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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Perry H. Gravely, Circuit Court Judge

Case No. 2022-CP-23-01310
Appellate Case No. 2025-001630

Sealevel Systems, Inc.,

Appellant,

v.

CreatiVasc Medical, Inc., Diaxamed, LLC, successor in interest to Brookhaven Vascular Inc., successor in interest to Brookhaven Merger Corp, successor in interest to CreatiVasc Medical, Inc.,

Respondents,

FINAL BRIEF OF RESPONDENTS CREATIVASC MEDICAL, INC. AND BROOKHAVEN VASCULAR INC., SUCCESSOR IN INTEREST TO BROOKHAVEN MERGER CORP., SUCCESSOR IN INTEREST TO CREATIVASC MEDICAL, INC.

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STATEMENT OF THE CASE

This case arises from a Customer Supply Agreement entered into on October 28, 2014, between Appellant Sealevel Systems, Inc. ("Sealevel" or "Appellant") and Respondent CreatiVasc Medical, Inc. ("CreatiVasc"), and subsequently amended on April 10, 2015, and March 9, 2016 (the "Supply Agreement"). (R. at 736-51.) The Supply Agreement contemplated that Sealevel would design and manufacture motor control and valve monitor electronics for use in CreatiVasc's Hemoaccess Valve System (the "System"), an implanted medical device designed to address complications associated with hemodialysis. (R. at 737 § 1.)

Sealevel filed its Summons and Complaint on August 2, 2018, alleging five causes of action: (1) Declaratory Judgment; (2) Breach of Contract; (3) Intentional Interference with Contract; (4) Quantum Meruit; and (5) Promissory Estoppel. (Compl.) The case was tried to a jury from February 11 to 13, 2025. (R. at 134.) At the close of Sealevel's case, Respondents moved for a directed verdict on all claims. (R. at 502.) The trial court granted the motion in part, directing a verdict for Respondents on Sealevel's quantum meruit claim and holding the promissory estoppel claim in abeyance. (R. at 543:14-544:6; 546:5-6.) The trial court submitted Sealevel's breach of contract claim (against Respondents CreatiVasc, Brookhaven Vascular, Inc. ("Brookhaven Vascular"), and Brookhaven Merger Corp. ("Brookhaven Merger")) and intentional interference with contact claim (against Respondent DiaxaMed, LLC ("DiaxaMed") (improperly identified as Diaxamed, LLC)) to the jury. (R. at 542:22-543:8; 546:2-4.) CreatiVasc, Brookhaven Vascular, Brookhaven Merger, and DiaxaMed (collectively, "Respondents") chose not to present any evidence and rested, renewing their directed verdict motions, which were denied. (R. at 553:25-554:24.)

The jury returned a verdict in Sealevel's favor on both claims, awarding $321,540 for breach of contract against CreatiVasc, Brookhaven Vascular, and Brookhaven Merger; $400,000 for intentional interference with contract against DiaxaMed; and $2,500,000 in punitive damages against DiaxaMed. (R. at 12-13; R. at 651:12-652:1.)

On February 24, 2025, Respondents timely moved for judgment notwithstanding the verdict ("JNOV") pursuant to Rule 50(b), SCRCP. (R. at 75-98.) Respondents also moved, alternatively, for a new trial under the thirteenth juror doctrine, a new trial absolute pursuant to Rule 59, SCRCP, and a new trial *nisi remittitur*.[1] (R. at 91-96.) After a hearing on May 23, 2025, the trial court granted Respondents' JNOV motion in its entirety on June 24, 2025, and dismissed Sealevel's promissory estoppel claim (the "JNOV Order"). (R. at 29-30.) Sealevel filed a Motion to Reconsider on July 7, 2025, which the trial court denied on July 18, 2025. (R. at 33.) Sealevel filed its Notice of Appeal on August 15, 2025.

[1] Because the trial court granted the JNOV, it did not reach Respondents' alternative motions. Should this Court reverse the trial court's grant of JNOV on any claim, the action should be remanded to the trial court for a ruling on Respondents' alternative post-trial motions.

STATEMENT OF FACTS

In approximately 2007, CreatiVasc acquired the patent for and began developing the Hemoaccess Valve System (the "System"), an implanted medical device intended to reduce complications associated with hemodialysis access. (R. at 15; R. at 200:2-219:1.) The System was designed to allow blood flow through a dialysis graft to be selectively turned on during treatment and off afterward, addressing issues caused by the continuous blood flow in conventional grafts. (R. at 203:6-204:11.) The original "Gen 1" version of the System could only be activated by puncturing the skin with a needle and injecting saline. (R. at 16.) CreatiVasc thereafter explored the possibility of a "Gen 2" design that could be activated without using needles. (R. at 16.) That version utilized an external handheld device with a spinning magnet that, when placed over the implant, engaged an internal magnet to drive a gear pump, which in turn moved saline into or out of internal balloons to open or close the valve. (R. at 259:3-11.)

In September 2014, Steve Johnson, then CEO of CreatiVasc, was introduced to Tom O'Hanlan, the owner of Sealevel. (R. at 248:14-23.) The two companies agreed to collaborate on the development of the remote actuator component. On October 28, 2014, the parties entered into the Supply Agreement. (R. at 736-51.) Following execution of the Supply Agreement, CreatiVasc underwent a series of corporate restructurings to raise additional capital. (R. at 404:7-17, 409:11-15, 443:4-7, 468:18-469:3; R. at 806-73.) In 2015, Brookhaven Merger merged into CreatiVasc, and CreatiVasc subsequently changed its name to Brookhaven Vascular. (R. at 805-873; R. at 47 ¶ 4.) This brief refers to CreatiVasc, Brookhaven Merger, and Brookhaven Vascular collectively and interchangeably as "CreatiVasc." Throughout these corporate changes, the Supply Agreement remained intact, and the parties entered into amendments on April 10, 2015 and March 9, 2016. (R. at 764-66, 775-77.)

The Supply Agreement stated that Sealevel would "design, manufacture, sell and deliver" to CreatiVasc "hardware and software (the 'Product') used in the System's handheld actuator and implanted balloon pressure monitoring devices in accordance with the specifications set forth in Exhibit A." (R. at 737 § 1.) However, the "Specifications" identified as Exhibit A did not yet exist at the time the Agreement was executed. (R. at 195:7-16; 354:1-15.) The Agreement also incorporated by reference an Exhibit B ("Purchase Order"), Exhibit C ("Invoice"), and Exhibit D ("Quotation"), none of which existed at the time or were included in the Agreement. (R. at 736-51.) There was no agreement on the price of the Product. Instead, the Supply Agreement provided that the "price for the Product will be agreed upon in writing by the Parties and may not be changed except as agreed upon in writing by the Parties." (R. at 737 § 3.) There was no minimum purchase obligation, and no delivery dates. The Agreement contemplated that "the dates and quantities of the Product to be delivered and the current price for the Product" would be specified in separate Purchase Orders that were never executed. (R. at 737-38 § 3.)

In short, the Supply Agreement was a framework for future collaboration—an agreement to agree—not a binding commercial contract with enforceable terms. (R. at 18-20.)

