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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In The Court of Common Pleas,
Thirteenth Judicial Circuit
The Hon. Perry H. Gravely, Circuit Court Judge

Case No. 2018-CP-23-04092 / Case No. 2022-CP-23-01310
Ct. App. 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.

APPELLANT'S FINAL BRIEF

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III. Alternatively, did the trial court err by directing a verdict in Respondents' favor on Sealevel's claim for quantum meruit?

IV. Alternatively, did the trial court err by denying Sealevel relief under the doctrine of promissory estoppel?

STATEMENT OF THE CASE

This case involves a Supply Agreement between two commercial parties, for the purchase by Respondent CreatiVasc Medical, Inc. ("CreatiVasc") of a highly-specialized, complex, component part of a kidney dialysis system. Appellant Sealevel Systems, Inc. ("Sealevel") developed and made the part, pursuant to specifications by certain Respondents. But things fell apart when, after ordering the part, Respondent CreatiVasc merged itself out of existence. CreatiVasc did this without telling Sealevel, which carried on with development and production of the specialized part. CreatiVasc's successors, Respondents Brookhaven Merger Corp. ("Brookhaven Merger"), Brookhaven Vascular, Inc. ("Brookhaven Vascular"), and DiaxaMed, LLC ("DiaxaMed")—all of which may or may not have been (and still be) carrying on with the dialysis system using Sealevel's protected proprietary information—promptly disclaimed all responsibility for Sealevel's invoices and all liability under the Supply Agreement.

After a three-day trial, including testimony and more than twenty exhibits, the jury found in favor of Sealevel on its claims for breach of contract against CreatiVasc and Brookhaven. It also found in favor of Sealevel on its claim for tortious interference with contract against DiaxaMed. The jury awarded damages, including punitive damages.

The trial court wrongly set aside the jury's verdict, despite voluminous evidence supporting it.

I. Factual Background

Tom O'Hanlan ("T. O'Hanlan") and his wife founded Sealevel in the late 1980s. (R. p. 245, lines 10–18). Sealevel and its team of engineers develop and make electronics, motors, and mechanics. (R. p. 189, line 24–p. 190, line 1; R. p. 728 ("We are a 28 year old upstate company that designs and manufactures complex electronic systems for the military and Fortune 500. We have a new $2mm assembly line and some very good engineers.")).

In September of 2014, a third party introduced Sealevel, by way of T. O'Hanlan, to Steve Johnson ("Johnson"), an executive with Respondent CreatiVasc, via email. (R. p. 248, lines 14–23; *see also* R. pp. 728–29). At the time, CreatiVasc was looking for a company to make a component part of its implanted hemodialysis system, known as the CreatiVasc Hemoaccess Valve System® (the "System"). It explained, "We have discovered distant manufacturers but would ideally like to keep it in SC if at all possible." (R. pp. 729–30). Johnson became Sealevel's primary contact at CreatiVasc. (*e.g.* R. pp. 724–32, 764–66).

On October 28, 2014, Sealevel and CreatiVasc each executed the Customer Supply Agreement, as amended on April 10, 2015, and again on March 9, 2016 (the "Supply Agreement"). (R. p. 253, lines 9–17; *see also* R. pp. 736–51, 775–77; *see also* R. p. 36, ¶1; R. p. 41, ¶ 27–29; R. p. 42, ¶ 34; R. p. 43, ¶ 38; *see also* R. pp. 46–47, ¶ 2; R. p. 50, ¶ 23; R. p. 51, ¶¶ 28, 31; R. p. 52, ¶ 34). The thrust of the Supply Agreement was that "[CreatiVasc] desires to have Sealevel design and manufacture the motor control and valve monitor electronics (both hardware and software) for use in the CreatiVasc Hemoaccess Valve System®." (R. p. 737, ¶ A). The Supply Agreement contains general contractual provisions, including confidentiality obligations, indemnification provisions, and a limitation of liability in Sealevel's favor. (R. pp. 736–51).

Thus, the Supply Agreement set forth the parties' agreement that CreatiVasc desired to have Sealevel design, produce, and deliver a complex mechanism component for inclusion in CreatiVasc's patented and trademarked kidney dialysis System, which Sealevel would sell to CreatiVasc, and CreatiVasc would buy from Sealevel. (R. p. 737, ¶ A, § 1). Importantly, pursuant to the Supply Agreement, the parties agreed Sealevel would "design, manufacture, sell, and deliver," and would be the exclusive supplier of, certain specialized "hardware and software (the 'Product') used in [CreatiVasc's] System's handheld actuator" to CreatiVasc. (R. p. 36, ¶ 1; *see also* R. p. 737 § 1).

