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 REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Treatises

INTRODUCTION

The Phil Durango provision in Annex C of the 2005 contract between Appellant and Respondent Poly-Tech Industrial, Inc. (the "2005 Agreement") contains four durational terms:

> Commission [*(1)*] for this account [*(2)*] is to continue if for any reason the regular contract is discontinued and [*(3)*] paid to the estate of Daniel P. Cedrone [*(4)*] for as long as project continues.

Setting aside the ambiguities arising from the undefined term "regular contract," and there being no "estate of Daniel P. Cedrone,"[1] two of Annex C's durational terms describe what will *not*—ipso facto—end the commission:

- [*(2)*] termination of the 2005 Agreement (assuming that is what "regular contract" means), or
- [*(3)*] Cedrone's death (assuming that is what "paid to the estate of Daniel P. Cedrone" means).

Respondents hyper-focus on these two durational terms, arguing they render the commission terminable only upon one event: CRI no longer making the CAT. (Resp. Br. 15, 20, 22, 29). But the other two durational terms in the Phil Durango provision describe what *will* end the commission:

- [*(1)*] the commission is only "for this account," and
- [*(4)*] the commission only lasts as long as the "project."

Without "this account," which can only reasonably be interpreted as Phil Durango LLC, there is no "commission for this account." Thus, the Phil Durango provision can reasonably be interpreted as: (1) recognizing the existence of and identifying "Phil Durango L.L.C." as the commission-generating account; (2) tying the commission to the continuation of that account; and (3) providing

[1] There will be no "estate of Daniel P. Cedrone" until Cedrone is deceased.

the discontinuation of the Phil Durango LLC account as an event triggering the end of the commission.

The Phil Durango provision also expressly identifies the discontinuation of "project" as a commission-ending event. Respondents do not dispute the discontinuation of "project" ends the commission. Instead, relying on the GraviGate Products provision's language "for as long as the *product line* continues,"[2] Respondents define "project" as merely "selling Combat Tourniquets," synonymous with "product line." (Resp. Br. 22).

For purposes of this appeal, CRI does not dispute the commission survives Article IX, capital-T "Termination" of the 2005 Agreement or Cedrone's death. But it is undisputable that in addition to saying what will *not* end the commission, the Phil Durango provision also says what *will* end the commission. A jury could reasonably interpret the Phil Durango provision as conditioning the commission on the existence of an "account," as it references "commission for *this account*," not "commission for *CAT sales*." And a jury could reasonably interpret "project"—an undefined term used one time in the entire contract—as an arrangement necessarily involving Phil Durango LLC and not merely "selling Combat Tourniquets," appropriately distinguishing it from the term "product line" found in another provision for another account. Accordingly, the summary judgment should be reversed.

ARGUMENT

I. While the Phil Durango provision's ambiguity is the principal issue presented in this appeal, the resolution of that issue will necessarily result in secondary issues regarding either: (1) the scope of the summary judgment order, or (2) the extrinsic evidence in the summary judgment record.

The summary judgment Order concludes the Phil Durango LLC provision in Annex C unambiguously means that CRI must pay Poly-Tech commissions on CAT sales for so long as

[2] (Emphasis added).

CRI makes the CAT.[3] The corollary to that conclusion is that the only way CRI can stop owing Poly-Tech commissions is to stop making the CAT.

However, the trial court's June 8, 2022 email ruling suggests that the trial court actually found only that the commission obligation survives termination of the contract—*i.e.*, just because the contract is terminated doesn't mean the commission necessarily ends.[4] That would be one reasonable interpretation of the Phil Durango provision's "is to continue if for any reason the regular contract is discontinued" language, as far it goes.

But the summary judgment Order—as drafted by Respondents' counsel—didn't stop there. It went much further, stating in categorical, absolute terms that the commission obligation continues as long as CRI makes the CAT, period, meaning CRI cannot make the CAT without owing Poly-Tech a commission.

That interpretation improperly renders as surplusage at least two other durational terms of the Phil Durango provision that independently—*i.e.*, apart from termination of the contract or Cedrone's death—delineate the commission obligation's duration: (1) "commission for this account," and (2) "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.

Assuming *arguendo* the commission obligation can survive beyond termination of the contract (which CRI does not dispute in a hypothetical sense),[5] the **principal question** for this Court is this:

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[3] (R. pp. 27, 33, 38).
[4] (R. pp. 827–28).
[5] By assuming this for the sake of argument, CRI does not concede it.

Could a jury nevertheless reasonably conclude that the commission obligation could still terminate (whether before or after termination of the contract or Cedrone's death) if either:

1. **the Phil Durango "account" at CRI ceased to exist, or**

2. **the "project" ceased to exist once Phil Durango LLC was no longer involved (or even in existence), and Poly-Tech was no longer convincing Phil Durango to use CRI to assemble and mass produce the CAT?**

If a jury could reasonably answer **"Yes"** to *either* of these things, then the trial court erred in finding the provision unambiguous as a matter of law, and the summary judgment—which concludes that the *only* way the commission ends is if CRI stops making the CAT—must be reversed.

