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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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

1. Did the trial court err by concluding that, as a matter of law, the only reasonable interpretation of the parties' agreement is that CRI was and is obligated to pay account commissions to Poly-Tech for as long as CRI makes and sells the product, even if the product account no longer exists and the project is over?

2. Did the trial court err by concluding that its interpretation of the parties' contract as unambiguously requiring CRI to pay account commissions to Poly-Tech for as long as CRI makes and sells the product was supported by extrinsic evidence in the record?

3. Did the trial court err by finding that CRI was and is obligated to continue paying Poly-Tech commissions without addressing CRI's defenses and counterclaims?

4. Did the trial court's interpretation of the parties' contract render CRI's commission obligation perpetual, with no objective triggering event, and thus unenforceable?

STATEMENT OF THE CASE

This is an interlocutory appeal from a grant of partial summary judgment in a business court case involving a contract dispute over whether commissions are still owed for an account that no longer exists. In June 2001, Respondent Poly-Tech Industrial, Inc. ("Poly-Tech"[1]) and Appellant Composite Resources, Inc. ("CRI") entered into a Sales Representative Agreement, under which Poly-Tech would receive commissions for accounts that it brought to CRI for CRI to manufacture products. (R. pp. 887, 889–90).

In June 2005, CRI and Poly-Tech agreed to amend their 2001 contract to include two "special accounts" and to provide CRI with protections against any competition or conflicts of interest from Poly-Tech. (R. pp. 530–40, 887, 889–90). One of the special accounts was the "Phil Durango L.L.C." account. (R. p. 540). In exchange for Poly-Tech convincing Phil Durango LLC to use CRI to assemble and mass produce its product (the "Combat Application Tourniquet," or "C-A-T") and for Poly-Tech managing the Phil Durango LLC relationship, CRI agreed to pay Poly-Tech a commission for the "Phil Durango L.L.C." account based on sales of the C-A-T. (R. pp. 48, 517). Under the "Phil Durango L.L.C." account section of the 2005 Agreement ("Annex C"), the parties agreed 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." (R. p. 540).

Several years later, in November 2014, CRI purchased the C-A-T intellectual property from Phil Durango LLC for $11 million. (R. pp. 587, 752). After that, CRI's Phil Durango LLC account ceased to exist and CRI stopped assembling the C-A-T for Phil Durango LLC. (R. p. 587). Additionally, after selling the intellectual property, Phil Durango LLC was dissolved by its owner

[1] CRI will refer to both Respondents collectively as "Poly-Tech." CRI will refer to Respondent Dan Cedrone separately as appropriate.

in October 2016. (R. p. 587).

In August 2018, CRI terminated the entire 2005 Agreement and ceased paying Poly-Tech commissions for all accounts, including commissions for the Phil Durango LLC account. (R. p. 541). Then, on January 7, 2019, Poly-Tech and its sole shareholder, Dan Cedrone, sued CRI for unpaid commissions for the Phil Durango LLC account. (R. pp. 44–62). Poly-Tech alleged claims for, *inter alia*, breach of contract, breach of contract accompanied by fraud, violation of the Sales Representative Act,[2] and conversion.[3] (R. pp. 51–61). Poly-Tech sought $2,032,165 in unpaid commissions through August 2018 and $6,093,495 in punitive damages. (R. p. 55). Poly-Tech also sought a declaratory judgment that: (1) Cedrone was a third-party beneficiary to the 2005 Agreement; (2) the term "project" in Annex C means "the provision of [the C-A-T] by or through the efforts of [CRI]," and (3) the "perpetual obligations under Annex C of the contract survive the termination of the sales representative relationship." (R. pp. 59–61).

CRI answered, denying that Poly-Tech was entitled to recover any unpaid commissions under Annex C of the Agreement because from the time that CRI had acquired the C-A-T intellectual property from Phil Durango LLC (and since Phil Durango LLC no longer even existed), there had been no sales—and thus no commissions owed—for that account. (R. p. 77). CRI also asserted the affirmative defense of prior breach, as well as a counterclaim for breach of the non-compete, no-conflict-of-interest, and nondisclosure provisions of the 2005 Agreement (including the implied covenant of good faith and fair dealing) resulting from Poly-Tech's development and marketing of a competing tourniquet called the HALO—while collecting $7

[2] S.C. Code Ann. §§ 39-65-10 to -80.

[3] The trial court granted CRI's motions for summary judgment on Poly-Tech's Sales Representative Act and conversion clams. CRI's motion for summary judgment on Poly-Tech's breach of contract accompanied by fraud claim is still pending as of the date of this filing.

million in commissions—prior to CRI's August 2018 termination of the 2005 Agreement. (R. p. 84).

On March 18, 2022, Poly-Tech filed a "Motion for Partial Summary Judgment as to Unambiguous Material Terms" (the "MPSJ") in which it argued that Annex C unambiguously and as a matter of law required CRI to pay Poly-Tech commissions on sales of the C-A-T "for as long as the project continues," and that "project" simply meant the "sale of tourniquets by [CRI]." (R. p. 516). Poly-Tech did not ask the trial court to interpret or give effect to Annex C's predicate phrase "[c]omission for this account," referring to "Phil Durango L.L.C." Poly-Tech and Cedrone did not acknowledge the phrase in their motion.

Poly-Tech also submitted extrinsic evidence in the form of the 2021 deposition testimony of Lisa Bennett, who is now the ex-wife of CRI's President, Jonathan Bennett, but who was CRI's "operations director" when the 2005 Agreement was executed. (R. pp. 519–20, 542–45). During her deposition, which was ten years after her divorce from Jonathan Bennett and her departure from CRI, Lisa Bennett testified that in 2005 she had considered the commission obligation "to be as long as the tourniquets were in production." (R. pp. 519–20, 542–45).

CRI's response to the MPSJ argued that: (1) Poly-Tech's interpretation of the 2005 Agreement rendered the commission obligation "perpetual," and thus unenforceable; (2) Poly-Tech's reliance on extrinsic evidence fatally undermined any argument that the contract terms were unambiguous; and (3) the terms *were* ambiguous, thus foreclosing summary judgment. (R. p. 570). CRI also contended that: (1) "[i]n November 2014, CRI purchased the CAT Tourniquet patents from Phil Durango, LLC and Phil Durango, LLC ceased to be a customer <u>account</u> at CRI"; and (2) in 2016, Phil Durango LLC was dissolved. (R. p. 587–89).

CRI also submitted evidence demonstrating that, as of March 2018, Poly-Tech and

Cedrone were conspiring with two other individuals, William Carson and William Cannon, to develop and patent a competing tourniquet called the HALO, thus breaching multiple provisions of the 2005 Agreement, even though they continued to accept millions of dollars in C-A-T commissions. (R. pp. 576, 591–626). CRI filed additional excerpts from Lisa Bennett's deposition testimony where she testified that: (1) "if Poly-Tech or Dan Cedrone developed a competing tourniquet that would be a breach of this agreement"; and (2) the 2005 Agreement had *not* been "drafted in a sense that it could never be terminated by [CRI]." (R. pp. 582–83, 628–41).

The trial court conducted the summary judgment hearing in two parts, after which it continued the hearing and permitted the parties to submit additional briefing. In its supplemental brief, CRI argued that Annex C was fatally indefinite and unenforceable because it contained so many undefined terms, and CRI also maintained its alternative position that Annex C was ambiguous. (R. pp. 655, 660).