To create the Product, intended by CreatiVasc to be a handheld device providing certain functions to the "System" belonging to CreatiVasc, Sealevel needed to design and construct the electronics, motor, and mechanics of the Product. (R. p. 189, line 20–p. 190, line 1; R. p. 195, lines 3–18; *see also* R. p. 737, § 1). The Supply Agreement protected the proprietary nature of Sealevel's design work, and the inherent value of that work, under the Agreement's Section captioned "Confidential Information." (R. p. 741, § 14). This Section prevented CreatiVasc from disclosing "any technical or other information" to "any third party." (*Id.*). It also prohibited CreatiVasc from "us[ing] such information for its own benefit except for the purposes of this Agreement." (*Id.*). This Section is clear that CreatiVasc's obligations regarding Sealevel's proprietary information "shall survive the termination of this Agreement for a period of five (5) years." (*Id.*).

Meanwhile, unbeknownst to Sealevel, shortly after the parties executed the Supply Agreement, CreatiVasc began to undergo certain mergers and acquisitions activity. First, on March 10, 2015, CreatiVasc merged with Brookhaven Merger Corp. ("Brookhaven

Merger") in a transaction valued at $23,957,996.00. (R. p. 404, lines 7–17; *see also* R. pp. 805–73). John Feltman ("Feltman"), an executive with Brookhaven Medical, Inc. ("Brookhaven Medical"), partially led this transaction, recognizing that CreatiVasc needed more funds to develop the System. (R. p. 468, line 18–p. 469, line 3; R. p. 469, line 18–p. 470, line 2). Feltman and Brookhaven Medical allowed CreatiVasc and Steve Johnson to continue to perform under the Supply Agreement, and to continue to develop CreatiVasc's System. (R. pp. 403–05; R. p. 421, lines 6–12; R. p. 473, line 21–p. 475, line 8). Documents of merger filed with the S.C. Secretary of State indicated that all "material contracts" were disclosed in Schedule 4.08, including all contracts "to purchase total requirements of any product or service from a third party," such as the Supply Agreement. (R. p. 832, § 4.08). The Supply Agreement remained intact following this merger; one month after the merger, CreatiVasc and Sealevel entered into the First Amendment to the Supply Agreement on April 10, 2015. (R. p. 421, lines 6–12; R. p. 473, line 21–p. 475, line 8; R. pp. 764–66; R. p. 41, ¶ 28).

In early 2016, CreatiVasc ordered six (6) of the Products from Sealevel. (R. p. 231, line 8–p. 234, line 18; R. p. 268, lines 7–11; R. p. 355, lines 13–15; R. p. 450, lines 20-22; *see also* R. pp. 767–74). On February 15, 2016, CreatiVasc provided Sealevel with detailed specifications and design requirements for the "HemoAccess Valve System (HVS) Handheld" (the Product). (R. pp. 767–70). On March 9, 2016, the parties entered into a Second Amendment to the Supply Agreement. (R. pp. 775–77). Sealevel continued to work on manufacturing the Products to CreatiVasc's specifications, which was a costly and time-consuming endeavor; it ultimately made a workable Product for CreatiVasc.

(R. p. 39, ¶ 17; *see also* R. pp. 736–51; R. pp. 802–04; *see also* R. p. 192, lines 3–10, 12–17; R. p. 193, lines 15–19; R. p. 262, line 25–p. 263, line 5; R. p. 266, lines 7–25; R. p. 268, lines 15–22; R. p. 291, lines 15–20; R. p. 292, line 1–p. 297, line 1; R. p. 377, line 25–p. 378, line 12). CreatiVasc made a $10,000 advance payment on its order for the Products. (R. pp. 803–04).

Subsequently, on June 1, 2016, CreatiVasc changed its name to Brookhaven Vascular, Inc. ("Brookhaven Vascular"). (R. p. 409, lines 11–15). To make a long story somewhat shorter, it was ultimately undisputed that the Brookhaven entities are the successors-in-interest to CreatiVasc. (R. p. 20, n. 14).

Meanwhile, during the same time period (*i.e.* 2015-2016), CreatiVasc and Brookhaven were working with a company called ATEX Technologies, Inc. ("ATEX") on another, different component part of the CreatiVasc HemoAccess Valve System (or a similar iteration of the System). (R. pp. 752–58, 764–66). In fact, ATEX had a separate supply agreement with CreatiVasc, dated after Sealevel and CreatiVasc's Supply Agreement, also related to the System (or a similar iteration of the System). (R. p. 752–58; R. pp. 483, line 23–p. 484, line 20).