The answer to that **principal question** determines which **secondary question** follows.

****

If the answer is **"No,"**—*i.e.*, "account" and "project" unambiguously mean simply CRI making tourniquets—then that prompts a **secondary question**: **What is the scope of the summary judgment order?** For example, is CRI nevertheless entitled to assert its defenses and counterclaims at trial? Or are they precluded by the Order's unqualified decretal language that CRI "was and is contractually obligated to pay Plaintiffs a commission . . . including after termination of the sales representative relationship on August 31, 2018, including on Combat Tourniquets Defendant produced and sells after the date of this Order, until the Combat Tourniquets stop being produced and sold"? (R. p. 27).

Significantly, if this Court interprets the scope of the Order as barring CRI's defenses and counterclaims, then the summary judgment must be reversed at least as to that, to allow the jury to meaningfully consider CRI's defenses and counterclaims. As addressed in Appellant's Brief (at p.

35), Respondents did not seek summary judgment on CRI's counterclaims and defenses. Accordingly, the counterclaims and defenses were not properly before the trial court for adjudication. Additionally, the summary judgment record reflects many genuine issues of material fact in support of CRI's counterclaims and defenses such that summary judgment would be improper even if those questions were properly before the court.

Conversely, if this Court interprets the scope of the Order as preserving CRI's counterclaims and defenses, then this Court should say so and—because the trial court erroneously declined to—clarify the Order's reach so that the issues remaining for trial are clearly defined for the parties and the trial court. This Court's guidance is warranted for clarity and in the interest of judicial economy.

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Alternatively, if this Court answers the principal question in the **affirmative**—*i.e.*, a reasonable jury *could* interpret: (1) "commission for this account" as meaning that the commission obligation is conditioned on the continuing existence of the Phil Durango, LLC "account" at CRI; or (2) "project" as meaning a three-party arrangement that CRI, Poly-Tech, *and* Phil Durango entered into, and in which Poly-Tech is paid a commission for convincing Phil Durango to use CRI to mass produce the CAT—then the summary judgment should be reversed, at least as to its determination that the contract language is unambiguous.

But that still leaves open another **secondary question**: **Did the trial court alternatively intend to base its summary judgment ruling on extrinsic evidence?** If the answer is **"yes,"** then the summary judgment should be reversed, because (1) extrinsic evidence should not be used to interpret unambiguous contract language, and (2) the extrinsic evidence demonstrates many genuine issues of material fact as to what the parties intended by "account" and "project," thereby

precluding summary judgment. If the answer is **"no,"** then this Court should clarify that in its opinion and vacate that portion of the trial court's order. Again, this Court's guidance is warranted for clarity and in the interest of judicial economy.

In sum, regardless of this Court's ultimate interpretation of the relevant contract language, the order on appeal is internally inconsistent and overly broad in scope, each of which alone necessitates, at minimum, a reversal or vacation in part of the order.

II. The Phil Durango provision conditions the commission obligation on the existence of "Phil Durango LLC" and the Phil Durango LLC "account."

Again, the principal question presented by this appeal is whether a jury could reasonably interpret "account" and "project" as meaning more than just CRI making tourniquets. CRI submits that "account" and "project" *un*ambiguously circumscribe the commission duration. Without a Phil Durango "account," there can be no sales for "this account," and thus no "commission for this account," as the provision unambiguously states. And considering Respondents' judicial admission in their complaint that their commission was "in return" for "convinc[ing] Durango to use Composite to assemble and mass-produce the Combat Tourniquet," Phil Durango was a necessary participant in the "project."[6] *See Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) ("Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions."); *Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964) ("[T]he general rule[is] that the parties to an action are judicially concluded and bound by such unless withdrawn, altered[,] or stricken by amendment or otherwise. The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against

[6] (R. p. 48).

the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible.").

Thus, CRI has argued that the terms "Phil Durango LLC" and "this account" *un*ambiguously mean that the commission's duration is conditioned on the existence of Phil Durango LLC and the Phil Durango "account." But it is not a close call that these terms create *at least* ambiguity.

Initially, Respondents' motion for partial summary judgment ignored "Phil Durango LLC," and "this account," and did not ask the trial court to find the terms unambiguous, much less to interpret or apply them in construing the commission duration in Annex C. CRI's summary judgment response argued that Annex C could not be interpreted without "this account," which CRI contended "is clearly the Phil Durango LLC customer account with CRI," and that "[b]ecause the Phil Durango 'account' no longer exists, the 'commissions for this account' should have also ceased to have been paid"[7]:

> Phil Durango, L.L.C. is no longer in business, and there is no longer a Phil Durango, L.L.C. customer account at CRI. *See* Thompson Aff., para. 4 - 5. Based upon any reasonable interpretation of the Agreement, Poly-Tech did not earn any commissions on the "Phil Durango, LLC" account after November 2014 because the Phil Durango "special account" ceased to exist after that time.[8]

Then, at the summary judgment hearing, the trial court specifically asked Respondents about "Phil Durango LLC": "I circled the name Phil Durango, LLC. Why did that—why is this under a section called, 'Phil Durango, LLC?'"[9] Offering no basis in the Phil Durango provision, Respondents answered:

> It's a shortcut name for the production of the CAT tourniquets. . . . It's just a—it's just a shortcut name for the products covered under that paragraph and products covered under that paragraph are the CAT tourniquets.[10]

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[7] (R. p. 578).
[8] (R. p. 580).
[9] (R. p. 96, lines 15–17).
[10] (R. p. 96, line 22–p. 97, line 3).