On June 8, 2022, the trial court issued an e-mail ruling (the "E-mail Ruling"), determining that, as a matter of law, the provision "for as long as the project continues" unambiguously means that CRI "is contractually obligated to pay plaintiffs the amounts reflect[ed] in the contract on page 11 of 11 [(Annex C)] past the termination date." (R. p. 827). The E-mail Ruling referenced Lisa Bennett's extrinsic testimony, but it emphasized that "no inference should be drawn that the contested material terms were ambiguous and needed further factual development." (R. p. 828). The trial court did not address the "Phil Durango L.L.C." account or the fact that any commissions must be "for this account," meaning for Phil Durango L.L.C. Nor did the trial court expressly interpret "project," or address whether "project" must be interpreted within the context of Phil Durango LLC's involvement. The trial court also did not address CRI's evidence of Poly-Tech's competition, conflict of interest, and disclosure of confidential information arising out of their

development and marketing of the HALO.

The trial court instructed Poly-Tech to prepare a proposed order, to "be edited and revised once received." (R. p. 828). On August 31, 2022, Poly-Tech submitted a 19-page proposed order that included findings that CRI "*was and is*" contractually obligated to pay Plaintiffs commissions, "including *after termination* of the sales representative relationship" and "*after the date of this Order*." (R. pp. 27–28, 825) (emphasis added). Poly-Tech's proposed order also stated that "the uncontroverted external evidence . . . eliminates the possibility of a genuine issue of material fact," and that "Defendant filed no counter evidence with its filings in opposition to the Motion." (R. pp. 982, 993). In fact, however, CRI had filed 55 pages of "counter evidence," detailed further below. (R. pp. 587–89, 598–641).

On September 29, 2022, the trial court signed Poly-Tech's proposed order without first making any edits or revisions (the "September 29 Order"). The September 29 Order included language that appeared to fix CRI's liability—i.e., "as a matter of law, for 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 [tourniquets] sold in the future." (R. pp. 27, 38).

On October 10, 2022, CRI timely filed a motion to reconsider, clarify, alter, or amend the September 29 Order (the "Motion to Reconsider"). CRI raised numerous grounds, including:

- asking the trial court whether it had intended to fix CRI's liability, and to clarify the September 29 Order accordingly;
- asking the trial court whether it had intended to reject CRI's defenses and counterclaims and—assuming not, since Poly-Tech had not moved for summary judgment on them—to further clarify the September 29 Order to reflect as such;
- asking the trial court to correct the misstatements in the September 29 Order that CRI had (1) filed no "counter evidence" and (2) not argued that the 2005

Agreement was ambiguous;

- asking the trial court to clarify whether it had interpreted Poly-Tech's motion as arguing in the alternative that the extrinsic evidence entitled them to summary judgment and, if so, whether the trial court's summary judgment was alternatively based on extrinsic evidence; and

- asking the trial court to reconsider its interpretation of Annex C because it (1) failed to give effect to the phrase "commission for this account"—account being "Phil Durango L.L.C."—and (2) ignored that in 2005, the "project" was 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 LLC to use CRI to assemble and mass-produce the C-A-T.

(R. pp. 688–717).

On November 4, 2022, while the Motion to Reconsider was pending, CRI's counsel deposed Cedrone. (R. pp. 864). On November 15, 2022, CRI supplemented its Motion to Reconsider (the "Supplement") with Cedrone's deposition testimony relating to the Annex C terms "account" and "project." (R. pp. 839–62).

On June 8, 2023, the trial court signed an order denying the Motion to Reconsider and clarifying the September 29 Order "to reserve to the jury the question of how to calculate commissions due and raw material payments due." The June 8 Order further provided:

> To the extent paragraph 1, at the bottom of page 18, and paragraph 2, at the top of page 19 [of the September 29 Order], impose, or can be read as imposing, a mandatory calculation formula, that language and/or conclusion is stricken.

(R. pp. 41–42). In other words, the June 8 Order merely deleted the dollar amounts for commissions and payments due, but it did not correct or clarify any of the points CRI raised in its Motion to Reconsider. (R. pp. 41–42). On July 7, 2023, CRI timely filed its notice of appeal. (R. pp. 975–1001).

STANDARD OF REVIEW

"[S]ummary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003). In reviewing a grant of summary judgment, this Court applies the same standard as the trial court under Rule 56(c), SCRCP, viewing the facts in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor. *See Gibson v. Epting*, 426 S.C. 346, 350, 827 S.E.2d 178, 180 (Ct. App. 2019). The moving party is entitled to summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"The trial court must deny such a motion when the evidence yields more than one inference or its inference is in doubt. If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 489, 649 S.E.2d 494, 497 (Ct. App. 2007) (citations omitted); *Vaughan v. Town of Lyman*, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006) (reversing an award of summary judgment and stating "the evidence is susceptible to more than one reasonable inference, and therefore should be submitted to the jury"); *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 219 n.4, 578 S.E.2d 329, 334 n.4 (2003) ("The standard for summary judgment 'mirrors the standard for a directed verdict under Rule 50(a)' [SCRCP]."). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501.

Whether the language of a contract is ambiguous is a question of law for the court. *Auten v. Snipes*, 370 S.C. 664, 669, 636 S.E.2d 644, 646 (Ct. App. 2006). A contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation. *S.C. Dep't of*

Nat. Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001); *Davis v. Davis*, 372 S.C. 64, 76, 641 S.E.2d 446, 452 (Ct. App. 2006); *Miller v. Blumenthal Mills, Inc*., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005) ("On appeal from an order granting summary judgment, the appellate court will review *all ambiguities*, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." (emphasis added)).

Uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe. *Hann v. Carolina Cas. Ins. Co*., 252 S.C. 518, 524, 167 S.E.2d 420, 422 (1969). Whether a contract is ambiguous must be determined from the entire contract and not from any isolated clause of the agreement. *Farr v. Duke Power Co*., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975); *cf. Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 242, 672 S.E.2d 799, 803 (Ct. App. 2009) ("In the matter presently before the Court, an ambiguity exists in the Settlement Agreement regarding the definition and scope of 'landlord/tenant claims.' The term 'landlord/tenant claims' is reasonably susceptible to more than one interpretation, and therefore, summary judgment was inappropriate.").

The construction of a clear and unambiguous contract is a question of law. *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987). However, courts are "not at liberty" to "strain to determine the parties' intention." *Pee Dee Stores*, 381 S.C. at 245, 672 S.E.2d at 804 ("Thus, the parties' intention is a question of fact to be ascertained by the trier of fact. To ascertain the parties' intent, the trier of fact must look at the language of the Settlement Agreement, the circumstances known to the parties at the time, and all other pertinent extrinsic evidence."). "When the contract's language is unambiguous it must be given its plain and ordinary meaning and the court may not look to extrinsic evidence to interpret its provisions." *Pres. Capital Consultants,*

LLC v. First Am. Title Ins. Co., 406 S.C. 309, 320, 751 S.E.2d 256, 261 (2013) (quoting *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 394 S.C. 300, 307, 715 S.E.2d 655, 659 (Ct. App. 2011)).