Sealevel's consideration for the Supply Agreement was the exclusive supplier relationship. Sealevel's own representative, Tom O'Hanlan, candidly admitted under oath that the consideration for Sealevel's involvement in the project was the prospect of becoming the exclusive supplier of the Product if it was ever successfully developed and went to market. When asked whether he would agree the Supply Agreement did not contain any provisions that required CreatiVasc or any entity standing in CreatiVasc's shoes to pay Sealevel for its engineering time, O'Hanlan testified:

> I would agree with that as stated, but the contract does provide for the exclusive rights to manufacture the product. So that's how a lot of companies make their money is you forego the front-end cost in exchange for the manufacturing rights in anticipation that it's going to be a high -- high volume or a profitable venture.

(R. at 373:14-374:7.) This admission is critical. O'Hanlan acknowledged that the Supply Agreement contained no provision requiring CreatiVasc to pay Sealevel for its engineering time and that Sealevel's compensation model was premised on future manufacturing profits—profits that never materialized because no commercially viable product was ever brought to market.

Despite years of collaborative effort by both parties, the System was never fully developed. No version of the Gen 2 System, which is the version that would have incorporated Sealevel's handheld actuator component, was ever produced, marketed, or sold. (R. at 371:17-21 (O'Hanlan conceding there was no evidence that the Product was ever developed, marketed, or sold by anyone).) Multiple witnesses confirmed this reality. (R. at 20-21.) Both sides poured significant time and money into the project. Sealevel focused on the external actuator component and the internal sensor integration, while CreatiVasc worked on the internal valves, pump, and balloons. (R. at 24.) The technology simply did not work as envisioned. As Tom O'Hanlan himself testified, the parties' efforts faced significant hurdles, including problems with battery life, the absence of a working mechanical pump from third-party manufacturers, and the inability to develop a reliable saline-proof pressure sensor. (R. at 358:7-359:7; R. at 874-875, 885-888, 889-891, 892.)

In February 2016, CreatiVasc sent an email to Sealevel, which stated: "We would like to *receive a quote* for production of 6 HVS Handheld *prototypes*." (R. at 774. (emphasis added).) Critically, this communication was a request for a quote, not a Purchase Order. CreatiVasc specifically noted that "[t]hese 6 prototypes will be used for initial system functional testing," underscoring that this was a development-stage request, not a commercial order. (R. at 773.) Despite Appellant's characterization of this communication as a binding "order," the undisputed testimony establishes that Sealevel never sent the requested quote nor built, shipped, or delivered any of the six requested prototypes, and no Purchase Order was ever made. (*See* Appellant's Initial

Br. 1, 4-6, 8 (asserting CreatiVasc had ordered the Product).) On cross-examination, defense counsel asked Tom O'Hanlan directly about whether Sealevel ever shipped or delivered the six prototypes, and O'Hanlan responded: "We never shipped them." When pressed further, O'Hanlan further conceded: "We never delivered them, because we didn't know where to send them." (R. at 355:13-21.)

By late 2016, CreatiVasc was again facing financial depletion and confidence in the project was waning. On December 30, 2016, DiaxaMed, LLC, a company formed by Brian McMurray, purchased certain assets and intellectual property of CreatiVasc. (R. at 778-791; R. at 476:7-19, 482:7-19, 486:6-9,491:7-19.) Critically, DiaxaMed did not take an assignment of or otherwise assume CreatiVasc's obligations under the Supply Agreement. (R. at 494:12-495:5; R. at 778-791.) The Supply Agreement remained with CreatiVasc. (R. at 26; R. at 494:25-495:9.) McMurray testified that DiaxaMed had no interest in using a handheld actuator for the implanted device, which is the very technology that was the subject of the Supply Agreement. (R. at 487:21-488:23; 492:22-25.) Instead, DiaxaMed shifted its focus to refining the original Gen 1 version of the System, which relied on a needle and subcutaneous port to activate the balloon valves. (R. at 487:21-488:23, 493:16-494:7.) The evidence at trial was uncontradicted: DiaxaMed has never used, and has never attempted to use, any technology developed or designed by Sealevel. (R. at 488:8-14.) DiaxaMed has generated no revenue from any source since its inception. (R. at 486:13-18.)

On June 26, 2017, Sealevel sent a letter with an invoice in the amount of $321,540.00 to CreatiVasc. (R. at 802-804.) This invoice was not for the delivery of any product. It was, by O'Hanlan's own testimony, a retrospective tally of engineering and development time. (R. at 24; R. at 372:19-374:7; *see also* R. at 192:3-10, 198:12-199:15.) O'Hanlan admitted that the invoice was sent as an attempt to get CreatiVasc's "attention" after communications between the companies had ceased at that point. (R. at 372:21-24; *see also* R. at 190:1-6.) There is no provision in the Supply Agreement authorizing Sealevel to invoice CreatiVasc for research and development time, and O'Hanlan conceded as much. (R. at 372:6-374:7; *see also* R. at 193 :8-198:23.)

Former CEO of CreatiVasc, Steve Johnson, explained at trial that the Supply Agreement did not provide for research and development compensation to Sealevel because "this was seen as a speculative project where they were investing hours in time up front in the hopes that down the road when it went to the market, they would be the exclusive and sole provider of the finished product, and that is when they would make their money back." (R. at 427:17-22.)

Contrary to statements made throughout Appellant's brief, the undisputed trial testimony was that Sealevel never delivered the Product to CreatiVasc. (R. at 355:8-22; *see also* 276:23-277:2.) The only evidence is that CreatiVasc requested a *quote* for the production of six prototypes in February 16, 2016, when Sealevel was still admittedly having problems with the Product. (R. at 268:23-269:9, 271:24-272:2, 366:15-367:6.)

At the close of Sealevel's case, Respondents moved for directed verdict on all five causes of action, arguing that: (1) the Supply Agreement was unenforceable; (2) even if enforceable, no evidence of breach existed; (3) no evidence of damages existed; (4) the tortious interference claim failed for lack of an enforceable contract, breach, and intentional procurement; and (5) no evidence supported the quantum meruit or promissory estoppel claims. (R. at 502:18-508:22.) The trial court granted the directed verdict motion in part. As to quantum meruit, the court found no evidence that Respondents realized any benefit from Sealevel's work, citing the hornbook principle that "the Plaintiff's cost to performance [sic] might represent some evidence of value, [but] they do not represent a recoverable item of restitution themselves." (R. at 543:11-18.) The court also found no evidence of retention of any benefit, observing that there was "loose . . . product out there that is not being used by anybody" and information on a computer but no evidence of retention, use, or value to Respondents. (R. at 543:22-544:6.) As to promissory estoppel, the court held the claim in abeyance as an equitable matter to be determined by the court. (R. at 546:5-6). With respect to breach of contract, the court acknowledged it was "a close call" but allowed the claim to proceed to the jury. (R. at 546:9-17.) The court likewise found tortious interference to be a "close call" but permitted it to go to the jury as to DiaxaMed only. (542:22-543:6.) After Respondents rested without presenting any evidence, they renewed their directed verdict motions, which the trial court denied a second time. (Trial Tr. 553:25-554:24.)