The trial court inquired further:

> THE COURT: So, that's not important to anything.
>
> MR. MUNSON: It's not important to us, your Honor.[11]

At the risk of belaboring the obvious, Respondents' counsel urged the trial court to interpret "Phil Durango LLC"—an actual company and CRI account—as "a shortcut name for the production of the CAT tourniquets" while waving it aside as "not important" in the context of a "motion for partial summary judgment as to unambiguous material terms."

CRI's counsel tried to address the "importance" of "Phil Durango LLC" in interpreting the provision. CRI urges this Court to read the transcript of the colloquy between the trial court and counsel on this point, at pp. 10–13. Despite "circling" Phil Durango LLC and asking Respondents about it, the trial court was not interested in what it characterized as CRI's "narrative" or "dissertation" about the significance of Phil Durango LLC.

After the first summary judgment hearing, Respondents briefed their contract construction motion further, defining "Phil Durango LLC" for the first time as the "Product rights holder for Combat Application Tourniquets," based on the "USPTO Office Combat Application Tourniquet Trademark index, for which the Court [may] take judicial notice. (https://tmsearch.uspto.gov/bin/showfield?f=doc&state=4806:xua5lx.5.2)"[12]:

[11] (R. p. 97, lines 4–7).
[12] (R. p. 678).

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. **DEFINTION**: Product rights holder for Combat Application Tourniquets. **SOURCE**: USPTO Office Combat Application Tourniquet Trademark index, for which the Court make take judicial notice. (https://tmsearch.uspto.gov/bin/showfield?f=doc&state=4806:xua51x.5.2)

In other words, Respondents asked the trial court to determine that Phil Durango LLC—a proper noun—*unambiguously and as a matter of law* means generically "Product rights holder for Combat Application Tourniquets," *based on extrinsic evidence*. It is hard to imagine a request more diametrically opposed to a "motion for partial summary judgment as to unambiguous material terms," which is what Respondents filed.

Incredibly, Respondents now ask *this* Court in the context of de novo review[13] to conclude that "Phil Durango LLC"—which Respondents now contend is in the 2005 Agreement by mere "happenstance"—unambiguously and as a matter of law means "merely the *initial* name for the product rights holder for the Combat Tourniquet."[14] Even more extraordinarily, Respondents

[13] Respondents contend that CRI "erroneously relies on the inapplicable 'fact-based summary judgment review path.'" (Resp. Br. 8). That is incorrect. The standard of review as to the trial court's determinations that the Phil Durango provision in Annex C is unambiguous and means as a matter of law that CRI cannot make the CAT without owing Poly-Tech a commission is de novo. The standard of review as to the evidence of the "objective manifestations of the parties' assent at the time the contract was made"—which Respondents agree is properly before the Court as part of the threshold ambiguity determination—is to view it in the light most favorable to CRI. *See, e.g.*, *Koester v. Carolina Rental Center, Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994); Rule 56(c), SCRCP. That applies equally to this Court's review of the extrinsic evidence in resolving the "alternative sustaining ground" secondary question—*i.e.*, the extrinsic evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to CRI.

[14] (Resp. Br. 21) (emphasis added). Appellant notes that, to the extent this argument is different from the argument Respondents advanced to the trial court, it is not appropriately before this court. *See Elam v. S.C. DOT*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are

direct this Court to *the same extrinsic evidence*—the "USPTO Office Combat Application Tourniquet Trademark index," and a hyperlink to it.

To recap, Respondents have gone from completely *ignoring* "Phil Durango LLC," to

- marginalizing it as "a shortcut name for the production of CAT tourniquets" and "not important" to the interpretation of the Phil Durango provision and the commission duration;

- defining it to mean "product rights holder" for the C-A-T, based solely on extrinsic evidence; and

- characterizing it to this Court as nothing more than "happenstance," but nevertheless asking this Court to make a de novo interpretation of Phil Durango LLC (as an unambiguous term?) based on a hyperlink to the "USPTO Office Combat Application Tourniquet Trademark index."

Respondents themselves have given "Phil Durango LLC" differing interpretations, which alone is fatal to a determination that "Phil Durango LLC" and "this account" are not subject to more than one reasonable interpretation. *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation.").