STATEMENT OF FACTS

I. The Parties and the C-A-T

Phil Durango LLC was an entity created by a former military battlefield medic named Mark Esposito to develop and patent the C-A-T. (R. p. 47). The C-A-T is a highly effective tourniquet used by various military, law enforcement, and emergency response organizations, including the U.S. Department of Defense ("DOD") and NATO. (R. p. 516). The C-A-T is unique in that it is designed to be applied and tightened with one hand, using a winding component called a windlass, shown here:

CRI is a Rock Hill corporation that manufactures and sells the C-A-T. (R. p. 46). CRI sells the C-A-T primarily through its DOD distributor North American Rescue ("NAR"), located in Greenville County. Jonathan Bennett is CRI's President and owner. (R. pp. 53–54).

At the time of the events giving rise to this action, Poly-Tech was a North Carolina corporation engaged in plastics manufacturing and metal fabrication, and Dan Cedrone was Poly-Tech's sole shareholder. (R. p. 46).

In or around 2004, Mark Esposito found and contacted Cedrone over the internet to consult with him regarding purchasing raw materials for a prototype version of the C-A-T. (R. p. 47). Esposito had already formed Phil Durango LLC, through which he had invented, developed, and

patented the C-A-T. (R. p. 47).

Esposito wanted to mass-produce the C-A-T and sell it. (R. p. 47). Cedrone—through Poly-Tech's already-existing sales representative relationship with CRI, memorialized in a 2001 contract—knew that CRI had the capability to do that, and that Poly-Tech did not. (R. pp. 48, 516–17, 883, 897).

For years, Poly-Tech had been selling CRI's manufacturing and design capabilities to potential customers who had products in development but needed additional support to achieve commercialization. (R. p. 880). If Poly-Tech brought a company to CRI and CRI reached an agreement whereby it would manufacture or design a product for that company, then that company would become an "account" for CRI, and Poly-Tech would get a commission for that CRI "account." (R. p. 880).

Cedrone convinced Esposito to have Phil Durango LLC use CRI to assemble and mass produce the C-A-T, and Phil Durango LLC became a CRI account. (R. pp. 48, 883). In return, CRI agreed to pay Poly-Tech a commission from CRI's revenues generated from C-A-T sales for Phil Durango LLC. (R. pp. 48, 883).

II. The 2005 Agreement

In 2005, Cedrone needed a bank loan to finance the construction of a new building. To secure financing from the bank, Cedrone needed proof of Poly-Tech's entitlement to commissions from CRI on C-A-T sales for Phil Durango, LLC. To accommodate Cedrone, Bennett agreed to amend their 2001 Sales Representative Agreement by entering into the 2005 Agreement. (R. pp. 887–88). Under the 2005 Agreement, Poly-Tech was appointed CRI's non-exclusive sales representative, and CRI agreed to pay Poly-Tech "Commissions," defined in Annex C to the 2005 Agreement. (R. p. 530). Annex C is divided into Subsections A, B, and C. (R. pp. 539–40).

Subsections A and B govern Poly-Tech's commissions on CRI's accounts generally.

Subsection C was created in the 2005 agreement to cover two "special accounts"—described as "exceptions" to Subsections A and B: (1) "GraviGate Products" and (2) "Phil Durango L.L.C." Subsection C's "GraviGate Products" provision states:

> 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.

(R. p. 540). Unlike the "GraviGate Products" provision's reference to "this *product*" and the "*product line*," the "Phil Durango L.L.C." provision uses the terms "this *account*" and the "*project*":

> 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.

(R. p. 540). Despite arguing that these two provisions should be interpreted exactly the same—that CRI should pay a commission as long as the C-A-T product line continues—Poly-Tech acknowledged during the summary judgment proceedings, "the words don't exactly match." (R. p. 149). Crucially, the 2005 Agreement does not define the terms "product line" or "project," both of which appear a single time in the entire contract. But "product line" refers to "GraviGate Products" as it appears under that section. Likewise, "project" refers to "Phil Durango L.L.C." as it appears under that section.

As "terms and conditions" to receiving Commissions under the 2005 Agreement, Poly-Tech agreed to, *inter alia*, "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 renumeration is involved, contingent or otherwise, which in any way": (1)

"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." (R. p. 530). Poly-Tech further agreed to refrain from "the soliciting of orders for, or representing, or dealing in, any goods competing with any core products handled by [CRI]." (R. p. 530). Poly-Tech has admitted that "having any alternative to the C-A-T tourniquet available so that somebody could make an alternative choice is not in [CRI's] interest." (R. p. 871, lines 12–16). The 2005 Agreement also contained a confidentiality provision, wherein Poly-Tech agreed to "keep confidential" and "not disclose, during or subsequent to the term of this Agreement, any information of an unpublished, confidential or proprietary nature for its own benefit after termination of this Agreement." (R. pp. 531–32).

Poly-Tech agreed that these terms and conditions were "like prerequisites" to the contract and became Poly-Tech's "obligations" to CRI. (R. p. 873, lines 3–8). Poly-Tech further agreed that if it violated those conditions, it would be in breach of the 2005 Agreement. (R. p. 873, lines 20–24). Poly-Tech also agreed that if it were to subsequently develop a conflict of interest, it would not be in compliance with the 2005 Agreement. (R. p. 875, lines 14–19).

When the 2005 Agreement was signed, Phil Durango LLC owned the intellectual property and rights to the C-A-T. (R. p. 876, lines 15–19). Neither CRI nor Poly-Tech had the ability to manufacture, market, or sell the C-A-T without Phil Durango LLC's permission and involvement. (R. pp. 876–77). In 2005, Phil Durango LLC marketed and sold the C-A-T. CRI in turn manufactured the C-A-T on behalf of Phil Durango LLC to fill those orders and sold the finished tourniquets to Phil Durango LLC.

Poly-Tech admitted that "in June of 2005, when this contract was signed, the project was [CRI] manufacturing tourniquets on behalf of Phil Durango," "[w]ith Poly-Tech getting paid a

commission for having convinced Phil Durango to use CRI to assemble and mass produce the tourniquets." (R. p. 883, lines 11–20). Poly-Tech further agreed that Phil Durango LLC was "a necessary party to the Phil Durango tourniquet project." (R. p. 885, lines 15–17). In fact, Cedrone testified in a November 2022 deposition that Phil Durango LLC *was* "the account" and "the project." (R. p. 891, lines 18–22).

In 2014, Esposito decided he wanted out of the project and to sell the C-A-T intellectual property. (R. p. 896). CRI had to pay $11 million—part cash, part note—for the rights to continue manufacturing and selling the C-A-T. (R. pp. 896–97). Poly-Tech admitted that after Esposito sold the C-A-T, Phil Durango LLC—who "w[as] the project"—"exited the scene." (R. pp. 891, line 22, 898, line 4). The Phil Durango LLC account entitling Poly-Tech to commissions ceased to exist, as did Phil Durango LLC when it was dissolved by Esposito in October 2016, after CRI paid the note on the intellectual property in full.

III. Poly-Tech agrees to a commission reduction and then tries to renege.

From the time that it purchased the C-A-T intellectual property, CRI was met with near constant pressure from its primary distributor, NAR, to lower the C-A-T price or risk dramatically losing market share. (R. p. 753). CRI's CFO, Derek Thompson, advised Bennett that since the Phil Durango LLC account was gone and the project involving the manufacture of the C-A-T on behalf of Phil Durango, LLC had ended, CRI was no longer obligated to pay Poly-Tech commissions. (R. p. 753). Bennett acknowledged that the account for which Poly-Tech was receiving commissions had ended, as had the project, but he declined to stop paying Poly-Tech a commission based on loyalty and what he had viewed as his friendship with Cedrone. (R. p. 753). Bennett's position was that CRI had purchased the C-A-T intellectual property from Phil Durango LLC so that CRI could continue making the C-A-T, not as a reason to immediately discontinue Poly-Tech's commissions and other business as well. (R. p. 753).