The jury returned a verdict for Sealevel on both remaining claims. (R. at 651:12-652:1.) On February 24, 2025, Respondents timely filed post-trial motions, including a motion for JNOV. After a hearing, the trial court granted the JNOV in its entirety on June 24, 2025, finding that no reasonable jury could have reached the challenged verdict. (R. at 14-32). The trial court also dismissed Sealevel's promissory estoppel claim. (R. at 30-31).

This appeal followed.

STANDARD OF REVIEW

A motion for judgment notwithstanding the verdict under Rule 50(b), SCRCP, "is a renewal of a directed verdict motion." *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006) (citing *Glover v. N.C. Mut. Life Ins. Co.*, 295 S.C. 251, 256, 368 S.E.2d 68, 72 (Ct. App. 1988)). "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000) (citing *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992)). In ruling on a JNOV, the trial court is "required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions . . . ." *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994) (citing *Vacation Time of Hilton Head Island, Inc. v. Lighthouse Realty, Inc.*, 286 S.C. 261, 267, 332 S.E.2d 781, 785 (Ct. App. 1985)).

However, this standard has important limitations. Viewing inferences in the light most favorable to the non-moving party "does not authorize submission of speculative, theoretical, and hypothetical views to the jury." *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997). "A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation." *Id.*

"The appellate court will reverse the trial court's ruling only when no evidence supports the ruling or when an error of law controls the ruling." *Hamilton v. Reg'l Med. Ctr.*, 440 S.C. 605, 626, 891 S.E.2d 682, 693 (Ct. App. 2023) (citing *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006)).

Moreover, regarding the trial court's dismissal of Sealevel's promissory estoppel claim, this Court reviews the trial court's findings under the standard applicable to equitable claims. *West v. Newberry Elec. Co-op.*, 357 S.C. 537, 542, 593 S.E.2d 500, 502 (Ct. App. 2004) ("The doctrine of promissory estoppel is equitable in nature."). "In equity actions[,] an appellate court can review the record and make findings based on its view of the preponderance of the evidence." *J & W Corp. of Greenwood v. Broad Creek Marina of Hilton Head, LLC*, 441 S.C. 642, 664, 896 S.E.2d 328, 340 (Ct. App. 2023) (citation omitted). "However, this Court is not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000) (citations omitted).

ARGUMENTS

I. THE TRIAL COURT CORRECTLY HELD THAT THE SUPPLY AGREEMENT IS UNENFORCEABLE AS A MATTER OF LAW.

The centerpiece of Sealevel's brief is its contention that the trial court erred as a matter of law as to contract formation when it found the Supply Agreement unenforceable. This argument fails because it ignores the undisputed record: the Supply Agreement left nearly every material commercial term for future agreement. Such an agreement is unenforceable as a matter of law.

A. The UCC Does Not Save an Unenforceable Agreement to Agree.

Sealevel devotes a significant portion of its brief to arguing that the UCC's provisions on contract formation, particularly S.C. Code Ann. § 36-2-204, save the Supply Agreement from unenforceability. (Appellant's Initial Br. 18-22.) This argument fails for several independent reasons.

As an initial matter, Appellant's characterization of the Supply Agreement as predominantly a contract for the sale of goods rather than services is both legally and factually dubious. Although the trial court's ruling does not clearly address whether the Supply Agreement constituted a contract for the sale of goods, the result is the same under either the UCC or common-law principles: no enforceable contract was formed, and the trial court's conclusion should be affirmed.

South Carolina courts employ the "predominant factor" test to determine whether a hybrid contract involving both goods and services is governed by Article 2 of the Uniform Commercial Code or by common-law contract principles. *Plantation Shutter Co. v. Ezell*, 328 S.C. 475, 478, 492 S.E.2d 404, 406 (Ct. App. 1997) (citing *Ranger Constr. Co. v. Dixie Floor Co.*, 433 F. Supp. 442 (D.S.C. 1977)); *see also Ranger Const. Co.*, 433 F. Supp. at 444 ("'Mixed' contracts, or contracts which involve both goods and services, are not automatically included within the scope of Article II merely because they are partially involved with the exchange of goods.”). “Under this test, if the predominant factor of the transaction is the rendition of a service with goods incidentally involved, the UCC is not applicable.” *Id.* Conversely, if “the contract’s predominant factor is the sale of goods with labor incidentally involved, the UCC applies.” *Id.*

In conducting this inquiry, courts consider: (1) the language of the contract; (2) the nature of the business of the supplier; and (3) the intrinsic worth of the materials involved. *Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456, 460 (4th Cir. 1983) (collecting cases); *see also Abex Corp./Jetway Div. v. Controlled Sys., Inc.*, 983 F.2d 1055, 1993 WL 2721, at *4 (4th Cir. 1993 (unpublished table decision). Additionally, courts examine other factors such as the relative value of the goods and non-goods, whether the goods sold would be useful without the services connected to them, the compensation structure of the contract, and whether the party was engaged primarily to render expertise or professional judgment, as opposed to furnishing a tangible end product. *See* 195 Am. Jur. *Proof of Facts* 3d 345, §§ 2, 9-12 (July 2025 Update).

Application of these factors to the Supply Agreement confirms that its predominant purpose was the rendition of design and engineering services, with any future sale of goods being merely incidental to those services. The Supply Agreement required Sealevel to “design, manufacture, sell and deliver” the hardware and software used in a portion of the System. (R. at 736 § 1.) Design is a service, and the Supply Agreement places it at the forefront of Sealevel’s obligations. Critically, the “Specifications” that were to define the Product (Exhibit A to the Supply Agreement) were entirely blank when the parties executed the Supply Agreement. (R. at 195:13-16.) There were no Specifications, no Purchase Orders, and no Quotations, which are the very documents that would have facilitated an actual sale of goods. (R. at 736; R. at 195:12-198:1.) The Supply Agreement thus contemplated, at its core, that Sealevel would first expend significant time and expertise to *create* something that did not yet exist. The Background recitals themselves confirm this: "Customer desires to have Sealevel *design and manufacture* the motor control and valve monitor electronics." (R. at 7374, Background ¶ A (emphasis added).) Sealevel was retained for its specialized engineering expertise, not merely to furnish an off-the-shelf product. *See Ranger Constr.*, 433 F. Supp. at 445 (reasoning that where a party is "primarily a service-oriented business which deals in materials as an incident to its performance of services," the UCC does not apply).

Sealevel's own corporate representative, Tom O'Hanlan, described the Supply Agreement as "a standard agreement that we've used with other companies when we go into a *co-development agreement*. And basically, . . . as it says it's a supply agreement saying '*We're going to do this joint venture together*, and *then* you're going to be the supplier.'" (R. at 253:25-254:5 (emphasis added).) CreatiVasc's Steve Johnson confirmed that "Sealevel is brought on board because of its expertise in electronics" to "work on the electronics controlling that handheld device." (R. at 440:9-15.) In other words, Sealevel was engaged to apply its engineering expertise to design and develop a novel product that had never existed previously.

The only invoice Sealevel ever presented was for 2,386 hours of "Engineering Labor" at $125 per hour, plus $23,290 in material costs—totaling $321,540, of which more than 92% was for labor, not materials. (R. at 803-04.) Notwithstanding Respondents' dispute with the appropriateness of Sealevel's invoice, this hourly, labor-based billing structure is the hallmark of a services engagement, not a sale of goods. *See* 195 Am. Jur. *Proof of Facts* 3d 345, § 10 ("If the cost of the goods is but a small portion of the overall contract price, this fact would increase the likelihood that the services portion predominates[.]").