Moreover, the trial court erred in adopting Respondents' interpretations, which require tortured analyses untethered to the contract. Conversely, based on the clear, unambiguous language of the 2005 Agreement, "Phil Durango LLC" is the name of an actual corporate entity, characterized by the contract as a "special account," and the name of the "account" for which Respondents seek commissions. The Phil Durango provision can (more than) reasonably be interpreted as connecting the duration of the commission obligation to the existence of the Phil Durango LLC entity and "account" at CRI. Respondents' attempt to dismiss it as "happenstance"

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preserved for appellate review only when they are raised to and ruled on by the lower court.")

is directly contrary to the rules of contract construction, which—as Respondents agree[15]—require that contract provisions be interpretated such that a term is *not* rendered "happenstance."

III. The Phil Durango provision conditions the commission obligation on the continuation of "project," not a "product line."

Even if this Court concludes "Phil Durango LLC" unambiguously means "merely the initial name for the product rights holder for the Combat Tourniquet," which it should not, that still leaves the commission's other durational term—"project." Even in the briefing to this Court, Respondents essentially concede the ambiguity of "project"—which, again, is undefined and appears once in the entire contract—by repeatedly including some sort of defining modifier: *i.e.*, "*manufacturing* project," "*manufacturing* project *opportunity*," "*Combat Tourniquet production* 'project,'" etc. (Resp. Br. 3, 22) (emphases added).

In their motion for partial summary judgment, Respondents unilaterally defined "project" as the "sale of tourniquets by Composite."[16] CRI explained the term "project" had to be interpreted in the context of Phil Durango LLC: "The plain language of the Agreement expressly ties the 'project' to the Phil Durango 'special account.' The 'project' no longer existed once Phil Durango ceased to be a customer account."[17]

And when CRI pointed out that the Phil Durango provision used the term "project," while the immediately preceding GraviGate provision used the term "product line"—indicating the parties intended to mean two different things—Respondents brushed it aside, arguing "these phrases are synonymous," breaking another cardinal rule of contract interpretation. *See Taracorp, Inc. v. NL Indus., Inc*., 73 F.3d 738, 744 (7th Cir.1996) ("[W]hen parties to the same contract use

[15] (Resp. Br. 27) (referencing the "cardinal rule that a contract should not be read to render any provision superfluous").
[16] (R. pp. 516, 527–28).
[17] (R. p. 578).

. . . different language to address parallel issues . . . , it is reasonable to infer that they intend this language to mean different things."). And as they did with "Phil Durango LLC," Respondents relied on the same extrinsic USPTO link.[18]

Respondents' reliance on extrinsic evidence to interpret "project" continued. In the motion to reconsider proceedings, Respondents derided CRI's argument that "project" could be interpreted as something different from "product line" and—to demonstrate—cited the trial court to "a Grade 4 National Reading Vocabulary of 900 words 'students need to master by the end of Grade 4'":

> 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.[19]

Of course, neither "TampaREADS.com and/or ReadingKEY.com" defines "project" as "sale of tourniquets by Composite" or "product line."

CRI also argued "project" should be interpreted in the context of Respondents' judicial admission that their commission was "in return" for "convinc[ing] Durango to use Composite to assemble and mass-produce the Combat Tourniquet," and thus Phil Durango was a necessary participant for the "project" to continue.[20] Respondents' response—repeated in the same appellate brief in which they criticize CRI's references to extrinsic evidence—is to refer to extrinsic evidence that CRI continued to pay Poly-Tech commissions after Phil Durango had left the scene and the "project" had ended.[21]

Regardless of whether that would be evidence for a jury to consider in interpreting

[18] (R. p. 682).
[19] (R. p. 794).
[20] (R. p. 48).
[21] (Resp. Br. 30).

"project,"[22] the jury should also consider CRI's credibility and explanations for why it continued to pay Poly-Tech, including that CRI did not purchase the CAT intellectual property for the purpose of cutting off the commissions. Rather, CRI *had* to purchase the CAT intellectual property from Phil Durango to be able to keep making the CAT.[23] The point is not lost on CRI that its continued commission payments after the "account" and "project" ended raise questions. But it is for the jury—not the trial court or this Court on appeal (especially when interpreting purportedly unambiguous contract language)—to decide whether CRI's explanations for continuing to pay Poly-Tech are credible, which include a failure to immediately recognize the effect of the CAT intellectual property acquisition, and a decision just to maintain the status quo and business relationship between the parties.

The jury should also consider that businesspeople routinely make business decisions based not on just what a contractual provision allows them to do. These are textbook fact issues that preclude summary judgment. *See Conner v. City of Forest Acres*, 348 S.C. 454, 462, 560 S.E.2d 606, 610 (2002) ("Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."); Rule 56(c), SCRCP; *e.g.*, *Koester v. Carolina Rental Center, Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Conner*, 348 S.C. at 462, 560 S.E.2d at 610. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be

[22] *See In re Dunes Hotel Assocs.*, 212 B.R. 110, 119 (Bankr. D.S.C. 1997) ("Only upon a determination that those terms are ambiguous is it necessary to look to extrinsic evidence, such as the parties' course of conduct.")
[23] (R. p. 752).

improperly deprived of trial on disputed factual issues. *Id*.