However, in 2017, CRI was faced with an existential crisis: a new, significantly cheaper tourniquet called the AlphaPointe TMT entered the market. (R. p. 753). 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. (R. p. 753). CRI agreed to the reduction and that the reduction would be shared equally with NAR, with each entity reducing its revenue by $1.25 per tourniquet. (R. p. 753). This need to reduce the price of the C-A-T to stay competitive caused Thompson to (1) revisit the 2005 Sales Representative Agreement and Poly-Tech's commissions, and (2) seek the advice of CRI's lawyer regarding whether those commissions were an ongoing obligation, and whether the 2005 Agreement could be terminated. (R. p. 753). In March 2017, CRI's lawyer advised that because the "Phil Durango L.L.C." account no longer existed and had been discontinued, no commissions were payable to Poly-Tech, and further that the 2005 Agreement was terminable. (R. p. 753).

Rather than terminate the 2005 Agreement, Bennett opted to do what the parties had done in the past when the "Phil Durango L.L.C." account existed, and when Phil Durango LLC was still involved in the "project." (R. p. 50). When CRI had made price reductions in the past, Poly-Tech agreed to share in the reductions by reducing its commissions. (R. p. 50). For example, in 2013 Poly-Tech's commission had been permanently reduced by agreement from $1.75 to $1.25 per tourniquet.[4] (R. p. 50). Accordingly, in March 2017, Bennett informed Cedrone that CRI and Poly-Tech would share evenly in a C-A-T price reduction of $.625 each. (R. p. 754). As it had done so previously, Poly-Tech agreed to the 2017 reduction, with Cedrone stating that he 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." (R. p. 754).

[4] The September 29 Order erroneously found the commission owed to Poly-Tech was "$1.75 per [Combat] [T]ourniquet sold." (R. p. 38). After CRI pointed out that the $1.75 amount was incorrect, the trial court struck that language from the order. (R. p. 42).

Two weeks later, Poly-Tech ignored its own written "accommodation," tried to walk back its agreement, and became increasingly difficult to work with, ultimately demanding that Bennett run CRI's C-A-T related business decisions past Cedrone. (R. p. 754).

IV. Poly-Tech and Cedrone develop a competing tourniquet in secret, and CRI terminates the 2005 Agreement.

Unbeknownst to CRI, as early as August 3, 2017, Cedrone and Poly-Tech were designing and developing an alternative tourniquet to the C-A-T called the HALO. (R. pp. 591–626). Along with two others, William Carson and William Cannon—who had been under NDAs to CRI[5]—Cedrone and Poly-Tech were "participants" in the "idea" to "come up with a tourniquet that would beat or unseat the C-A-T," using Poly-Tech employees and resources and Poly-Tech's building and machinery. (R. p. 917). All the while, Poly-Tech was receiving millions of dollars from CRI in C-A-T commissions pursuant to the 2005 Agreement. (R. p. 919).

From August 2017 to August 2018, while accepting $7 million in C-A-T commissions in just that year, Cedrone and Poly-Tech: (1) "got a trademark on an alternative tourniquet"; (2) "filed a patent for an alternative tourniquet"; (3) "made prototypes for . . . the tourniquet that was going to unseat the C-A-T"; (4) "made bulletins, for example, that showed the HALO tourniquet next to the C-A-T tourniquet"; (5) "gave the C-A-T distribution pricing" to their HALO partners to "come up with a competitive price to the C-A-T"; and (6) "made training videos of how to use a competitive tourniquet." (R. pp. 919–22).

Again, CRI was unaware of Poly-Tech's development and efforts to commercialize an alternative competing tourniquet. But based on Poly-Tech's reaction to the $.625 reduction and the fact that the Phil Durango LLC "account" and "project" had ceased to exist, CRI decided to

[5] The summary judgment evidence reflects Poly-Tech's admission that Carson discussed possible improvements to the C-A-T "under a non-disclosure agreement" with Jonathan Bennett and Mark Esposito. (R. p. 594).

terminate the 2005 Agreement. Accordingly, in June 2018, CRI gave Poly-Tech 60-days' notice of termination of the 2005 Agreement. (R. pp. 51, 541). In August 2018, CRI stopped paying commissions to Poly-Tech. (R. pp. 51, 541).

ARGUMENT

I. The trial court erred by interpreting Annex C as unambiguously—and as a matter of law—requiring CRI to pay Poly-Tech commissions for as long as CRI is associated with the making and selling of the C-A-T, because the trial court failed to consider or give effect to the term "Phil Durango L.L.C." in conjunction with "commission for this account" and "project."

A. Any commission must be "for" the "Phil Durango L.L.C" account, which no longer exists.

Section 1 of the 2005 Agreement provides that Poly-Tech is the "Representative" for CRI "at the commission rates defined in Annex C." (R. p. 530). Annex C is entitled "Commissions." (R. p. 539). 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) then lists two "special accounts": (C)(1) "GraviGate Products," and (C)(2) "Phil Durango L.L.C.":

> 1. GraviGate Products
>
> 17% on All GraviGate, GraviBar & Gravi-T Products sold.
>
> Commission for this product is to continue at 10% if for any reason the regular contract is discontinued and paid to the estate of Daniel P. Cedrone for as long as the product line continues.

> 2. Phil Durango L.L.C.
>
> A Commission rate of $1.75 per tourniquet sold.

> 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.

Importantly, these separate subsections use different language to describe CRI's obligations to pay commissions to Poly-Tech. *See Gibson v. Gibson*, 113 S.C. 160, 167, 101 S.E. 922, 924 (1920) ("Where different words are used in an instrument, it suggests that different ideas were intended."). The fact that the trial court "construed" these allegedly unambiguous terms to mean "for as long as CRI is associated with the making and selling of the C-A-T Tourniquets" by itself reflects that the summary judgment was erroneous. If Subsection (C)(2) were unambiguous, the trial court would not need to construe it.

"Phil Durango, L.L.C." was a CRI account when the 2005 Agreement was signed. Subsection (C)(2) ties any "commission" 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. *See 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."); *see also Pee Dee Stores, Inc.*, 381 S.C. at 243, 672 S.E.2d at 804 ("It is highly unlikely that the language of Paragraph 8 was included in the Agreement but yet meant to have no effect."); 11 *Williston on Contracts* § 32:11 (4th. ed. 2012) ("Interpretations which give a contract meaning are preferred to those which render it meaningless."); 17A C.J.S. *Contracts* § 417 (2020) ("[A] court is bound to construe contracts so as to give effect to all provisions, whenever possible, and there is a presumption that the parties have not used words needlessly. A construction rendering a provision, term, or part meaningless . . . should be avoided.").

Yet, the September 29 Order gives no effect to "Phil Durango, L.L.C.," "this account," or "project." Rather, it incorrectly equates these terms with the product itself 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." (R. pp. 27, 33, 38). However, that interpretation ignores that any

commission owed must be "for this account," which is "Phil Durango, L.L.C." This is further supported by Poly-Tech's admission in its 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." (R. p. 48) (emphasis added).