Moreover, Sealevel never manufactured or delivered any "goods" to Respondents. At most, the parties discussed a *quote* for six prototypes, but Sealevel never provided a quote, and

Respondents never assented to any such proposal or created a Purchase Order. (R. at 234:1-4, 268:23-269:2, 355:13-21; R. at 772-74.) The purported "good" was never produced; at most, a purported prototype was made, but it was beset by operational issues. (R. at 271: 24- 272: 2; 358:10-360:12; 363:20-364:24; R. at 877-80, 883.) The Supply Agreement itself confirmed that no sale of goods occurred. It provides that title to the Product would pass only "[u]pon shipment of the Product to [CreatiVasc] pursuant to this Agreement *and under a Purchase Order*[.]" (R. at 738 § 7 (emphasis added).) Because no Product—indeed, no product of any kind—was ever shipped to Respondents under any Purchase Order, title to any purported goods never passed. These undisputed facts underscore that the Supply Agreement was not predominantly for the sale of goods but instead concerned development efforts and the possibility of a future commercial relationship. *See TK Power, Inc. v. Textron, Inc.*, 433 F. Supp. 2d 1058, 1062-63 (N.D. Cal. 2006) (analyzing an agreement that was centered on the production of a preliminary prototype that preceded the delivery of actual goods, and concluding the essence of the agreement was for service, not goods).

The thrust of the parties' collaboration was the joint development of technology that did not yet exist. The Product had not been created, no specifications had been agreed upon, and both parties were engaged in an iterative, uncertain process of research and development. This is far more akin to a collaborative development arrangement than a straightforward sale of goods. Accordingly, the predominant purpose of the Supply Agreement was for the rendition of a service with goods potentially involved if the development arrangement was successful and upon terms to be agreed upon in the future. Because the predominant purpose was services, Article 2 of the UCC and its relaxed formation provisions do not apply. The trial court correctly applied common-law contract principles and concluded that the Supply Agreement's failure to establish material terms renders it unenforceable as a matter of law.

Even assuming, *arguendo*, the Supply Agreement's predominant purpose was the sale of goods, that conclusion does not relieve Appellant of the fundamental requirement to demonstrate that the parties reached a meeting of the minds. The UCC is not a magic wand that transforms every preliminary framework into a binding contract, nor do its formation provisions dispense with the fundamental requirement of mutual assent. Appellant's reliance on Section 36-2-204 (3), which provides that "even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy," is misplaced. This provision contemplates that one or more ancillary terms may be left open—not that nearly *every* material term may be deferred to future agreement. When the price, specifications, quantity, and delivery terms are all left open, there is no "contract" to which the UCC's gap-filler provisions can attach. The UCC presupposes the existence of a contract; it does not create one from whole cloth.

As set forth more fully below, here, the parties expressly deferred all essential terms to future written agreements. Such an arrangement is insufficient to "show agreement" within the meaning of § 36-2-204 and is precisely the kind of "agreement to agree" that is unenforceable under both common law and the UCC. Even under the UCC, contract formation still requires mutual assent and a present intent to be bound. *See* S.C. Code Ann. § 36-2-204(1) ("A contract for sale of goods may be made in any manner sufficient to show agreement."). The Official Comments underscore this point: "The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement[.]" S.C. Code Ann. § 36-2-204 cmt. Likewise, the South Carolina Reporter's Comments explain that although "Section 2-204(3) would seem to relax the contract requirement of definiteness where *some* of the terms are left open . . . [,] the Code still requires a mutual intent to make a contract which involves something more than an 'agreement to agree' in the future." *Id.* (emphasis added). Accordingly, the trial court correctly found no enforceable contract was formed but merely a "fluctuating framework" for a possible future agreement. (R. at 18-20.)

Additionally, Appellant's reliance on S.C. Code Ann. § 36-2-201(3)(a), regarding specially manufactured goods, is inapposite. That provision is a statute-of-frauds exception, not a contract-formation provision. It does not create a contract where none exists; it merely permits enforcement of a contract that has already been formed. Because no enforceable contract was formed here, this provision has no application.

B. The Supply Agreement Left All Material Terms for Future Agreement.

Under South Carolina law, "[i]n order for a contract to arise, there must be a meeting of the minds of the parties involved with regard to all essential and material terms of the agreement." *Hardaway Concrete Co. v. Hall Contracting Corp.*, 374 S.C. 216, 225, 647 S.E.2d 488, 492 (Ct. App. 2007) (citations omitted). "Thus, for a contract to be binding, material terms cannot be left for future agreement." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014). "In a contract for services[,] two essential terms are the scope of the work to be performed and the amount of compensation." *W.E. Gilbert & Assocs. v. S.C. Nat. Bank*, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985).

Here, the Supply Agreement is a contract for services that failed to establish any of the terms necessary to create an enforceable commercial contract. Even if it was a contract for the sale of goods, it is likewise unenforceable.

i. No Agreed-Upon Specifications.

The Supply Agreement called for Sealevel to manufacture the Product "in accordance with the specifications set forth in Exhibit A." (R. at 737 § 1.) But Exhibit A, the "Specifications," was admittedly blank at the time the Supply Agreement was entered into. (R. at 354:1-15.) Without specifications, the parties had no agreement on what Sealevel was supposed to make. This is not a minor gap or an ancillary term. The Supply Agreement was built around the Specifications: the Scope provision (§ 1) required Sealevel to design and manufacture "in accordance with" them; the Warranty provision (§ 8) obligated Sealevel to ensure the Product conformed to "Sealevel Standards" that were themselves defined by reference to the specifications; and the entire commercial framework—pricing, purchase orders, delivery—was predicated on the existence of an agreed-upon Product to be bought and sold. (R. at 737-38 §§ 1, 3, 8.) Yet neither the Specifications nor the "Sealevel Standards" were ever agreed upon or incorporated into the Supply Agreement. (R. at 19.)

Appellant attempts to fill this void by pointing to the parties' February 2016 email communications and attachments as supposed "detailed specifications" that cured the Agreement's indefiniteness. (*See* Appellant's Initial Br. 19.) This argument fails for several reasons. First, Exhibit 11, authored by Lindsey Sanders of CreatiVasc and dated February 15, 2016, is a unilateral "Requirement Specifications for HVS Handheld" document. (R. at 767-70.) It was prepared by CreatiVasc alone, not jointly agreed upon by the parties, and was never signed by any representative of Sealevel or incorporated into the Supply Agreement by written amendment as required by Section 21, which provides that "[n]o amendment to this Agreement shall be effective unless it is in writing and signed by a duly authorized representative of each Party." (R. at 743 § 21.) Second, Exhibit 12, Sanders' February 16, 2016 email, was by its own terms a "quote request," not a set of agreed specifications incorporated into the Supply Agreement. (R. at 773-74.) The email explicitly stated that it sought "a quote for production of 6 HVS Handheld prototypes" and requested a call "to discuss the project." (R. at 773-74.) Third, and critically, these February 2016 communications actually demonstrate the absence of agreed specifications rather than their existence. Sanders' email proposed the elimination of the lithium battery, the removal of pressure sensors, the elimination of NFC capability, and the elimination of all implantable electronics. (R. at 773-74; R. at 232:24-233:15.) When Sealevel's engineer Antonio Martin received the proposed changes, he immediately pushed back, questioning "why the prohibition of the Lithium battery" and noting that alternative chemistries "will require more space and will add weight." (R. at 772-73.) Sanders responded on February 19, 2016, stating "[w]e are meeting today to discuss [Sealevel's] questions." (R. at 772.) Appellant ignores that the record reflects there are no requirements exchanged after February 19, 2016, and no agreed specifications. Far from constituting agreed-upon specifications, these communications illustrate that the parties were still in the process of determining the most fundamental aspects of what the Product would be, more than sixteen months after executing the Supply Agreement. This back-and-forth exchange is the hallmark of ongoing negotiation and development, not an agreed-upon set of binding specifications as required by the Supply Agreement.

ii. No Agreed-Upon Price.

