

Page 150:

Q: ... Pursuant to your Sales Representative Agreement, was there any obligation to include Poly-Tech at the table to discuss developments to the CAT tourniquet?

A: I felt there was. At the time I just did it just as a plastics engineering type person and as a perpetual partner in the project.

Q: And again we talked about partner before. That's your perception, that you were a partner; right?

A: It was the spirit of the agreement, yes.

Page 153:

Q: So to be clear, do you believe that Poly-Tech should still be getting \$1.75 for every CAT tourniquet sold?

A: Yes.

Q: And when do you believe that obligation would end?

A: Never.

Q: And what have you done to be able to continue to get \$1.75 per CAT tourniquet forever?

A: It's in our agreement. It's in the spirit of the agreement. I got the business initially, nurtured it throughout the project and had many conversations with Jon and Lisa and clarified that this was a forever thing.

Page 202:

Q: Mr. Cedrone, what did you have to do -- and by you, again I mean Poly-Tech, but you're here as its representative. What did Poly-Tech have to do to earn commissions for CAT sales made by CRI?

A: Primarily bring the project to them.

Q: What project are you talking about?

A: The manufacturing of the CAT tourniquet and the selling of the CAT.

Page 256-7:

Q: ... What is not included in the regular agreement?

A: The GraviGate product and the tourniquet, the CAT tourniquet.

Q: And I want to make sure we're clear on that. You're saying that the - I guess the portion of the agreement that discusses the GraviGate and the CAT tourniquet are not part of the regular agreement? Is that what you're saying?

A: Well, they're part of the agreement in total; however, ... The CAT tourniquet was always a -- it was something different in that for any reason this regular agreement was terminated, that payment of commissions would continue as long as the project continued.

Page 260:

Q: ... I was asking you under what circumstances the agreement could be terminated as to Annex C dealing with the CAT tourniquet. I'm going to ask you a little different question, but it's similar. Is there any circumstance under which Composite Resources would no longer have an obligation to pay Poly-Tech commissions?

A: On the CAT?

Q: Yes, on the CAT tourniquets.

A: Not to my knowledge.

Page 261:

A: ... Is Composite Resources still involved in the project in your hypothetical situation?

Q: Composite Resources in my hypothetical would still manufacture the CAT tourniquets for this third party.

A: Then yes, they would owe me the commissions.

Page 293-4:

Q: ... Do you consider this commission agreement and the special account for Phil Durango, LLC to be a perpetual obligation to pay Poly-Tech commissions?

A: Yes, sir.

Q: All right. Let's look at the last sentence or paragraph of Annex C, Section C-2. ... It starts out and says commission for this account. What account is that referring to?

A: The project of making tourniquets.

Q: Where is that project of making tourniquets set out in this agreement?

A: The last sentence: For as long as the project continues.

Q: Does that say project for making tourniquets?

A: No. It says: For as long as the project continues.

Q: Okay. Do you not agree, sir, that account refers to Phil Durango, LLC?

A: That was a term that Lisa and Jonathan used for the project.

Page 298-299

Q: ...What does it mean when it says: If the regular contract is discontinued and paid to the estate of Daniel P. Cedrone?

A: Are you asking my understanding of that?

Q: Yes.

A: If for any reason the regular contract is discontinued, i.e., canceled for any reason, the commissions for the CAT tourniquet would continue to be paid to me dead or alive.



Page 304:

Q: Okay. All right. Let's read the last section. I know you like that section. It says: For as long as the project continues. What does that mean?

A: As I said several times, it was our mutual understanding via conversations that as long as Composite Resources was making tourniquets, I would get paid the commission that we agreed upon forever.

Page 305:

Q: But right now you cannot point me to a section in here that describes what the project is?

A: Well, the project in the paragraph and section that it's in is only related to the CAT tourniquet, so one would presume that the project is the manufacturing of the CAT tourniquet. That was my understanding.

Q: Doesn't the section deal with Phil Durango, LLC?

A: In making the tourniquets.

(emphasis added). The referenced pages are redacted and attached hereto as **Exhibit A**.