Phil Durango LLC "ceased to be a customer account" for CRI in November 2014, when CRI "purchased the CAT® Tourniquet patents from Phil Durango, LLC." (R. pp. 574, 587, 77 ("[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.")). Phil Durango LLC certainly "ceased to be a customer account" when it ceased to exist after dissolution by its owner Mark Esposito in 2016.

The commissions are "for this account," *not* for a "product" or "product line," as the parties contracted with respect to the GraviGate products. *See Gibson*, 113 S.C. at 167, 101 S.E. at 924 ("Where different words are used in an instrument, it suggests that different ideas were intended."). Since "Phil Durango L.L.C." must be given effect, in the absence of that account, there can be no commission for that account. At a minimum, a genuine issue of material fact exists as to whether the parties intended for the commission obligation to continue if the Phil Durango LLC account ceased to exist—which would be contrary to the business relationship between CRI and Poly-Tech, wherein Poly-Tech was paid commissions on customer accounts it brought to CRI.

Poly-Tech judicially admitted that it was being paid a commission not based on the sale of tourniquets, but for Poly-Tech's relationship with Phil Durango LLC. (R. p. 48). When Phil Durango LLC obligated CRI to pay $11 million dollars for the C-A-T intellectual property so that CRI could continue to assemble and manufacture the C-A-T, the account ceased to exist. If there is no account, there is no commission. Again, a genuine issue of material fact exists as to whether

the parties intended for the commission obligation to continue after Poly-Tech was no longer convincing Phil Durango LLC to use CRI to assemble and mass produce the C-A-T.

Moreover, Mark Esposito dissolved Phil Durango LLC. If there is no Phil Durango LLC, there can be no Phil Durango LLC account, and accordingly there is no commission owed under the account. If—as the trial court apparently determined—the commission was tied solely to the making of a product without regard to Phil Durango LLC's involvement, the 2005 Agreement would have simply said "commission for this ***product***," as it did with respect to the GraviGate account above—not "commission for this account" as it clearly states.

To determine that CRI is obligated to pay commissions based solely on the manufacture of the tourniquet without regard to the involvement of Phil Durango LLC can only be accomplished by ignoring the distinction between the terms and defining "account" as tourniquets, "Phil Durango L.L.C." as tourniquets, and "project" as the tourniquet "product line," all while ignoring why Poly-Tech was being paid a commission in the first place: for convincing Phil Durango LLC to use CRI to assemble and manufacture the C-A-T. (R. pp. 48, 517).

B. The trial court's interpretation of "project" fails to give effect to the entire "Phil Durango L.L.C." account provision and the situation of the parties, as well as their purposes, at the time the 2005 Agreement was executed.

Likewise, the trial court's interpretation of "project" as simply the "sale of tourniquets" ignores the material terms "Phil Durango, LLC" and "this account." From the context of the 2005 Agreement (Poly-Tech being paid a commission "for convincing Phil Durango to use CRI to assemble and manufacture" the C-A-T) and the context in which the word "project" appears (within the Phil Durango, LLC special account commission provision), the meaning of "project" must include Phil Durango, LLC. At the very least, a genuine issue of material fact exists as to whether the "project" continues without Phil Durango LLC.

"Project" either 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 manufacture" the tourniquets, or it is ambiguous. But it cannot be that "project" *unambiguously* means simply the manufacture of tourniquets, with or without the involvement of Phil Durango LLC, given the context of the provision and Poly-Tech's pleaded 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 LLC is to write "Phil Durango, L.L.C.," "special accounts," and "this account" out of the 2005 Agreement. *See Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008) ("In determining as a matter of law whether a contract is ambiguous, the court must consider the contract as a whole, rather than deciding whether phrases in isolation could be interpreted in various ways . . . ."). At minimum, there is ambiguity as to whether Phil Durango LLC's continued involvement is a prerequisite to CRI's obligation to pay Poly-Tech commissions.

This ambiguity is demonstrated by the four corners and context of the 2005 Agreement. Together with Poly-Tech's admission in its summary judgment motion that in 2005, CRI agreed to pay Poly-Tech a commission "in return" for Poly-Tech convincing Phil Durango LLC to use CRI to assemble and mass-produce the C-A-T, there is a genuine issue of material fact as to whether the "project" continued after Phil Durango L.L.C. "exited the scene."

Accordingly, the trial court erred by ruling as a matter of law that Annex C unambiguously requires CRI to continue paying commissions for the Phil Durango L.L.C account for so long as CRI produces and sells the C-A-T, notwithstanding the undisputed fact that Phil Durango LLC "exited the scene" years ago and is no longer a CRI account.

II. The extrinsic evidence in the record demonstrates numerous genuine issues of material fact exist as to the parties' intent and does not provide an alternate ground for summary judgment.

As set forth above, it is unclear whether the trial court granted summary judgment based

on the extrinsic evidence as an alternative ground. On one hand, Poly-Tech contended that the September 29 Order "expressly state[s] that it was not granting relief based on the external evidence." (R. pp. 787–88). But Poly-Tech also urged the trial court not to revise the September 29 Order to "affirmatively disavow" reliance on extrinsic evidence and "cripple one of the legs that steady the Order against reversal." (R. p. 789).

Either the trial court intended to grant summary judgment based on the "alternative ground" that "the uncontroverted external evidence filed with the motion papers . . . eliminates the possibility of a genuine issue of material fact,"[6] or it did not. While the E-mail Ruling indicated the latter,[7] the September 29 Order drafted by Poly-Tech states that extrinsic evidence "directly supports Plaintiffs' Motion." (R. p. 35). Although CRI asked the trial court to clarify whether its summary judgment ruling was supported in the alternative by extrinsic evidence—and, if so, to address CRI's "counter evidence"[8] described on pages 8, 10–11, 13, and 21–22 of the Motion to Reconsider—the trial court did not clarify this issue, thereby leaving in place its earlier disavowal of any intent to overcome any ambiguity with extrinsic evidence.

A. Where a contract is unambiguous, extrinsic evidence is inadmissible.

As a threshold matter, if the trial court considered extrinsic evidence, the September 29 Order is erroneous insofar as it purports to use that evidence to interpret "Unambiguous Material

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[6] (R. pp. 23–24).

[7] The E-Mail Ruling stated:

> [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.*

(R. p. 828) (emphasis added).

[8] (R. p. 35). Poly-Tech chose to draft the September 29 Order using the term "counter evidence."

Terms." *See Pres. Capital Consultants, LLC*, 406 S.C. at 320, 751 S.E.2d at 261 ("When the contract's language is unambiguous it must be given its plain and ordinary meaning and the court may not look to extrinsic evidence to interpret its provisions." (quoting *Stevens Aviation, Inc.*, 394 S.C. at 307, 715 S.E.2d at 659)); *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603, 799 S.E.2d 912, 917 (2017) ("Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties *as found within the agreement*." (emphasis original)).