The Supply Agreement provided that the "price for the Product will be agreed upon in writing by the Parties." (R. at 737 § 3.) In other words, there was no price term. The Agreement expressly deferred this essential term to future negotiation.

The only writings in the record that Appellant points to are CreatiVasc's email request for a quote that was never provided and Sealevel's invoice sent to get CreatiVasc's attention. These exchanges are a far cry from the parties agreeing to a price for the Product in writing.

iii. No Minimum Purchase Obligation.

Importantly, the Supply Agreement imposed no obligation on CreatiVasc to purchase any particular number of units. Purchase quantities were to be specified in future "Purchase Orders" that were never executed. (R. at 737-38 § 3.)

iv. No Delivery Dates.

The Supply Agreement contemplated that "the dates and quantities of the Product to be delivered" would be specified in future Purchase Orders. (R. at 737 § 3). Again, no such dates were ever agreed upon.

v. No Existing Exhibits.

In addition to the non-existent Specifications (Exhibit A), the Agreement incorporated by reference a Purchase Order form (Exhibit B), an Invoice form (Exhibit C), and a Quotation form (Exhibit D). None of these exhibits existed at the time of execution. (R. at 737-38, 747-50.) O'Hanlan confirmed at trial that these exhibits were "also blank" or "not on the contract." (R. at 195:12-197:4.)

vi. The Supply Agreement Amounts to an Agreement to Agree.

The undisputed evidence establishes that the Supply Agreement was exactly what the trial court found it to be: "nothing more than a fluctuating framework in which the parties agreed to proceed in good faith to attempt to design, manufacture, and sell a product that did not yet exist, under terms to be determined in the future." (R. at 18.) This is the classic "agreement to agree," which South Carolina courts have consistently held to be unenforceable.

The South Carolina Supreme Court's decision in *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 762 S.E.2d 696 (2014), is instructive and supports the trial court's result. In *Stevens & Wilkinson*, the City of Columbia entered into a Memorandum of Understanding ("MOU") with developers to collaborate on the "design, development, construction and delivery" of a hotel. *Id.* at 581, 762 S.E.2d at 702. When the City abandoned the project, the developers sued for breach of contract. The Supreme Court held the MOU was too indefinite to be enforceable, noting it failed to specify key terms such as price, the actual design process, and the scope of duties, and that it merely contemplated future agreements. *Id.* at 580-81, 762 S.E.2d at 702. The Court emphasized: "We cannot see how merely stating a forthcoming document will dictate the terms of the 'design, development, construction and delivery' does not plainly leave material terms undecided. The whole project is the design, development, construction, and delivery of the hotel." *Id.*

The parallels here are unmistakable. Just as the MOU in *Stevens & Wilkinson* left the essential terms of the hotel project to future agreements, the Supply Agreement in this case left the essential terms of the Product—its specifications, its price, the quantities to be purchased, and the dates for delivery—to future Purchase Orders, Quotations, and other documents that were never executed. Just as the Court in *Stevens & Wilkinson* found that the MOU "purported to 'represent the entire agreement'" but in reality "lack[ed] a meeting of the minds on multiple material terms yet to be defined," so too does the Supply Agreement here purport to "represent the entire agreement between the Parties with respect to the purchase and sale of the Product" (R. at 745 § 26), while leaving every material commercial term undefined.

Appellant attempts to distinguish *Stevens & Wilkinson* by invoking the UCC, but this gambit fails for the reasons set forth above. The Supreme Court's holding in *Stevens & Wilkinson* is clear: when the essential terms of a contract are left for future agreement, there is no enforceable contract. This is precisely the situation here.

C. Respondents' Admission in Their Answer Does Not Create an Enforceable Contract.

Appellant repeatedly emphasizes that "Defendants admit that the Customer Supply

Agreement was a valid and binding contract at the time the parties entered into such agreement." (R. at 51 ¶ 28; Appellant's Initial Br. 9-10, 24, 39). Appellant treats this as a dispositive concession. It is not.

While sometimes used interchangeably, there is a distinction between a contract being valid and a contract being enforceable. By way of example, S.C. Code Ann. § 36-2-201, which Appellant relies on in its brief, demonstrates the legislature's recognition that validity and enforceability are distinct legal concepts, which subsection (3) providing that a contract can be "valid in other respects" but only enforceable under certain enumerated exceptions. *See* S.C. Code Ann. § 36-2-201(3). Respondents' Answer stated the Supply Agreement was valid and binding, not enforceable, and it further stated the "Supply Agreement and its amendments speak for themselves." (R. at 516 ¶ 28.) The trial court examined the Supply Agreement on its face and concluded as a matter of law that it lacks the essential terms required for enforceability. That an earlier pleading described the document as a "valid and binding contract" cannot override the legal reality that the document fails to establish a meeting of the minds on material terms.

Moreover, the admission in the Answer was qualified as being "at the time the parties entered into such agreement." (R. at 51 ¶ 28.) Respondents acknowledged the existence of the Supply Agreement as a document; they did not concede that every lawsuit premised on that document would be legally viable regardless of its terms. And Respondents consistently maintained throughout this litigation that the Supply Agreement lacked enforceable terms, including at summary judgment, directed verdict, and post-trial. The trial court agreed, and this Court should affirm. Appellant's suggestion that Respondents engaged in a "belated tactical decision to try to distance themselves" from the Supply Agreement (Appellant's Initial Br. 24) is factually inaccurate. Respondents raised the enforceability defense in their Motion for Summary

Judgment on October 3, 2023, more than a year before trial. (R. at 64-66.) This was not a last-minute ambush. It was a consistently maintained legal position that the trial court ultimately found to be correct.

II. EVEN IF THE SUPPLY AGREEMENT WAS ENFORCEABLE, THE TRIAL COURT CORRECTLY FOUND NO EVIDENCE OF BREACH OR DAMAGES IN THE TRIAL RECORD.