In addition, to be relevant, the additional information in Composite's Second Motion for Reconsideration would have to be admissible. Rule 56(e) (opposing evidence "shall set forth such facts as would be admissible in evidence."). The Order granting partial summary judgment determined that the Agreement unambiguously requires Composite to pay commissions after termination of the regular contract for as long as the project of making CAT Tourniquets continues. ("[t]he obligation to pay Tourniquet Commissions and Raw Material Profits survive the termination of the Contract." Order, p. 8). At this point, Composite's purported extrinsic evidence is irrelevant and will be subject to a motion in limine before trial. *See Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 48, 747 S.E.2d 178, 185 (2013) (affirming summary judgment) ("[s]ince the [r]elease unambiguously sets forth the contracting parties' intent, we are bound by that clearly

expressed intent without resort to extrinsic evidence.”) (internal citation omitted) (emphasis added); *Brockhaus v. Gallego Basteri*, No. 15-CV-2707 (KBF), 2015 WL 13882382, at \*1 (S.D.N.Y. Nov. 20, 2015) (“because the Court views the contract as unambiguous, defendant's motion to preclude parol evidence is GRANTED.”)

In the factually similar case of *Moss v. Porter Bros.*, 292 S.C. 444, 357 S.E.2d 25 (Ct. App. 1987) (affirming partial summary judgment as to contractual liability for commissions in a sales agreement), a salesman brought an action against former employer for breach of a sales commission agreement. The court granted the salesman summary judgment on issue of liability based on the unambiguous language of the contract. On appeal, the Court of Appeals held that, the salesman's unambiguous rights under the contract were not affected by the later course of conduct between the parties regarding the practice of paying commissions. *Id.* at 447. (“[t]he trial court expressly rejected the notion that anything in the affidavits submitted by Porter Brothers ‘can be used to change the clear terms of the [employment] contract.’”). The Court of Appeals agreed with this conclusion “because [the terms] are unambiguous and thus cannot be varied or explained by evidence of custom or usage.” *Id.* at 448; see also *Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 598 (4th Cir. 2004) (in applying South Carolina law, the Fourth Circuit refused to “look to the course of dealing between the parties” in “defining the parties’ obligations under the [ ] Agreement.”)

**E. Composite’s Second Motion for Reconsideration is unpersuasive.**

Since 2019, Composite has been embarked on a wearisome campaign to undercut the unambiguous meaning of the tourniquet project agreement by advancing the

nonsensical notion that rather than “Phil Durango” describing the “project” (which is the subject of the contract), instead, “project” describes “Phil Durango” (which is neither the subject of, nor party to, the contract). Although this distraction has garnered a lot of ink and time, it has not, and still does not, garner any traction.

After two days of asking essentially the same question of Dan Cedrone as the corporate representative in the Rule 30(b)(6) deposition (see Section E, *supra*), Composite picked right up with the same bombardment at Dan Cedrone’s personal deposition. It then cherry-picks words and stitches them together, contrary to the clear essence of Cedrone’s testimony, to disingenuously suggest that Poly-Tech capitulated on its steadfast position that the Agreement requires Composite to pay commissions and material remunerations for as long as the project of making CAT tourniquets continues, regardless of the termination to the regular agreement for any reason. This is not sufficient to overcome the previously entered Order. *See Grimsley*, 415 S.C. at 42 (reinstating trial court's grant of summary judgment and noting court of appeals improperly “cherry-picked” an isolated portion of the record, placed it out of context, and “elevated what is, at best, a metaphysical doubt into a genuine issue of material fact”); *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984) (upholding summary judgment grant of specific performance of contract and stating that “[t]he judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine.”). Composite then uses that manufactured conclusion to file a 95-page “supplement” in order to re-re-hash its failed arguments from six months of summary judgment filings and hearings.

Plaintiffs object to Composite's reliance on a draft deposition in violation of SCRC P 30(e)'s right guaranteed to every deponent to read and correct "in form or substance" his/her deposition.<sup>2</sup> Because this information is not properly before the Court, is not relevant, is untimely, and the reliance on such information was previously waived by Composite, Plaintiffs will not rely here on any of Mr. Cedrone's testimony for the purposes of opposing the Motions for Reconsideration in order not to inadvertently waive this objection. However it is worth highlighting the questioning to reveal the verbal slight-of-hand used to create the isolated excerpts presented by Composite to suggest a remarkable about-face after 4-years of consistent averments throughout this litigation.

Take the case where brother A establishes himself as trustee over a fund for the benefit of himself and his brother B. At brother B's deposition in the breach of fiduciary duty case, it is established that he, as a beneficiary, owes no fiduciary duties. He then establishes that brother A is also a beneficiary, and later it is reiterated that neither beneficiary owes fiduciary duties. Later, at summary judgment, brother A argues that brother B cannot prevail on breach of fiduciary duties because brother B admitted in his deposition that brother A did not have fiduciary duties.