A fellow by the name of Brian McMurray ("McMurray") was the President of ATEX. (R. p. 483, line 3–p. 484, line 20). Later, McMurray formed a new company, called DiaxaMed, LLC ("DiaxaMed"). DiaxaMed was formed to acquire Brookhaven Vascular's assets. (R. p. 448, lines 18–21; R. p. 480, lines 4–6; R. p. 486, lines 6–9). McMurray already had a working relationship with CreatiVasc, including through ATEX's separate supply agreement also related to the System (or a similar iteration of the System). (R. pp. 752–

58; R. p. 483, line 23–p. 484, line 20). McMurray also had a working relationship with Brookhaven Medical as Brookhaven Medical's largest investor and an advisor on its Board. (R. p. 465, lines 21–24).

Ultimately, on December 30, 2016, DiaxaMed did purchase all of Brookhaven Vascular's assets; however, DiaxaMed claimed that it did not assume the obligations in the Supply Agreement. (R. pp. 778–91; *see also* R. p. 494, line 25–p. 495, line 9). In fact, despite DiaxaMed and its attorneys conducting due diligence on Brookhaven Vascular prior to purchasing its assets, and despite McMurry's long involvement with both CreatiVasc and Brookhaven Medical, McMurray and DiaxaMed nonetheless declared that they did not know much, if anything, about Sealevel or the Supply Agreement. (R. p. 489, line 13–p. 490, line 10; R. p. 492, line 14–p. 493, line 12). Pertinently, DiaxaMed structured the acquisition such to take <u>all</u> assets and liabilities of CreatiVasc, ***except*** the Supply Agreement, of which it maintained it had no knowledge. (R. pp. 778–91).

Apparently, at some point during this period of myriad transactional activity, CreatiVasc/Brookhaven Vascular decided to cease efforts to develop the System in such a way that it would need the Product. (R. p. 238, line 22–p. 239, line 5; R. p. 394, line 14–p. 395, line 4, R. p. 470, lines 7–21; R. p. 476, lines 7–19). **But CreatiVasc/Brookhaven Vascular never told Sealevel about this decision.** (R. p. 268, lines 5–22). Consequently, Sealevel continued to expend significant effort, time, and money, working to make the Products that CreatiVasc had ordered, in accordance with the specifications CreatiVasc required — while CreatiVasc/Brookhaven Vascular, and/or DiaxaMed, no longer intended to develop, market, and sell the System of which the Product would be a component. (R. p. 39, ¶ 17).

In the midst of 2016, Sealevel contacted CreatiVasc to let it know it had the Product available for delivery. (R. p. 268, lines 5–9). But, during this period of time, CreatiVasc went silent; CreatiVasc would not communicate at all with Sealevel. (R. p. 268, lines 5–22) ("So, we got ghosted. We got -- we got whatever you call it. Just ghosted. No answer. Nobody would take our calls.").

Then, on January 12, 2017, Steve Johnson emailed T. O'Hanlan and Ben O'Hanlan (the then-President of Sealevel), stating that "CreatiVasc and Brookhaven Vascular are no more." (R. p. 795). At that time, Johnson was working for DiaxaMed, which had recently acquired Brookhaven Vascular. (*Id.*; *see also* R. pp. 778–91; R. p. 494, line 25-p. 495, line 9). Significantly, at the same time, Johnson also signed an Asset Protection Agreement with DiaxaMed that contained a non-disparagement provision. (R. p. 413, line 18-p. 415, line 1; R. pp. 792–93). At trial, Johnson testified that because of the non-disparagement agreement, he was cautious and concerned about anything he said about the merger. Johnson stated he "did not want to be seen in any way as being contrary to what was in the non-disparagement agreement," and he "was also careful not to say anything negative about the parties." (R. p. 414, lines 5–22)

At no point did either CreatiVasc or Sealevel terminate the Supply Agreement, which in any event required "mutual written agreement" for termination. (R. p. 739, § 12; *see also* R. p. 429, lines 11–13). At no point did CreatiVasc seek consent from Sealevel to disclose "any technical information or other information exchanged by the Parties during this Agreement;" but the Supply Agreement required CreatiVasc to keep all such information "whether written, oral, *computer based* or otherwise" confidential. (R. p. 741, § 14(a)) (emphasis added).