A. The Trial Court Correctly Found No Evidence of Breach.

Even if this Court were to find that the Supply Agreement is enforceable, the JNOV Order must still be affirmed because there is no evidence in the record establishing a breach. The Supply Agreement made Sealevel the "exclusive supplier of the Product" to CreatiVasc, but this exclusivity was impliedly contingent on two conditions: (1) Sealevel actually creating a working Product capable of integration into the Gen 2 System, and (2) CreatiVasc actually producing, marketing, and selling the System. Neither condition was ever satisfied. (R. at 237:1-3, 271:22-272:5, 371:16-21, 394:11-13; *see also* R. at 276:23-277:2, 568-569 (Appellant's trial counsel conceding at closing argument that Sealevel has "never disputed that [the product never went to market], and no evidence to support that").) The Supply Agreement did not require CreatiVasc to purchase the Product, but rather CreatiVasc promised that, if it elected to do so, it would not purchase or order the Product from any person or entity other than Sealevel. (R. at 737 ¶ 1.) There is no evidence CreatiVasc or any Respondent ever purchased the Product or anything similar from any person or entity.

The evidence was undisputed that no version of the System has ever been developed for commercial sale, and no unit has ever been sold. (R. at 371:17-21; R. at 20-21.) Tom O'Hanlan himself conceded on the witness stand that Sealevel has no evidence that the Product has ever been sold to anyone. (R. at 371:16-21). The Supply Agreement's exclusivity provision was a promise to purchase from Sealevel if and when the System went to market. The System never went to market. No one breached an obligation to purchase a product that was never commercially viable.

Appellant attempts to reframe the breach as CreatiVasc's failure to pay for six prototypes allegedly "ordered" in early 2016. (Appellant's Initial Br. 28-29). But the record does not support this characterization. The February 2016 communications from CreatiVasc to Sealevel were requests for a quote and discussions of specifications and design requirements that were part of the ongoing collaborative development process, and not binding purchase orders under the Supply Agreement. (R. at 767-74.) As established above, the Supply Agreement's purchase-order process required separate written Purchase Orders specifying "the dates and quantities of the Product to be delivered and the current price for the Product." (R. at 737 § 3). No such formal Purchase Orders were ever issued, and no price was ever agreed upon for the Product. Without an agreed price, there can be no binding purchase order and no obligation to pay.

Significantly, Sealevel never shipped or delivered any Product. Under the terms of the Supply Agreement, title to the Product passes only upon shipment pursuant to a Purchase Order; thus, no title ever passed to any Respondent. (R. at 738 § 7.) The Supply Agreement likewise makes clear that any payment obligation is contingent upon shipment. Sealevel may issue an invoice only "*[o]n or after shipment* of Product to [CreatiVasc] *under a Purchase Order*," and payment is not due until thirty days "from the date of shipment or the date of Invoice, *whichever is later*." (R. at 738 § 4.) Because no Purchase Order was made, and because no Product was ever shipped, none of the contractual conditions precedent to payment have been satisfied. Accordingly, no payment obligation arose, and CreatiVasc cannot be in breach.

Appellant also argues that CreatiVasc's failure to formally terminate the Supply Agreement constitutes a breach. (Appellant's Initial Br. 31). This argument conflates the absence of termination with the presence of breach. The fact that neither party invoked the termination provision does not mean that one party breached the Agreement. The Agreement can remain in existence without any breach occurring. Indeed, both parties' counsel acknowledged at trial that the Agreement has never been terminated. (R. at 429:11-13, 606:14-22). This is entirely consistent with the Supply Agreement's nature as a framework that was never activated by a commercially viable product.

Appellant further argues that there was evidence of a breach of the implied covenant of good faith and fair dealing. (Appellant's Initial Br. 30-31). But the implied covenant cannot be used to create contractual obligations that do not exist. Under South Carolina law, the covenant of good faith and fair dealing is "merely another term of the contract at issue." *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 472, 597 S.E.2d 881, 884 (2004) (citation omitted). If the contract itself imposes no obligation on CreatiVasc to purchase the Product at a particular time or price, the covenant of good faith cannot be used to manufacture such an obligation. "[T]he implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract." *Id.* at 473, 597 S.E.2d at 884. The duty of good faith does not require a party to continue a collaborative venture indefinitely, particularly when the underlying technology has proven commercially unfeasible.

Crucially, Sealevel's claim that CreatiVasc breached the covenant of good faith and fair dealing rests on the assertion that Respondents "concealed their mergers from Sealevel." (Appellant's Initial Br. 30.) But the Supply Agreement expressly permits the very conduct Sealevel now characterizes as bad faith. It provides that "any Party may, without consent, assign this Agreement in connection with the transfer or sale of all or substantially all of its business, or in the event of its merger, consolidation, change in control or other similar transaction." (R. at 743

¶ 24.) That is precisely what occurred here. And contrary to any suggestion of a nefarious purpose, the uncontradicted testimony establishes that Respondents' restructurings were necessitated by CreatiVasc repeatedly running out of funds while attempting to develop the System. (R. at 214:18-24, 443:4-7, 448:7-21, 468:18-469:3, 476:7-19, 479:18-24.)

Finally, Sealevel's argument that CreatiVasc breached the Confidentiality provision of the Supply Agreement (Appellant's Initial Br. 31-32) was, as the trial court correctly found, entirely unsupported by the evidence. The only testimony on this point was that Steve Johnson was required to turn over his laptop and other storage media to DiaxaMed when he was terminated. (R. at 403:19-404:4.) But there was no testimony about what those devices contained, how the devices were stored or treated, or whether those devices were ever accessed, and no evidence whatsoever that CreatiVasc or any other party actually disclosed Sealevel's confidential information to a third party. (R. at 21-22.) Appellant's theory of a confidentiality breach rests entirely on speculation and inference-stacking, which is precisely the kind of conjecture that cannot support a jury verdict. *See Small*, 329 S.C. at 461, 494 S.E.2d at 841.

B. Sealevel Has No Evidence of Recoverable Damages.

Even if an enforceable contract existed and was breached, which Respondents deny, the JNOV must be affirmed because Sealevel presented no cognizable evidence of damages.

i. The Supply Agreement Contains No Provision Authorizing Recovery of Engineering Costs.

Section 3 of the Supply Agreement, titled "Purchase Orders; Price," expressly defines the exclusive mechanism by which prices were to be established and payments triggered. It provides: "Orders for the Product shall be made by Customer by written or electronic orders *issued by Customer* to Sealevel substantially in the form of Exhibit B . . . (each such order, a 'Purchase Order'). The Purchase Order shall specify the dates and quantities of Product to be delivered *and* *the current price for the Product*. *The price for the Product will be agreed upon in writing by the Parties and may not be changed except as agreed upon in writing by the Parties*." (R. at 737 § 3.) Section 4, in turn, ties payment exclusively to the shipment of finished goods: "On or after shipment of Product to Customer under a Purchase Order, Sealevel shall issue an invoice in the form of Exhibit C to Customer . . . ." (R. at 738 § 4.) Read together, these provisions establish an unbroken chain of prerequisites to any payment obligation: (1) the parties must first agree on a price in writing; (2) CreatiVasc must then issue a Purchase Order specifying dates, quantities, and the agreed price; (3) Sealevel must manufacture and ship the Product; and (4) only then may Sealevel issue an invoice, with payment due thirty days later. None of these prerequisites was ever satisfied. No price was ever agreed upon in writing. No Purchase Order was ever issued. No Product was ever shipped. The Supply Agreement simply does not contemplate, and does not authorize, billing for engineering and development time incurred before any of these conditions are met.