B. CRI filed counter evidence.

Moreover, the trial court erred by concluding that CRI "filed no counter evidence with its filing in opposition to the Motion." (R. p. 35).[9] In fact, CRI filed 55 pages of "counter evidence," including:

a. the Affidavit of Derek Thompson, averring that as of November 6, 2014—when CRI purchased "Phil Durango, LLC's patents for the CAT Tourniquet" for millions of dollars—there was "no longer a Phil Durango LLC customer account";

b. the February 5, 2019 patent for the competing "HALO" tourniquet, reflecting Cedrone as an "Applicant" and an application file-date of "March 7, 2018," well before the August 2018 termination of the 2005 Agreement;

c. Poly-Tech's deposition testimony admitting that the HALO is a competing product to the C-A-T; and

d. Lisa Bennett's testimony that if Poly-Tech developed a competing tourniquet, that would be a breach of the 2005 Agreement, for which the agreement could and should be justifiably and appropriately terminated.

(R. pp. 587–89, 598–641). The "counter evidence" further included the deposition testimony of Cedrone as Poly-Tech's corporate representative, testifying that Poly-Tech was "marketing and advertising the HALO tourniquet on its web page," and that the HALO was a "competitive

[9] Again, the E-mail Ruling did not say that. Poly-Tech added it to the proposed order, which the trial court signed exactly as drafted by Plaintiffs.

product" to the C-A-T. (R. pp. 625–26). The trial court acknowledged at the May 4, 2022 hearing that both parties had presented extrinsic evidence.[10] The "counter evidence" presented by CRI creates genuine issues of material fact precluding the trial court's determination that CRI unambiguously "was and is obligated" to continue paying C-A-T commissions to Poly-Tech "after the date of this Order."

C. The extrinsic evidence in the record presents genuine issues of material fact precluding summary judgment.

In its E-mail Ruling, the trial court referenced "the testimony of Lisa Bennett to the effect that 'as long [as CRI] is making tourniquets Poly-Tech would get paid.'" (R. p. 828). However, the trial court did not reference that extrinsic evidence to support a judicial determination that Annex C means as a matter of law that CRI owes commissions until the tourniquets are no longer produced and sold, *no matter what*—as the September 29 Order was drafted to say. The trial court simply referenced that evidence in rejecting CRI's argument that Annex C was so indefinite as to be unenforceable.

The trial court found that CRI's "indefiniteness" argument failed because, for example, Lisa Bennett testified as to an interpretation, rendering it ***not*** fatally indefinite. The trial court did not then also ***adopt*** that interpretation based on Lisa Bennett's testimony, and for good reason—Lisa Bennett's interpretation is that "competition" was ***also*** one "of the reasons it could be terminated." (R. pp. 634–39).

Poly-Tech seized on the trial 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, Poly-Tech also drafted the September 29 Order to incorrectly recite language—found nowhere in the

[10] (R. p. 120, lines 4–6) ("What y'all have argued to me today, both sides want me to consider other outside extrinsic evidence . . . .").

E-mail Ruling—that "Defendant filed no counter evidence with its filings in opposition to the Motion," ignoring Lisa Bennett's additional testimony in the 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."

(R. pp. 634–39). This evidence is "counter" to the 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.

(R. p. 33). If, as Lisa Bennett testified—and the 2005 Agreement clearly states—competition is a breach of the 2005 Agreement, then such a breach would excuse CRI's further performance, including the commission obligation. *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)). In other words, if Poly-Tech committed a prior material breach of the 2005 Agreement, any obligation for CRI to pay those commissions was discharged or excused. *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").

There is evidence in the record that creates a genuine issue of material fact as to whether Poly-Tech breached the 2005 Agreement before August 2018, thereby excusing CRI from any further commission obligation. For example:

- the February 5, 2019 patent for the competing "HALO" tourniquet, reflecting Cedrone as an "Applicant" and an application file-date of "March 7, 2018," well prior to August 15, 2018 termination of the Agreement (Resp. MPSJ, Ex. 3); and

- Poly-Tech's deposition testimony admitting that the HALO tourniquet developed by it and Cedrone is a competing product to the CAT (*Id*., Resp. MPSJ, Ex. 4).

In sum, it is erroneous to find "Defendant filed no counter evidence." Further, the extrinsic evidence in the record creates multiple genuine issues of material fact as to the commission obligation's status, rendering an "alternative ground" for summary judgment unsupportable. Because genuine issues of material fact exist as to whether Poly-Tech's prior breaches excused CRI's further performance under the 2005 Agreement, it was error for the September 29 Order to find, as a matter of law, that CRI was and is obligated to continue paying commissions to Poly-Tech, and the Order denying CRI's Motion to Reconsider failed to correct this error.

D. Cedrone's deposition testimony creates genuine issues of material fact as to whether Phil Durango LLC was essential to the account and project.

In addition to the ambiguity within the 2005 Agreement itself, Dan Cedrone's deposition testimony created a genuine issue of material fact as to whether CRI's commission obligation continues in the absence of a Phil Durango LLC "account" or "project." Cedrone testified that, in June 2005, there was no "project" without Phil Durango, LLC:

Q. Without Phil Durango, there is no tourniquet project—

A. That would be true.

Q. —in June of 2005?

A. Correct.

(R. p. 889, lines 9–13). Cedrone also testified that: (1) it was "Phil Durango's decision"—as the owner of the intellectual property—who would be permitted to manufacture the C-A-T; (2) neither CRI nor Poly-Tech could manufacture the C-A-T without Phil Durango LLC's approval; and (3) in 2005, it was Phil Durango LLC's decision "alone" as to who could be involved in the manufacture and sale of the C-A-T. (R. p. 878).

As for the meaning of "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." (R. pp. 879–80). 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]." (R. p. 880, lines 6–11). 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. (R. pp. 47, 517).

Cedrone agreed that as of 2005, when this contract was signed:

- "the *project* was [CRI] manufacturing tourniquets *on behalf of Phil Durango*";
- Poly-Tech was "getting paid a commission for having convinced *Phil Durango* to use CRI to assemble and mass produce the tourniquets"; 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*."

(R. p. 883, lines 11–20; p. 885, lines 2–7) (emphases added). Cedrone agreed that Phil Durango LLC was a "necessary party" to the "project," and that "[t]he tourniquet project *necessarily*

involved Phil Durango in June of 2005." (R. pp. 885–86, 891) (emphases added).

Cedrone also admitted that as of 2005, it was "never contemplated" that Poly-Tech 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*." (R. pp. 886–87) (emphasis added). When asked whether the parties ever had a conversation in which they agreed that Poly-Tech would continue to be paid commissions even if the tourniquets were manufactured without Phil Durango LLC's involvement, Cedrone stated: "In 2005 that was not contemplated":

> 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.

(R. p. 886, line 25–p.887, line 4). And because it was not even contemplated, it could not have been the intent of the parties in 2005—much less the unambiguous meaning of the contract—that Poly-Tech would continue to be entitled to commissions even if Phil Durango LLC were no longer involved. *See Frewil, LLC v. Price*, 411 S.C. 525, 530, 769 S.E.2d 250, 253 (Ct. App. 2015) ("If a situation is unaddressed in a contract, the court may look to the circumstances surrounding the bargain as an aid in determining the parties' intent."). Cedrone went on to admit that Phil Durango, LLC <u>was</u> "the account" and "the project," and that it was "Phil Durango LLC's right to have the tourniquets manufactured or not." (R. p. 891).