This is essentially what happened in this recent Cedrone deposition, and that is why it is necessary to read the entire deposition to understand any testimonial nugget in its proper context. Specifically, in the deposition questioning, Composite developed two

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<sup>2</sup> Rule 309(e) provides: [w]hen the testimony is fully transcribed the deposition shall be submitted to the witness for examination .... Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them."

personas for Phil Durango LLC. One as the holder of the intellectual property (IP) with complete control over who can manufacture and sell the CAT Tourniquets (as long as it owns the IP). Two as a customer account of the tourniquets that it permitted Composite to manufacture and sell. With this dual persona, the questions along the line of “without Phil Durango there is no project” are equivocal, whether purposefully or inadvertent. As long as it owned the intellectual property, Phil Durango was necessary to the project. In its role as a customer account, Phil Durango was virtually irrelevant to the continuation of the tourniquet project because as long as Phil Durango (or subsequent holder of the IP) allowed Composite to make the CAT Tourniquets there was a deep and lucrative pool of other customers and end-users wanting to purchase CAT Tourniquets.

Composite’s questioning of Cedrone either bullied him to into an artificial corner [e.g., (paraphrasing) - in 2005 Phil Durango controlled who could make the CAT and so was necessary to the project/True; and, read along with me, this says there is a Phil Durango account/that is what that says] or was equivocal in not identifying (or being misleading about) which persona of Phil Durango that Composite was going to later ascribe to Cedrone’s answer. Even in isolation, neither of these creates an admission, much less an admission that cannot be corrected by 4-years of prior consistent statements by Plaintiffs. *Lytle v. Reagan*, 256 S.C. 269, 274, 182 S.E.2d 302, 305 (1971) (when a party's testimony is “adverse to himself [and] ... consists mainly of estimates, opinions and conclusions, rather than actual facts within his knowledge, such is not conclusive upon him when there is other evidence in the record tending to prove that such estimates, opinions and conclusions on his part are not in accord with the true facts”); *Arlington Indus., Inc. v.*

*Bridgeport Fittings, Inc.*, 610 F. Supp. 2d 370, 382 n. 17 (M.D. Pa. 2009), *aff'd*, 477 F. App'x 740 (Fed. Cir. 2012) (where it was “unclear from the questioning” and “response is equivocal at best” the matter was “insufficient to constitute an admission.”).<sup>3</sup> Not to mention the absurdity of arguing that Phil Durango controlled the “project”, not because it controlled the underlying intellectual property, but instead because, unbeknownst to it, “Phil Durango” was used to describe the project in the Agreement requiring Composite to pay commissions and material remunerations to Plaintiffs for as long as Composite manufactured and sold CAT Tourniquets. See Section E, *supra*, [Q: Okay. Do you not agree, sir, that account refers to Phil Durango, LLC? A: That was a term that Lisa and Jonathan used for the project.”].

Finally, even if it is determined that Cedrone’s testimony created a material admission, the Court can set aside that admission and that result would be appropriate here based on all the circumstances of this case over almost 4-years of litigation and the contentious nature of the repetitive questions during the depositions of Plaintiffs in this case. *Givens v. Erie Ins. Co.*, No. CV 6:22-00842-HMH, 2022 WL 2759167, at \*9 (D.S.C. July 14, 2022) (“a court, unquestionably, has the right to relieve a party of his judicial admission if it appears that the admitted fact is clearly untrue and that the party was laboring under a mistake when he made the admission.”); *Nat’l Union & Fire Ins. Co. of Pittsburgh, Pa. v. Arioli*, 941 F. Supp. 646, 655 (E.D. Mich. 1996) (finding that a court

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<sup>3</sup> This harkens back to Composite’s second wrongful removal to federal court allegedly based on unequivocal admissions of fact by Plaintiffs established federal question jurisdiction, which District Judge Lewis found were not conclusive statement of jurisdictional facts, and remand the case back to this Court.

may relieve a party from its admission if it was the result of inadvertence or mistake); 9 Wigmore on Evidence (3d ed.) § 2590. Even a written admission in response to a formal request to admit under SCRCP 36(b) may be withdrawn with consent of the court. *Wright v. Hiester Const. Co.*, 389 S.C. 504, 519, 698 S.E.2d 822, 830 (Ct. App. 2010).