The only evidence of damages that Sealevel presented at trial was a single invoice for $321,540.00, representing a retrospective estimate of engineering and development time. (R. at 803-04; R. at 22.) But the Supply Agreement contains no provision authorizing Sealevel to bill CreatiVasc for research and development expenses. This was established repeatedly and conclusively at trial.

On cross-examination, defense counsel asked Tom O'Hanlan: "You would agree with me that Exhibit 4 does not contain any provisions requiring CreatiVasc to pay Sealevel for its engineering time." O'Hanlan was then impeached with his deposition testimony, in which he admitted: "I would agree with that as stated, but the contract does provide for the exclusive rights to manufacture the product. So that's how a lot of companies make their money is you forego the front-end cost in exchange for the manufacturing rights in anticipation that it's going to be a high volume, a profitable venture." (R. at 373:14-374:7.) This admission is fatal to Sealevel's damages claim. O'Hanlan acknowledged that (1) the Supply Agreement does not require CreatiVasc to pay for engineering time, and (2) Sealevel's business model was to "forego the front-end cost" in exchange for future manufacturing profits. When those profits failed to materialize, because the underlying technology never succeeded, Sealevel cannot retroactively transform its speculative investment into a damages claim.

Moreover, the Supply Agreement provides a remedy provision in the event of breach or termination by CreatiVasc, stating that CreatiVasc must "take delivery of and pay the full price for the remainder of open Purchase Orders (if any)." (R. at 739 § 12(b)). No formal Purchase Orders were ever issued, and no price was ever agreed upon. Sealevel's damages under the express terms of the Agreement are therefore zero.

ii. The Invoice Was Not a Proper Measure of Damages.

Sealevel argues that the invoice reflects "the cost of the Product" rather than mere engineering time. (Appellant's Initial Br. 34-37.) This characterization is contradicted by the record. The invoice was, by O'Hanlan's own admission, not a genuine demand for payment under the Supply Agreement but rather an attempt to get CreatiVasc/'s attention after communications had ceased. (R. at 372:19-24.) The JNOV Order correctly characterized the invoice as "nothing more than a retrospective tally of engineering and development time that Sealevel devoted to the project." (R. at 24.)

Moreover, the trial court correctly observed that "it is undisputed that Sealevel would have incurred these same developmental costs regardless of whether the project was successful or not." (R. at 24.) Both Sealevel and CreatiVasc expended hundreds of hours trying to develop a product that worked. Sealevel focused on the external actuator; CreatiVasc focused on the internal components. The collaboration was a shared speculative venture. When such a venture fails, neither party is entitled to bill the other for its sunk costs, particularly when the agreement between them contemplated no such billing arrangement.

Sealevel criticizes the JNOV Order for overlooking that the invoice contains a line item for "Material Costs" of $23,290. (Appellant's Initial Br. 36). But even if one were to isolate this line item, it does not establish damages under the Supply Agreement. The Agreement contains no provision entitling Sealevel to reimbursement for material costs incurred during the development process. And in any event, the existence of a $23,290 material cost line item on an invoice that the jury used to award $321,540 in damages (the exact amount of the entire invoice) underscores that the jury simply adopted Sealevel's invoice wholesale, without any analysis of what damages, if any, were actually recoverable under the Supply Agreement.

The jury's confusion on the issue of damages was further laid bare by its own deliberation notes. During deliberations, the jury submitted a written question to the trial court asking: "Do we have to have an actual amount for damages in question to the actual damages or can we state all attorney's fees, court costs, and associated fees? If not, what is the Plaintiff's actual fees from above?" (R. at 649:17-20; R. at 1009.) This question is revealing. The jury was actively searching for a damages figure beyond what was in the record and was even contemplating awarding attorney's fees and court costs, neither of which was supported by any evidence or authorized by any provision of the Supply Agreement. The jury's evident struggle to identify a cognizable measure of damages, and its resort to asking whether it could award items entirely outside the record, underscores the trial court's finding that the evidence was legally insufficient to support the damages verdict.

The illusory nature of Sealevel's purported damages can be further demonstrated by considering if CreatiVasc had ceased all communications with Sealevel six months earlier, before the February 2016 quote request and before any prototype was even discussed. Sealevel's theory of the case would still entitle it to recover the exact same category of "damages": a retrospective tally of its own engineering time and material costs. That is because Sealevel's damages claim is entirely untethered from any contractual obligation to pay. The Supply Agreement contains no milestone payments, no development-fee schedule, and no provision requiring CreatiVasc to reimburse Sealevel's engineering costs at any stage. Under Sealevel's theory, the mere act of performing engineering work gives rise to a damages claim whenever the other party stops communicating, regardless of whether any product was ordered, any price was agreed upon, or any goods were shipped. This is not a measure of damages recognized by law; it is a request that the court rewrite the parties' agreement to include an obligation that the parties themselves chose not to include. The trial court correctly rejected this approach.

iii. The UCC Does Not Cure the Issues with Sealevel's Damages.

Appellant argues that the JNOV Order erroneously cited S.C. Code Ann. § 36-2-715 (governing buyer's incidental and consequential damages) when it should have cited S.C. Code Ann. § 36-2-710 (governing seller's incidental damages). (Appellant's Initial Br. 37-38.) Even if this is a scrivener's error in the citation, it does not affect the outcome. Under either provision, Sealevel's engineering and development costs are not recoverable.

Section 36-2-710 defines a seller's incidental damages as "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise *resulting from the breach*." (Emphasis added.) Sealevel's engineering costs were incurred in the speculative development of a product that never reached commercial viability, not in response to any breach.

The fundamental deficiency in Sealevel's damages theory is that the costs it seeks to recover do not flow from any alleged breach. Both Section 36-2-708 (governing seller's damages for non-acceptance or repudiation) and Section 36-2-710 (governing seller's incidental damages) require that recoverable damages be "resulting from the breach." S.C. Code Ann. §§ 36-2-708(2), 36-2-710. This causation requirement is a bedrock principle: under South Carolina law, "[t]he purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed." *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996). Sealevel's engineering and development costs were not caused by any breach. They were incurred in the ordinary course of the parties' collaborative development effort. As the trial court correctly observed, "Sealevel would have incurred these same developmental costs regardless of whether the project was successful or not." (R. at 24.) Because Sealevel's claimed damages are pre-breach development costs that bear no causal relationship to any alleged breach, rather than damages "resulting from the breach" as the UCC requires, they are not recoverable under any provision of Article 2. As the trial court correctly found, damages that are "uncertain, contingent, or speculative . . . cannot be recovered in any action ex contractu or ex delicto." (R. at 23 (quoting *United Merchants & Mfrs. v. S.C. Elec. & Gas Co.*, 113 F. Supp. 257, 261 (W.D.S.C. 1953)).

Furthermore, Appellant's argument that the Supply Agreement's indemnification provision provides an independent basis for damages is a red herring. (Appellant's Initial Br. 36-37.) The indemnification provision requires CreatiVasc to "indemnify and hold harmless Sealevel . . . from and against any and all Damages" arising from third-party claims, not from

CreatiVasc's own alleged breach. (R. at 739-40 ¶ 13.) This provision is a standard third-party indemnification clause, not a general damages clause expanding the remedies available for breach.