To continue manufacturing the C-A-T in 2014, CRI had to purchase the intellectual property from Phil Durango LLC. Cedrone admitted that, after CRI's purchase of the C-A-T-intellectual property from Phil Durango, LLC, Poly-Tech was no longer convincing Phil Durango LLC to use CRI to mass-produce and assemble the C-A-T, and, in fact, Poly-Tech and Cedrone "weren't involved at all" in the purchase or sale of the intellectual property or in CRI being able

to continue manufacturing the C-A-T. (R. p. 897). According to Cedrone, after Phil Durango LLC sold the C-A-T intellectual property to CRI, Phil Durango LLC "exited the scene" and the "project" was over. (R. p. 898).

In sum, Annex C, subsections (C)(1) & (2) identify two special accounts as exceptions to the regular commission rates. One of the special 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 intellectual property from Phil Durango LLC, Phil Durango LLC was dissolved, and there was no more "Phil Durango L.L.C." account. The "project" ended, as did the commission obligation.

Cedrone's deposition testimony demonstrates that when the 2005 Agreement was signed, "Phil Durango L.L.C." *was* the "account," and that without Phil Durango, LLC, there was no "project." The September 29 Order fails to recognize that Phil Durango LLC is essential to a proper construction of those terms. Cedrone's deposition testimony supports 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 LLC; and

2. "project" cannot be interpreted as a matter of law simply as "sale of tourniquets by [CRI]," when the parties undisputedly considered Phil Durango LLC to be a necessary part of the "project," and without whom there would be no "project."

At minimum, Cedrone's testimony creates genuine issues of material fact, foreclosing summary judgment.

E. Cedrone's deposition testimony also creates additional genuine issues of material fact as to CRI's defenses and counterclaims.

As for the evidence supporting CRI's prior breach defenses and counterclaims, Cedrone testified that:

- The 2005 Agreement's provision "on the terms and conditions hereinafter set forth" means that the following "terms and conditions" were "like prerequisites to the contract" (R. pp. 872, line 19–p. 873, line 8);

- "those conditions became an obligation" of Poly-Tech's when the 2005 Agreement was signed (R. p. 873, lines 16–19);

- If Poly-Tech violated those conditions, "then you're not complying with the Agreement," and that would be "a breach" (R. p. 873, lines 20–24);

- The 2005 Agreement's "first condition" was Section 2's "Acceptance of Appointment provision where it says that Poly-Tech may not have a conflict of interest with CRI" (R. p. 873, line 25–p. 874, line 8);

- If Poly-Tech had disclosed a conflict of interest prior to June 2005, "there's no way this contract would have been signed" because Section 2 "was a prerequisite, a condition" (R. p. 875, lines 4–13);

- "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" (R. p. 875, lines 14–19);

- CRI's "interest" was "to manufacture and sell . . . as many tourniquets as it could" (R. p. 866, lines 17–25; p. 870, lines 8–15);

- It would not be in CRI's interest to have "any alternative to the C-A-T tourniquet available" (R. p. 871, lines 12–16);

- "developing a competing tourniquet to the C-A-T tourniquet would be a conflict of interest with [CRI]" (R. p. 867, lines 17–23);

- Poly-Tech "having a trademark on alternative tourniquet" would not be in CRI's interest (R. p. 868, line 23–p.869, line 2);

- Poly-Tech "[m]arketing a tourniquet other than the C-A-T tourniquet is not in [CRI]'s interest" and would be "a conflict of interest" (R. p. 869, lines 3–7);

- Poly-Tech "market[ing] a tourniquet that is *meant to unseat* the C-A-T tourniquet" would "be a conflict of interest" (R. p. 869, lines 11–18) (emphasis added);

- Phil Durango's owner Mark Esposito "wouldn't have let [Poly-Tech] anywhere near the C-A-T tourniquet" had he known Poly-Tech was "going to go patent a different tourniquet as an alternative" (R. p. 892, lines 1–7); and

- "if [CRI] would have known that [Poly-Tech] had patented an alternative tourniquet, trademarked an alternative tourniquet, tried to market an alternative tourniquet, [CRI] would not have paid [Poly-Tech] anymore because [Poly-

> Tech would] have been not in compliance with this agreement." (R. p. 893, lines 5–14).

Cedrone also admitted that he specifically referenced the C-A-T as a "competitive product"[11] to his HALO partners in 2018 while being paid C-A-T commissions. (R. pp. 905–06).

Additionally, Cedrone testified that he appropriated CRI's distributor pricing information—that he "wouldn't have known" if he was not "associated with the C-A-T"—to make his own, alternative tourniquet competitive to the C-A-T. (R. p. 906). 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." (R. p. 907, line 16–23). 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." (R. p. 907, line 24–p.908, line 7).

Cedrone testified that he and his "partners in the HALO" knew "how much" the C-A-T's distributors paid for it because Cedrone told them. (R. pp. 894–95). Moreover, in a March 2018 e-mail between Cedrone and his "partners in the HALO," one of them stated the "goal" of the HALO was to "unseat" the C-A-T and make the HALO "a household name":

> Q. Sir, your partner in HALO is saying he *wants to unseat the C-A-T*, right?
>
> A. He says: Appealing to a civilian market represents a viable alternative.
>
> Q. If we are unable to *unseat the C-A-T*. Which is his goal. He says it right there—
>
> A. Right.

(R. pp. 903–04, 927–29) (emphasis added). Cedrone also testified that he specifically referenced the C-A-T as a "competitive product" to his HALO partners in 2018, while receiving millions of

[11] (R. p. 931).

dollars in C-A-T commissions pursuant to the 2005 Agreement:

> Q. Sir, there was a contract in place that you were under and getting paid under, correct?
>
> A. Yes.
>
> Q. You got paid $7 million. And during that period of time that you were being paid $7 million, you designed an alternative tourniquet, correct?
>
> A. Yes.

(R. p. 905; p. 919, lines 12–20; p. 931–32).

In conclusion, the evidence reflects genuine issues of material fact regarding Poly-Tech's prior material breaches of the 2005 Agreement, which if proven, would also terminate CRI's obligation to pay commissions to Poly-Tech. Thus, the extrinsic evidence cannot provide an alternative ground for the trial court's conclusion as matter of law that CRI "was and is obligated" to pay Poly-Tech commissions for as long as CRI is associated with the making and selling of C-A-T tourniquets.

III. If the September 29 Order fixed CRI's liability for commissions "as a matter of law, for as long as [CRI] is associated with the making and selling of C-A-T tourniquets," it is unsupported by the record since Poly-Tech did not move on—and the trial court did not adjudicate—CRI's defenses and counterclaims, as to which there are numerous genuine issues of material fact.

Poly-Tech argued to the trial court that: (1) 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*"; and (2) CRI's "recoupment counterclaim will not survive the impact of the Court's September 29, 2022 Order granting partial summary judgment." (R. pp. 772, 780, 783) (emphasis added)

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].

(R. pp. 38–39) (emphasis added) (footnotes omitted). The September 29 Order makes eight "Findings of Fact." (R. pp. 27–28). Findings 1, 4, and 5 are factual findings. The remaining "findings" are legal rulings on the meaning of the 2005 Agreement. 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). Again, these "findings" might be read as granting partial summary judgment on liability, leaving only a future determination of the amount of damages.