### **CONCLUSION**

Nothing in Composite's supplemental filing/Second Motion for Reconsideration warrants any modification of the Order. "Throwing the proverbial 'everything but the kitchen sink' at a plaintiff's motion for summary judgment does not, alone, create a sufficient issue of material fact to prevent summary judgment." *Jelic v. CitiMortgage, Inc.*, 150 So. 3d 1223, 1225 (Fla. Dist. Ct. App. 2014) (affirming summary judgment). In closing, it is worth reiterating the *Elam* court's sage observation, "[t]here must be finality, a time when the case in the trial court is really over and the loser must appeal or give up." 361 S.C. at 20.

For the foregoing reasons, individually and in total, Defendant's Motion(s) for Reconsideration should be denied, and Composite's supplemental filing should be ignored and disallowed. The Court may deny the motion on the papers "filed by the parties without oral argument" or further delay. That is appropriate here and Plaintiffs have previously submitting a Proposed Order to that effect with their earlier Opposition to the Motion for Reconsideration.

This the 22nd day of November 2022.

Respectfully submitted,

/s/ Keith D. Munson

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Michael.Montecalvo@wbd-us.com

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



# EXHIBIT A

Page 1

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS  
2 COUNTY OF YORK

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

5 Plaintiffs,

CIVIL ACTION NO.:

6 v.

2019-CP-24-00272

7 COMPOSITE RESOURCES, INC.,

8 Defendant.

9 \_\_\_\_\_/  
10  
11 VIDEOTAPED VIDEOTELECONFERENCE

30(b)(6)

12 DEPOSITION OF: POLY-TECH INDUSTRIAL, INC.'S CORPORATE  
13 REPRESENTATIVE DANIEL P. CEDRONE  
14 (via video teleconference)

15 DATE: December 11, 2020

16 TIME: 10:20 a.m. - 5:03 p.m.

17 LOCATION: 301 South College Street  
18 Charlotte, North Carolina

19 TAKEN BY: Attorney for the Defendant

20  
21 REPORTED BY: Elizabeth Drumm, CCR, RPR  
22 Registered Professional Reporter  
23 (via video teleconference)

24 VIDEOGRAPHER: Darren Carreras  
25 (via video teleconference)

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[REDACTED] do you disagree that that's the case and that

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there are substantial sales of CATs that you were

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responsible for in the last five years?

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A As far as I'm concerned, I'm responsible

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for all the sales because I started the project.

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[REDACTED]

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[REDACTED]

1 [REDACTED]  
2 Q Okay. Mr. Cedrone, when you say you  
3 started the whole project, what does that mean?  
4 What do you mean by that?

5           A           It means that the tourniquet project was  
6           designed to be a perpetual partnership between  
7           Poly-Tech and Composite Resources. And when I  
8           brought Mark Esposito to them, we all had that same  
9           understanding, so subsequently, any sale that  
10          resulted from that was borne of that instance.  
11          That's what I mean.

A horizontal bar chart comparing the percentage of respondents for each age group in the sample (left bars) and in the population (right bars). The y-axis lists age groups from 12 to 65+. The x-axis represents percentages from 0 to 100. The sample bars are generally shorter than the population bars, indicating a younger sample.

| Age Group | Sample (%) | Population (%) |
|-----------|------------|----------------|
| 12        | ~2         | ~5             |
| 13        | ~95        | ~98            |
| 14        | ~100       | ~100           |
| 15        | ~88        | ~92            |
| 16        | ~52        | ~58            |
| 17        | ~2         | ~5             |
| 18        | ~98        | ~95            |
| 19        | ~98        | ~98            |
| 20        | ~95        | ~98            |
| 21        | ~50        | ~55            |
| 22        | ~2         | ~5             |
| 23        | ~98        | ~98            |
| 24        | ~85        | ~92            |
| 25        | ~98        | ~98            |
| 26        | ~98        | ~98            |
| 27        | ~95        | ~98            |
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[REDACTED] Pursuant to your Sales

Representative Agreement, was there any obligation

to include Poly-Tech at the table to discuss

developments to the CAT tourniquet?

A I felt there was. At the time I just  
did it just as a plastics engineering type person  
and as a perpetual partner in the project.

Q And again we talked about partner  
before. That's your perception, that you were a  
partner; right?

A It was the spirit of the agreement, yes.

[REDACTED]

[REDACTED]

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Q So to be clear, do you believe that Poly-Tech should still be getting \$1.75 for every CAT tourniquet sold?

A Yes.

Q And when do you believe that obligation would end?

A Never.

Q And what have you done to be able to continue to get \$1.75 per CAT tourniquet forever?

A It's in our agreement. It's in the spirit of the agreement. I got the business initially, nurtured it throughout the project and had many conversations with Jon and Lisa and clarified that this was a forever thing.