Again, "project" is not defined, and it appears once in the entire agreement. The trial court erred by concluding as a matter of law that "project" unambiguously means CRI making tourniquets, synonymous with "product line." The summary judgment should be reversed.

IV. The breadth of the Order as written precludes CRI from meaningfully trying its defenses and counterclaims to the jury.

As outlined in Section I above, even if this Court's de novo review concludes that the Phil Durango provision unambiguously provides that the only way CRI can stop owing Poly-Tech commissions is to stop making the CAT, the secondary question remains: How far does the scope of the Order extend?

The Order is interlocutory. No matter the outcome of this appeal, there will be further trial court proceedings—including a jury trial—on remand. But the language of the Order creates great uncertainty as to its scope and effect on the issues remaining for trial following remand.

In their brief, Respondents are adamant the Order does not "affect"[24] CRI's liability. Respondents' position on this has been highly inconsistent. When it serves their purpose, Respondents contend that CRI's defenses and counterclaims "did not survive the impact of the Court's September 29, 2022 Order granting partial summary judgment."[25] But when CRI has pointed out that such a result would far exceed the relief requested in the motion for partial summary judgment or the summary judgment evidence—and thus the summary judgment ought to be clarified or set aside—Respondents have dismissed CRI's concern as "a false supposition."[26] Suffice it to say, Respondents strongly discouraged the trial court from clarifying the scope of the summary judgment in any way, preferring to keep the Order flexible in hopes that they can use it

[24] (Resp. Br. 32).
[25] (R. p. 772).
[26] (R. pp. 783–84).

to their advantage at trial.

Setting Respondents' inconsistency aside, were this Court to simply affirm the Order on appeal without clarifying its scope, many questions will remain as to how the case will be submitted to the jury. For example, CRI anticipates a breach-of-contract jury submission like the following[27]:

> **QUESTION**
>
> Did CRI fail to comply with the 2005 Agreement by stopping the payment of commissions to Poly-Tech in August 2018?
>
> Answer "Yes" or "No."
>
> Answer: _____

As discussed in Appellant's Brief, CRI has multiple defenses to this claim, including Poly-Tech's conflict-of-interest/competition,[28] disclosure of confidential information,[29] and breach of implied warranty of good faith and fair dealing[30] through the development and marketing of the HALO tourniquet, which occurred *prior to* the August 2018 termination of the 2005 Agreement. (*See* App. Br. 27 ("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.")). Accordingly, if the jury were to find that Poly-Tech committed a material breach prior to the August 2018 termination of the 2005 Agreement, then CRI's termination of the commission payments to Poly-Tech would *not* be a failure to comply with the 2005 Agreement. Poly-Tech's

[27] CRI does not suggest that these examples will be what is ultimately submitted to the jury. These examples are offered here only to illustrate the problems created by the language of the summary judgment, as applied to standard breach of contract jury questions.
[28] (R. pp. 64, 79–80).
[29] (R. pp. 65, 85).
[30] (R. p. 84).

prior material breach will have excused any further obligation by CRI to pay commissions after the date of that breach.

However, based on the language of the Order, CRI anticipates that Respondents will request that the trial court instruct the jury in some way, shape, or form like the following, using language taken directly from the Order on appeal:

> You are hereby instructed that I have found as a matter of law that CRI was and is contractually obligated to pay Poly-Tech commissions including after the termination of 2005 Agreement on August 31 2018, including on all C-A-T Tourniquets CRI produces and sells until the C-A-T stops being produced and sold.[31]

> You are hereby instructed that I have found as a matter of law that the 2005 Agreement obligates CRI to pay Poly-Tech commissions during the term of the 2005 Agreement, extending beyond the termination of the 2005 Agreement on August 31, 2018, and lasting for so long as the C-A-T is produced and sold.[32]

> You are hereby instructed that I have found as a matter of law 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 Poly-Tech commissions, including amounts that have not already been paid, and for all C-A-T Tourniquets sold in the future.[33]

At a minimum, these instructions would greatly confuse the jury. How could the jury answer "No"—CRI did not fail to comply with the 2005 Agreement by stopping the payment of commissions to Poly-Tech in August 2018—contrary to the trial court's instruction(s), even if the jury found that Poly-Tech *had* committed a prior material breach, which would mean CRI had *not* failed to comply? Based on the trial court's unqualified instruction(s) that CRI owes the commission until CRI stops making the C-A-T, the jury would *have* to answer the question "yes," nullifying CRI's prior breach of contract and breach of implied covenant of good faith and fair dealing defenses.

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[31] (R. p. 27).
[32] (R. p. 33).
[33] (R. pp. 38–39).