However, Poly-Tech 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."). CRI's defenses and counterclaims include allegations that Poly-Tech breached duties owed to CRI by: (1) violating the "no conflict of interest" and non-compete obligations imposed by the 2005 Agreement and implied covenant of good faith and fair dealing; and (2) disclosing confidential and proprietary information to third parties in connection with the development of a competing product. (R. p. 79–86). For example:

- Poly-Tech committed material breaches of Section 2 of the 2005 Agreement *prior to* CRI's termination of the 2005 Agreement by "engaging directly or indirectly" in activities and business transactions for themselves which "in any way" competed with "any" operation of CRI, or which may have resulted in a "conflict of interest or 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 good competing with any core products handled by" CRI. (R. pp. 79 ("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."), 82 (same and seeking recovery of commissions paid in error), 575–76).

- Poly-Tech committed material breaches of Section 5 of the 2005 Agreement by appropriating CRI's distributor pricing information that Poly-Tech "wouldn't have known" if it was not "associated with the C-A-T" in order to make an alternative tourniquet competitive to the C-A-T. (R. pp. 905–07).

- 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." (R. pp. 77 ("[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."), 574).

Under these defenses, CRI would not be liable to Poly-Tech under the 2005 Agreement, even under the terms as construed by the Court.

Poly-Tech's 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*, 483 F. App'x at 835 (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").

A fundamental canon of contract interpretation is that if one construction of a contract

would lead to an absurd conclusion, such interpretation should be avoided. *See 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 that would require CRI to continue paying Poly-Tech commissions as long as the tourniquets are sold *even if Poly-Tech breached Section 2's "no conflict of interest" and noncompete provisions or Section 5's confidentiality provision* would be absurd.[12]

Section 9 of the 2005 Agreement allows CRI to terminate the agreement if Poly-Tech commits a "material default in the performance of its obligations under this Agreement." Under the trial court's interpretation of Annex C as articulated in the September 29 Order, though, even that ground for termination could not extinguish CRI's ongoing payment obligations. Again, that "would lead to an absurd conclusion" and should be rejected. Further, as set forth above, the record presents multiple genuine issues of material fact as to whether Poly-Tech committed prior material prior breaches of the 2005 Agreement, which would excuse any further commission obligation on behalf of CRI.

In addition, Section 5 of the 2005 Agreement ("Confidentiality") requires Poly-Tech to keep confidential all information of an unpublished, confidential or proprietary nature. (R. pp. 531–32). Such obligation was in place during the term of the 2005 Agreement and continued after termination. This obligation is not only directed to "trade secrets," but extends to all confidential or proprietary information.

Section 5 is reasonably interpreted to mean that Poly-Tech, including its agents, employees, and representatives, must not disclose any of CRI's proprietary information. This obligation does

[12] Notably, that is exactly what Lisa Bennett testified to in her deposition. (R. pp. 634–39).

not terminate with the 2005 Agreement and is supported by the plain language of Section 6. In granting summary judgment, the trial court failed to consider Section 5 and the evidence of Poly-Tech sharing CRI's distributor pricing information with Poly-Tech's co-conspirators, while Poly-Tech was continuing to receive and accept commission under Annex C. (R. pp. 894–95, 903–05, 919, 927–32).

The plain language of Section 2, Section 5, and Annex C to the 2005 Agreement, along with the parties' intent and the circumstances surrounding the 2005 Agreement,[13] indicate that these promises were mutually dependent upon one another such that Poly-Tech's breach of Section 2 or Section 5 excused further performance by CRI as to its obligations under Annex C. Section 2 is entitled "Acceptance of Appointment" and is a "condition"[14] to Poly-Tech being "appointed" CRI's "Representative." As a condition to Poly-Tech's acceptance of appointment, it 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" CRI, (b) "may result in a conflict of interest or" (c) "would otherwise adversely affect the proper discharge of [Poly-Tech's] duties . . . 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" CRI. (R. p. 530) (emphases added). This record creates *at minimum* multiple fact issues as to Poly-Tech's prior material violations of the 2005 Agreement, thereby

[13] Cedrone admitted that in 2005, Section 2's noncompete and no-conflict-of-interest provisions and Annex C(C)(2) were added to the Agreement at the same time. (R. pp. 888–90). *See also* Section II.E above outlining Cedrone's deposition testimony that creates genuine issues of material fact as to the parties' intentions and CRI's defenses and counterclaims.

[14] Section 1 of the 2005 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*." (R. p. 530) (emphasis added).

precluding a liability finding against CRI at this stage. *See Foreign Acad. & Cultural Exch. Servs., Inc.*, 394 S.C. at 202, 715 S.E.2d at 333 ("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.").

In conclusion, Poly-Tech's Section 2 and Section 5 breaches excused CRI's Annex C obligations. Any interpretation of Annex C otherwise leads to an absurd result and renders other provisions of the 2005 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) future C-A-T commissions to Poly-Tech without adjudicating CRI's defenses and counterclaims, it is erroneous, and the trial court's subsequent order denying CRI's motion to reconsider did not cure this error. *See Englert, Inc. v. LeafGuard USA, Inc*., 377 S.C. 129, 133, 659 S.E.2d 496, 498 (2008) (holding the "trial court err[ed] in granting summary judgment where LeafGuard USA's defenses and counterclaims had not been ruled on").

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

Even though Poly-Tech judicially admitted at least *four* times[15] that its 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*." (R. pp. 37–38) (emphasis added). 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 September 29 Order, and Poly-Tech certainly would not agree with that interpretation.

On the other hand, the more reasonable—and likely—interpretation is that the September

[15] (R. pp. 518, 643, 682).

29 Order provides 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 trial court's ruling, then it is incorrect to state that the provision could ever truly "terminate." The most that could be said under that interpretation would be that the obligation might become temporarily paused, but it could never really "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).

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 recognized that under South Carolina law, "if one party could 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). Here, Poly-Tech 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."[16] (R. p. 682). As in *Tower Street*, "the [2005] Agreement is a perpetual contract without an express perpetual term. Thus, South Carolina law mandates that the [2005] Agreement is terminable at will, subject only to 'reasonable notice.'" *Id*. at *13. Such reasonable notice was provided to Poly-Tech in accordance with Section 9 of the 2005 Agreement.

When "project" is construed (as the September 29 Order does) without giving effect to Phil

[16] Again, Poly-Tech erroneously conflates "project" with the manufacture of the C-A-T.

Durango LLC, it creates a perpetual obligation—as long as CRI is engaged in the business of manufacturing tourniquets, CRI must pay Poly-Tech commissions. 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, as set forth herein, Annex C *is* subject to an interpretation that would render it definite, and 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.*, 331 S.C. at 391, 503 S.E.2d at 187. 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 2005 Agreement.

Simply stated, the Phil Durango LLC's disassociation 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 . . . ."). And it is a reasonable triggering event to terminate the commission obligation since Poly-Tech judicially admitted it was being paid commissions "in return" for convincing *Phil Durango LLC* to use CRI to assemble and mass-produce the C-A-T Tourniquet.

CONCLUSION

Based on the foregoing, Appellant Composite Resources, Inc. respectfully requests that this Court reverse the September 29, 2022 Order Granting Plaintiffs' Motion for Partial Summary Judgment and the June 8, 2023 Order Denying Defendant's Motion to Reconsider, Clarify, Alter, or Amend Order Granting Plaintiffs' Motion for Partial Summary Judgment. Appellant Composite Resources, Inc. respectfully requests such other and further relief to which it may show itself to be justly entitled.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2019-CP-46-00051

Appellate Case No. 2023-001103

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

v.

Composite Resources, Inc.,..... Appellant.

CERTIFICATE OF COUNSEL

Undersigned counsel hereby certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully submitted,

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