Q

CERTIFICATE OF REPORTER

COUNTY OF CHARLESTON )  
STATE OF SOUTH CAROLINA)

I, Elizabeth Drumm, Registered  
Professional Reporter and Notary Public for the  
State of South Carolina at Large, do hereby certify  
that the foregoing transcript is a true, accurate  
and complete record.

I further certify that I am neither  
related to nor counsel for any party to the cause  
pending or interested in the events thereof.

WITNESS MY HAND AND OFFICIAL SEAL this 20th  
day of December, 2020, in the City of Charleston,  
County of Charleston, State of South Carolina.



ELIZABETH DRUMM, RPR, CCR  
South Carolina Notary Public  
My Commission Expires:  
May 28, 2029

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1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS  
2 COUNTY OF YORK

3  
4 DANIEL P. CEDRONE and VOLUME II  
POLY-TECH INDUSTRIAL, INC.,

5 Plaintiffs, CIVIL ACTION NO.:

6 v. 2019-CP-24-00272

7 COMPOSITE RESOURCES, INC.,

8 Defendant.

9 \_\_\_\_\_/  
10 CONTINUED

11 VIDEOTAPED

12 30(b)(6)

13 DEPOSITION OF: POLY-TECH INDUSTRIAL, INC.'S CORPORATE  
14 REPRESENTATIVE DANIEL P. CEDRONE  
(via video teleconference)

15 DATE: January 7, 2021

16 TIME: 10:23 a.m. - 5:31 p.m.

17 LOCATION: 301 South College Street  
18 Charlotte, North Carolina

19 TAKEN BY: Attorney for the Defendants

20 REPORTED BY: Elizabeth Drumm, CCR, RPR  
21 Registered Professional Reporter  
22 (via video teleconference)

23 VIDEOGRAPHER: Kevin Ward  
24 (via video teleconference)  
25



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| Response | Percentage |
|----------|------------|
| Yes      | 20%        |
| No       | 80%        |

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What is not included in the

regular agreement?

A The GraviGate product and the  
tourniquet, the CAT tourniquet.

Q And I want to make sure we're clear on

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[REDACTED]

■ I was asking you under what circumstances the agreement could be terminated as to Annex C dealing with the CAT tourniquet. I'm going to ask you a little different question, but it's similar.

Is there any circumstance under which Composite Resources would no longer have an obligation to pay Poly-Tech commissions?

A On the CAT?

Q Yes, on the CAT tourniquets.

A Not to my knowledge.

Q

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**\_\_\_\_\_ To Composite Resources**

still involved in the project in some hypothetical

Composite Researches in my Hypothetical

would still manufacture the CAT couplings for this

third party.

A Then yes, they would owe me the

COMMISSIONS.

Q [REDACTED] [REDACTED]

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Page 293

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[REDACTED] [REDACTED]

[REDACTED]

Do you consider this commission agreement and the special account for Phil Durango, LLC to be a perpetual obligation to pay Poly-Tech commissions?

A Yes, sir.

Q All right. Let's look at the last sentence or paragraph of Annex C, Section C-2. Do you see what I'm talking about?

A Yes, sir.

Q All right. It starts out and says  
commission for this account. What account is that  
referring to?

A The project of making tourniquets.

Q Where is that project of making tourniquets set out in this agreement?

A      The last sentence: For as long as the project continues.

Q Does that say project for making

1       tourniquets?

2               A       No. It says: For as long as the  
3       project continues.

4               Q       Okay. Do you not agree, sir, that  
5       account refers to Phil Durango, LLC?

6               A       That was a term that Lisa and Jonathan  
7       used for the project. [REDACTED]

8       [REDACTED]

9               [REDACTED]

10       [REDACTED]

11              [REDACTED]

12       [REDACTED]

13       [REDACTED]

14       [REDACTED]

15       [REDACTED]

16              [REDACTED]

17       [REDACTED]

18       [REDACTED]       [REDACTED]

19       [REDACTED]

20              [REDACTED]

21              [REDACTED]

22       [REDACTED]

23       [REDACTED]

24              [REDACTED]

25              [REDACTED]       [REDACTED]

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What does it mean when it says: If the regular contract is discontinued and paid to the estate of Daniel P. Cedrone?

A Are you asking my understanding of that?

Q Yes.

A If for any reason the regular contract is discontinued, i.e., canceled for any reason, the



[illegible]

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[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

■

[REDACTED]

[REDACTED]

Q Okay. All right. Let's read the last section. I know you like that section. It says: For as long as the project continues. What does that mean?