Likewise, CRI will request a jury submission based on its counterclaims for Respondents' breaches of Articles II and V of the 2005 Agreement, and breach of the implied covenant of good faith and fair dealing,[34] similar to the following:

> **Question**
>
> Did Poly-Tech fail to comply with the 2005 Agreement, including the implied covenant of good faith and fair dealing?
>
> Answer "Yes" or "No."
>
> Answer: _____

A "Yes" answer (combined with an additional finding that Poly-Tech's failure to comply occurred prior to August 2018) would not only excuse any further obligation for CRI to pay Poly-Tech commissions, but it would also result in Poly-Tech's liability for the $7 million CRI paid in commissions while—unbeknownst to CRI—Poly-Tech was in material breach of the 2005 Agreement. (App. Br. 34). In other words, a party may not, on the one hand, declare a contract terminated and relieve itself from its own future performance obligations and, on the other hand, elect to receive the breaching party's continued performance. *See* 14 Samuel Williston, Treatise on the Law of Contracts § 43:15, at 677–78 (Richard A. Lord ed., 4th ed. 2013); *see also* 17A Am. Jur. 2d, Contracts § 715 (2004); Restatement (Second) of Contracts § 246, cmt. a-c, illus. 1–3; *Xtreme Coil Drilling Corp. v. Encana Oil & Gas (USA), Inc*., 958 F. Supp. 2d 1238, 1244 (D. Colo. 2013) ("If the non-breaching party chooses to continue to receive the performance by the breaching party, it is deemed to have affirmed the contract and is required to honor its own obligations.").[35]

[34] (R. pp. 81–85).

[35] With no support in the contract, Respondents suggest that their commissions were "essentially

But the Order's language—"for as long as CRI is associated with the making and selling of C-A-T Tourniquets, CRI was and is obligated to pay Poly-Tech commissions, including amounts that have not already been paid, and for all C-A-T Tourniquets sold in the future"—would render a jury's "Yes" answer immaterial. Even if the jury found that Poly-Tech *had* breached the 2005 Agreement prior to August 2018, the Order says Poly-Tech is entitled to commissions as long as CRI makes and sells the C-A-T, period. That is a significant problem with the Order, and why this Court should either interpret the Order's scope as being subject to any modifications, counterclaims, or defenses—as CRI repeatedly requested of the trial court[36]—or reverse the summary judgment to the extent it forecloses CRI's modifications, counterclaims, or defenses. In the absence of this Court's guidance, Respondents will advocate for the broadest possible application of the Order at trial, which will—at best—confuse the jury and—at worst—preclude CRI from meaningfully trying its counterclaims and defenses, which would be a substantial miscarriage of justice.

V. Respondents relied on extrinsic evidence in their motion for summary judgment, the Order references extrinsic evidence, and Respondents continue to rely on extrinsic evidence in their appellate brief.

Respondents complain about the "overloaded" appellate record, feigning that this appeal

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a royalty." (Resp. Br. 3, 34–35). The commissions were not a royalty, but even if they were, Respondents could not breach Articles II and V of the contract and the implied covenant of good faith and fair dealing and still claim entitlement to further commissions/royalties. *See Land & Marine Remediation, Inc. v. BASF Corp*., No. 2:11CV239, 2012 WL 2415552, at *8 (E.D. Va. June 26, 2012) ("The evidence demonstrated that defendant American Chlorophyll was the first to breach the contract by failing to pay plaintiff the royalties due under the contract. However, the court held that the plaintiff's decision to continue earning royalties, even if payment was not being received, and his failure to invoke the express notice and termination provision was an 'election,' to allow the contractual relationship to continue in the face of the defendant's non-payment. The court clarified that such election was not a waiver of the right to recover the *past* due royalty payments, *but that the election did preclude the plaintiff from abandoning his other contractual obligations (which included non-disclosure of the licensed processes)*." (emphasis added) (citations omitted)).

[36] (R. pp. 692–99, 815–16).

involves merely "the routine purely legal task of unambiguous contract interpretation."[37] Respondents must take this position considering the state of the summary judgment evidence, any complaint to which they waived below by failing to object or obtain a ruling. *See Doe v. S.B.M.*, 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct. App. 1997) ("A contemporaneous objection is required to properly preserve an error for appellate review. The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object." (citation omitted)).

Respondents are gaslighting. CRI had no choice but to "load" the record with summary judgment evidence reflecting genuine issues of material fact, because *Respondents* chose to include extrinsic evidence in their "motion for partial summary judgment as to unambiguous material terms." That bears repeating: Respondents filed a "motion for partial summary judgment as to unambiguous material terms," but then could not resist including what they considered their ace-in-the-hole: extrinsic evidence.

As soon as Respondents made that decision, CRI was obligated—as a "routine purely legal task" in summary judgment practice—to respond with its own extrinsic evidence to controvert Respondents and raise genuine issues of material fact. Respondents are directly responsible for this *not* being a "routine purely legal task of unambiguous contract interpretation."