III. THE TRIAL COURT DID NOT ERR IN DIRECTING A VERDICT ON SEALEVEL'S QUANTUM MERUIT CLAIM.

Sealevel argues, in the alternative, that if this Court affirms the finding that the Supply Agreement is unenforceable, it should reverse the directed verdict on Sealevel's quantum meruit claim. (Appellant's Initial Br. 42–44.) This argument fails because Sealevel did not establish the essential elements of quantum meruit.

Under South Carolina law, quantum meruit requires: "1) a benefit conferred upon the defendant by the plaintiff; 2) realization of that benefit by the defendant; and 3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value." *Rose Elec., Inc. v. Cooler Erectors of Atl., Inc.*, 418 S.C. 424, 431, 794 S.E.2d 382, 386 (Ct. App. 2016) (quoting *Swanson v. Stratos*, 350 S.C. 116, 121, 564 S.E.2d 117, 119 (Ct. App. 2002)); see also *Earthscapes Unlimited v. Ulbrich*, 390 S.C. 609 (Ct. App. 2010).

Sealevel's quantum meruit claim fails at the second and third element. The undisputed evidence establishes that no commercially viable product was ever developed, marketed, or sold. CreatiVasc never derived any benefit from Sealevel's work on the external actuator component, because the technology never worked as intended. (R. at 23.) The prototype had battery issues, relied on a sensor technology that proved unworkable, and was never integrated into a functioning System. (R. at 271:22-272:5.) Both parties invested time and money into a speculative venture that failed. Neither party "realized" a benefit from the other's work.

Sealevel's argument that "Respondents now have the Product, or information and materials related to the Product, which they could use in the future for the System" is speculative and contrary to the record. (Appellant's Initial Br. 44.) First, there is no evidence that any Respondent is using or has ever used any technology developed by Sealevel. McMurray's testimony was uncontradicted on this point. (R. at 488:8-14, 366:16-367:6, 447:10-17.) Second, the possibility that someone might hypothetically derive some future benefit from information related to Sealevel's work is precisely the kind of speculative, conjectural theory that cannot support a judgment. Third, quantum meruit measures the benefit conferred upon the defendant, not the cost incurred by the plaintiff. As the trial court correctly observed during colloquy, the measure of quantum meruit damages is "the value that the Defendant gets, not the amount of time or money or value of the Plaintiff's time." (R. at 281:1-4.) Sealevel conflated the two, seeking to recover its own engineering costs rather than establishing the value, if any, that Respondents actually received. Third, Respondents have never possessed the Product.

The trial court's directed verdict on the quantum meruit claim was correct and should be affirmed.

IV. THE TRIAL COURT PROPERLY DISMISSED SEALEVEL'S PROMISSORY ESTOPPEL CLAIM.

Appellant alternatively argues that the trial court erred by dismissing Sealevel's promissory estoppel claim. (Appellant's Initial Br. 44-46.) This argument fails because the evidence does not satisfy the elements of the doctrine under South Carolina law. Promissory estoppel requires: "(1) an unambiguous promise by the promisor; (2) reasonable reliance on the promise by the promisee; (3) reliance by the promisee was expected by and foreseeable to the promisor; and (4) injury caused to the promisee by his reasonable reliance." *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 379-80, 769 S.E.2d 237, 241 (2015) (citation omitted). "The doctrine is designed for the rare instance when equity's aid is necessary to prevent the rank injustice that would ensue if a party could avoid being held to a clear promise he made on which the other party foreseeably and reasonably relied to his detriment." *Cruz v. City of Columbia*, 443 S.C. 201, 205, 904 S.E.2d 451

(2024). "[T]he promise to be enforced must be unambiguous with clearly articulated, definite terms, while the sustained injury must result from an inconsistent disposition by the promisor." *Barnes v. Johnson*, 402 S.C. 458, 470, 742 S.E.2d 6, 11 (Ct. App. 2013).

First, Sealevel has not identified any specific, definite, and unambiguous promise made by CreatiVasc upon which it allegedly relied. The Supply Agreement itself is the antithesis of an unambiguous promise, with its blanket deferrals of price, specifications, quantity, and delivery terms to future agreement. Appellant points to the February 2016 email communications requesting a *quote* for six prototypes with specifications, but these communications were part of an ongoing, iterative development process. They were not "unambiguous promises" to pay any particular sum for any particular product at any particular time. They reflected the collaborative, back-and-forth process of design refinement that characterized the parties' entire relationship. (*See* R. at 772-74.)

Second, even assuming Sealevel subjectively relied on some representation by CreatiVasc, such reliance was not reasonable. Sealevel is a sophisticated commercial entity that had the opportunity to negotiate and obtain contractual protections, including a provision for reimbursement of engineering costs, before committing resources to the project. It chose not to do so. As O'Hanlan candidly admitted, Sealevel's business model was to "forego the front-end cost in exchange for the manufacturing rights in anticipation that it's going to be a high volume, a profitable venture." (R. at 374:2-7.) Having made a deliberate business decision to invest its own resources in a speculative venture, Sealevel cannot now invoke promissory estoppel to recover those costs when the venture fails.

Third, Promissory estoppel requires that the injury arise from an "inconsistent disposition" by the promisor. *A&P Enters., LLC v. SP Grocery of Lynchburg, LLC*, 422 S.C. 579, 588, 812

S.E.2d 759, 763 (Ct. App. 2018) (citation omitted). Here, neither CreatiVasc nor any Respondent engaged in an inconsistent disposition. The project simply failed because the technology did not work. Both parties devoted resources to a speculative effort that did not succeed. CreatiVasc did not promise success; it committed to a collaborative effort that, like many research-and-development projects, produced no commercially viable result.

Finally, "[t]he applicability of the doctrine depends on whether the refusal to apply it 'would be virtually to sanction the perpetration of a fraud or would result in other injustice.'" *Satcher v. Satcher*, 351 S.C. 477, 484, 570 S.E.2d 535, 538 (Ct. App. 2002) (quoting *Citizens Bank v. Gregory's Warehouse, Inc.,* 297 S.C. 151, 154, 375 S.E.2d 316 (Ct. App. 1988)). That demanding standard is not remotely satisfied here. Sealevel's promissory estoppel theory is nothing more than an attempt to enforce the very same promises that failed to create an enforceable contract. The undisputed record reflects that Sealevel knowingly participated in a developmental undertaking, one dependent on future agreement, successful product development, and eventual commercialization. The possibility that the venture might not materialize was inherent in the parties' deadlines. That risk, ultimately realized, does not transform Respondents' conduct into fraud or injustice. To hold otherwise would convert ordinary commercial risk into liability and expand promissory estoppel beyond its narrow, equitable purpose.

Thus, the trial court's dismissal of the promissory estoppel claim was well-reasoned and correct.

CONCLUSION

For the foregoing reasons, the trial court correctly granted Respondents' Motion for Judgment Notwithstanding the Verdict and dismissed Sealevel's promissory estoppel claim. Accordingly, this Court should affirm.

Respectfully submitted,

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