A As I said several times, it was our mutual understanding via conversations that as long as Composite Resources was making tourniquets, I would get paid the commission that we agreed upon forever.

■

[REDACTED]

[REDACTED]

■

[REDACTED]

■

[REDACTED]

[REDACTED]

■

[REDACTED]

[REDACTED]

■

[REDACTED]

[REDACTED]

[REDACTED]

■

[REDACTED]

[illegible]

## CERTIFICATE OF REPORTER

COUNTY OF CHARLESTON )  
STATE OF SOUTH CAROLINA)

I, Elizabeth Drumm, Registered  
Professional Reporter and Notary Public for the  
State of South Carolina at Large, do hereby certify  
that the foregoing transcript is a true, accurate  
and complete record.

I further certify that I am neither  
related to nor counsel for any party to the cause  
pending or interested in the events thereof.

WITNESS MY HAND AND OFFICIAL SEAL this 12th  
day of January, 2021, in the City of Charleston, County  
of Charleston, State of South Carolina.



ELIZABETH DRUMM, RPR, CCR  
South Carolina Notary Public  
My Commission Expires:  
May 28, 2029

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiffs,

v.

Composite Resources, Inc.,

Defendant.

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

### NOTICE OF APPEAL

Pursuant to Rule 203(d)(1)(B), SCACR, Defendant Composite Resources, Inc. respectfully files a copy of its Notice of Appeal from this Court's September 29, 2022 Order Granting Plaintiffs' Motion for Partial Summary Judgment and June 8, 2023 Order Denying Defendants' [sic] Motion to Reconsider, Clarify, Alter, or Amend, Order Granting Plaintiffs' Motion for Partial Summary Judgment, which was both served on counsel for Plaintiffs and filed in the Court of Appeals on July 7, 2023.

Respectfully submitted,

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By: /s/ Marghretta H. Shisko

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July 7, 2023

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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

Case No. 2019-CP-46-00051

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Appellate Case No. 2023-

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

v.

Composite Resources, Inc., ..... Appellant.

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**NOTICE OF APPEAL**

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Please take notice that Composite Resources, Inc. (“CRI”), by and through the undersigned counsel, appeals the order captioned “Order Granting Plaintiffs’ Motion for Partial Summary Judgment,” entered September 29, 2022, and the order captioned “Order Denying Defendants’ [sic] Motion to Reconsider, Clarify, Alter, or Amend Order Granting Plaintiffs’ Motion for Partial Summary Judgment,” entered June 8, 2023, in the above-referenced action. Defendant/Appellant CRI filed a timely motion to alter or amend the September 29, 2022 order pursuant to Rules 52(b) and 59(e), SCRCPP, on October 10, 2022 (October 9, 2022, being a Sunday). CRI received written notice of entry of the June 8, 2023 order on June 8, 2023, making this notice timely. Copies of the above-referenced orders are attached hereto.

Respectfully submitted,

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By: /s/ Marghretta H. Shisko

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July 7, 2023



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

COUNTY OF YORK

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

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

Plaintiffs,

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

v.

Composite Resources, Inc.,

Defendant.  

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

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

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

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

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

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

### **I. Factual and Procedural Background**

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

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

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

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

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

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

## II. Standard of Review

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

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

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

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

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

### III. Findings of Fact

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

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

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

#### IV. Conclusion of Law and Legal Analysis

The Court begins by stating certain contract interpretation principles:

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

Composite Resources also provided the following interrogatory answer:

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

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

Finally, Composite Resources provide the following document requests responses:

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

## V. Conclusion

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

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

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

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

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

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

**IT IS SO ORDERED.**

This \_\_\_th day of September, 2022.

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The Honorable J. Mark Hayes, II



York Common Pleas

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

**Case Number:** 2019CP4600051

**Type:** Order/Summary Judgment

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

SIXTEENTH JUDICIAL CIRCUIT

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

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

Plaintiffs,

v.

Composite Resources, Inc.,

Defendant.

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

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

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

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

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

**IT IS SO ORDERED.**

This \_\_\_\_th day of June, 2023.

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The Honorable J. Mark Hayes, II

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



York Common Pleas

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

**Case Number:** 2019CP4600051

**Type:** Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

Jan 30 2024

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.

CERTIFICATE OF COUNSEL

Undersigned counsel hereby certifies that the Record on Appeal contains all material proposed to be included by the parties and no other material.

Respectfully submitted,

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January 10, 2024