The trial court referenced Respondents' extrinsic evidence in its email ruling, and Respondents packed the Order with references to their extrinsic evidence, drafting it to falsely state: "Defendant filed no counter evidence with its filings in opposition to the motion."[38] And when CRI sought clarification as to the Order's disclaimer that extrinsic evidence was "not the basis for granting the relief set forth in this Order,"[39] Respondents doubled down on the extrinsic

[37] (Resp. Br. 4).
[38] (R. p. 35).
[39] (R. p. 33).

evidence, imploring the trial court not to "cripple one of the legs that steady the Order against reversal."[40]

CRI would have preferred for the Order to clearly limit itself to legal, unambiguous contract interpretation. But because of the way Respondents purposefully drafted the Order to include extrinsic evidence as "one of the legs that steady the Order against reversal," CRI was forced to: (1) consider the Order as being alternatively based on extrinsic evidence, (2) raise an appellate complaint based on the extrinsic evidence, and (3) bring forth a complete appellate record of the extrinsic (summary judgment) evidence. Had CRI treated this appeal as only "relat[ing] to the narrow question of whether the four corners of the contract are ambiguous," CRI would have risked a finding of waiver, abandonment, or an alternative sustaining ground. (Resp. Br. 5). *See S.C. Tax Comm'n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 170, 447 S.E.2d 843, 847 (1994) ("This Court will affirm where an appellant fails to appeal the alternative ground of a trial judge's ruling."); *see also Potts v. Yager*, C.A. No. 2015-001472, 2017 WL 6508735, at *1 (S.C. Ct. App. filed Dec. 20, 2017) ("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.").

In the end, Respondents do not seriously dispute that the summary judgment record contains many genuine issues of material fact fatal to the extrinsic evidence "leg" of the order. Initially, Respondents make a pretense of not "rising to the bait" of a real discussion of the summary judgment evidence. (Resp. Br. 5). Respondents then make a vague reference to eleven pages of their opposition to CRI's motion to reconsider in the trial court, with no description or analysis of what is there. Those eleven pages include Respondents':

[40] (R. p. 789).

- opposition to clarifying the Order's reliance/non-reliance on extrinsic evidence so that the order "can be affirmed on other sustaining grounds appearing in the record," while claiming five pages later that "the Order did not rely on extrinsic evidence";[41]

- reference to Respondents' 2018 patent for the HALO—CRI's summary judgment "counter evidence" reflecting Respondents' breaches of the 2005 Agreement by patenting a competing tourniquet—and acknowledgment that "there might be a difference of opinion as to whether a thread of contradiction can be drawn";[42]

- false[43] claim—which they have not repeated in their appellate brief—that CRI "remained silent for 17 weeks between receipt of the proposed order and entry of the Order," as though that should somehow operate as a bar to the motion to reconsider;[44]

- discouragement against clarification/reconsideration, since that would "create another opportunity to seek reconsideration";[45] and

- attempt to downplay the ambiguity of "project" by arguing that it is one of the "900 words 'students need to master by the end of Grade 4,'" again referencing extrinsic evidence and providing a hyperlink to it.[46]

Immediately after chastising CRI for "overload[ing] the record with an irrelevant and distracting data dump,"[47] Respondents deposit the removal proceeding submissions into the record, for no other purpose than to try to poison the well.[48]

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[41] (R. pp. 788, 792).
[42] (R. p. 789).
[43] In e-mail correspondence to the trial court and Respondents, 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." CRI emphasized that Respondents' 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 complete defense to the liability Plaintiffs request the Court to find in the order." (R. p. 816–18).
[44] (R. pp. 789–90).
[45] (R. p. 790).
[46] (R. p. 794).
[47] (Resp. Br. 5 n.4).
[48] Respondents omit that one of the removals resulted from Respondents' insistence on "arguably bringing a patent cause of action," implicating exclusive federal subject matter jurisdiction. *See Cedrone v. Composite Resources, Inc.*, No. CV 0:21-284-MGL, 2021 WL 4306166, at *4 (D.S.C. Sept. 22, 2021) ("[T]he Court *easily* concludes Composite had 'an objectively reasonable basis to remove this case[,]' *id*., because it appeared that Respondents were arguably bringing a patent

If Respondents truly wanted this appeal to be limited to "the narrow question of whether the four corners of the contract are ambiguous,"[49] they certainly could make that happen. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("Of course, a respondent may abandon an additional sustaining ground under the present rules . . . by failing to raise it in the appellate brief."); *Maxey v. R.L. Bryan Co*., 295 S.C. 334, 336 n.2, 368 S.E.2d 466, 467 n.2 (Ct. App. 1988); *May v. Hopkinson*, 289 S.C. 549, 558, 347 S.E.2d 508, 513 (Ct. App. 1986). In fact, Respondents have arguably done so by failing to set forth an extrinsic evidence point in their statement of the issues on appeal. *See* Rule 208(b)(1)(B), SCACR (providing that "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal"). But as far as CRI is aware, Respondents have not formally abandoned the extrinsic evidence "leg that steadies the Order against reversal." Instead, Respondents have included multiple discussions of the extrinsic evidence in support of their position in their appellate brief. (Resp. Br. 17–18, 21, 30–31).

Again, Respondents failed to object and have waived any argument that Cedrone's multiple admissions regarding "account," "project," and Respondents' serial breaches of the 2005 Agreement[50] are not part of the summary judgment record. Respondents do not dispute the Order is interlocutory and subject to revision at any time "before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Rule 54(b), SCRCP. Nor do Respondents dispute that Rule 54(b)—the principal purpose of which is the submission of "supplemental evidence" that has been "discovered during litigation" "since the submission of the issue to the

cause of action, which would have made removal appropriate." (emphasis added)).
[49] (Resp. Br. 5).
[50] (App. Br. 25–34).

court"[51]—governs CRI's motion to reconsider.[52]

Since Respondents declined to address Cedrone's many dispositive admissions reflected in pp. 28–34 of Appellant's Brief, CRI will not rehash them here. As to the secondary question identified above in Section I, if the trial court relied on the extrinsic evidence as an alternative sustaining ground, that was error because of the many genuine issues of material fact, and that portion of the summary judgment should be vacated or reversed.

VI. Under South Carolina law, as applied to the trial court's determination that CRI unilaterally controls whether it will keep making the CAT, Annex C is a perpetual obligation and terminable at will.

CRI is not "attempting to obtain appellate review of a non-appealable denial of summary judgment." (Resp. Br. 38). CRI's "Motion and Memorandum for Contract Construction" was not a motion for summary judgment. The trial court certainly did not interpret it as such, making a point to highlight that "[n]o rule of civil procedure was referenced to the Court in the motion,"[53] and that CRI "did not cite a rule of civil procedure under which it was seeking 'motion' relief."[54]

CRI's argument that Respondents' proposed interpretation of the Phil Durango provision renders it perpetual and terminable at will by either party was not the basis of a cross-motion for summary judgment. Instead, CRI made the argument to further illustrate why Respondents'

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[51] *See, e.g.*, *Gallant v. Telebrands Corp.*, 35 F.Supp.2d 378, 394 (D.N.J. 1998) (predicating Rule 54(b) reconsideration on whether "the parties proffer 'supplemental evidence or new legal theories'"); *Neal v. Honeywell*, 1996 WL 627616, at *2 (N.D. Ill. 1996) (noting that Rule 54(b) motions for reconsideration are "best characterized as a common law motion for reconsideration" to be granted where "a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the Court" (emphasis added)). Thus, Rule 54(b) "departs" from the Rule 59(e) standard by "accounting for potentially different evidence discovered during litigation as opposed to the discovery of 'new evidence not available at trial.'" *See Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017).

[52] Reply ISO Supp. at 4–8.

[53] (R. p. 827).

[54] (R. p. 36).

interpretation of the Phil Durango provision is not *a*—much less the *only*—reasonable interpretation, which is the threshold for an unambiguity determination.

Perpetual contracts are disfavored in South Carolina, and our courts are instructed to avoid interpreting contract provisions in a way that renders them perpetual, if possible. *See Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) ("Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails."). Giving effect to the durational terms "this account" and "project" renders the commission not perpetual, but rather of a reasonable, fair, and just duration.

As for the *Listerine* case cited by Respondents, it was not decided under South Carolina law, and no South Carolina court has relied on it. Further, *Tower St. Cap. Mgmt. Inc. v. KnightBrook Ins. Co*., No. 3:17-CV-01781-JFA, 2020 WL 13065453 (D.S.C. June 15, 2020), indicates that South Carolina courts would not be inclined to follow *Listerine*.

Applying New York law, the *Listerine* court repeatedly grounded its holding (that the payment obligation was not perpetual) on the fact that "plaintiff has the right to terminate its obligation to pay whenever in good faith it desires to cease the manufacture or sale of Listerine." *Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc*., 178 F. Supp. 655, 663 (S.D.N.Y. 1959) ("Whether or not the obligation continues *is in the control of the plaintiff itself*." (emphasis added)). But *Tower Street*, applying South Carolina law, held that "if one party could subjectively control or end a contract, a perpetual contract is created." *Tower St. Cap. Mgmt.*, 2020 WL 13065453, at *12.

The law is not well-settled on this point. Judge Anderson "found no controlling precedent in the decisions of the Supreme Court of the State of South Carolina and minimal precedent in the

decisions of the Court of Appeals of the State of South Carolina" concerning what termination-triggering events are required to keep a contract from being perpetual. *Tower St. Cap. Mgmt*., 2020 WL 13065453, at *3. Accordingly, Judge Anderson certified questions to the South Carolina Supreme Court. *Id*. But after oral argument, the Supreme Court rescinded its agreement to answer the certified questions. *Id*.

That said, Judge Anderson's analysis led to his conclusion that if one party has the "unilateral" ability to control whether a contract continues, it is a perpetual contract and terminable at will by either party:

> The contractual provision at issue here has the force and effect of creating a perpetual contract by allowing unilateral perpetual power to renew. Therefore, 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 *12 (citing *Carolina Cable Network v. Alert Cable TV, Inc*., 316 S.C. 98, 102–03, 447 S.E.2d 199, 202 (1994) ("Where the contract is terminable at will, reasonable notice from either party is all that is required to terminate the agreement.")). This Court should apply the *Tower Street* court's reasoning based on South Carolina law over the *Listerine* court's reasoning based on New York law.

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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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 this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully submitted,

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