After DiaxaMed took over, Steve Johnson continued to communicate with Sealevel, using a CreatiVasc email address with a DiaxaMed signature block. (R. p. 795). But on March 30, 2017, DiaxaMed terminated Johnson's employment. (R. p. 403, line 19-p. 404, line 4). As part of the termination, DiaxaMed required Johnson to surrender his laptop and flash drives, which contained Sealevel's proprietary and confidential information, to DiaxaMed. (R. p. 403, line 19-p. 404, line 4; R. p. 428, lines 15–19). Significantly, Johnson remains obligated to DiaxaMed under the non-disparagement agreement ("NDA"). (R. p. 403, line 19-p. 404, line 4; R. p. 413, line 18–p. 414, line 9).

Sealevel, however, was kept in the dark about all of this corporate activity. (R. p. 268, lines 5–22).

On June 26, 2017, Sealevel sent a letter with an invoice in the amount of $321,540.00 to CreatiVasc, which reflected the $10,000 advance payment previously made by CreatiVasc. (R. pp. 802–04). This invoice conservatively estimated the cost to make the Products as ordered, with specifications, by CreatiVasc, including, Sealevel's time and expenses for designing and manufacturing the Product. (R. p. 192, lines 3–10; R. p. 291, lines 15–20; R. p. 292, line 1–p. 297, line 1; R. p. 377, line 25–p. 378, line 12). In response to the invoice, an attorney on behalf of Brookhaven Medical (owned at the time by DiaxaMed) denied any liability for the invoice. (R. pp. 797–98). Remarkably, although the attorney referred in the letter to "discussions with Steve Johnson," the attorney stated that "CreatiVasc . . . does not have a copy of any purported supply agreement supporting the invoice." (*Id*.).

Respondents refused to pay any portion of the invoice, beyond CreatiVasc's initial deposit of $10,000. (R. p. 192, lines 11–17; *see also* R. pp. 797-98).

Now, DiaxaMed continues to attempt to develop hemodialysis products like the System (or a similar iteration of the System), having preserved for itself the opportunity to take the entirety of CreatiVasc's Hemoaccess Valve System®. Diaxamed has also enabled itself to develop a Product similar to the device already developed by Sealevel, because it has the benefit of Sealevel's proprietary information that is now in DiaxaMed's possession. (R. p. 403, line 19-p. 404, line 4; R. p. 428, lines 15–19; R. p. 486, lines 10–12; R. p. 487, lines 6–8). CreatiVasc and Brookhaven Vascular no longer exist, but Brookhaven Medical, which was the parent company of CreatiVasc/Brookhaven Vascular after the merger, remains alive as a shell entity. (R. p. 470, lines 7–21).

II. Procedural History

Plaintiff/Appellant Sealevel Systems, Inc. ("Sealevel") filed its Summons and Complaint on August 2, 2018, alleging five causes of action: (1) Declaratory Judgment as to Sealevel's rights under the Supply Agreement; (2) Breach of Contract; (3) Intentional Interference with Contract; (4) in the alternative, Quantum Meruit; and (5) in the alternative, Promissory Estoppel. (R. pp. 36–45). Sealevel brought these claims against Defendants CreatiVasc Medical, Inc. ("CreatiVasc"), DiaxaMed, LLC ("DiaxaMed"), Brookhaven Vascular, Inc. ("Brookhaven Vascular"), Brookhaven Merger Corp. ("Brookhaven Merger Corp."), John D. Feltman ("Feltman"), and James S. ("Steve") Johnson ("Johnson") (collectively, "Defendants"). *(See id.).* Sealevel demanded a jury trial in its Complaint. (*Id.*)

All Defendants filed their Answer on October 12, 2018. (R. pp. 46–54). Among other things, Defendants admitted that the Supply Agreement was a valid and binding contract. (R. p. 51, ¶ 28) ("Defendants admit that the Customer Supply Agreement was a valid and binding contract at the time the parties entered into such agreement."). Defendants also demanded trial by jury. (R. p. 46).

On March 9, 2021, the Court entered a Consent Order of Dismissal Pursuant to Rule 40(j), SCRCP. (R. pp. 1–3). By Order dated March 10, 2022, the case was restored to the common pleas docket. (R. pp. 4–5).

Defendants moved for summary judgment on October 3, 2023. (R. pp. 55–74). In their motion, Defendants argued: (1) Sealevel's claim for breach of contract should fail because the Supply Agreement failed to establish a meeting of the minds, rendering it unenforceable; (2) Sealevel's claim for intentional interference with contract should fail because the parties lacked an enforceable contract; (3) even if the parties had an enforceable contract, Defendants had not breached that agreement or suffered damages recoverable under the agreement; and (4) Sealevel's alternative claims for promissory estoppel and quantum meruit should fail because Sealevel had not conferred any benefit on Defendants, nor had Sealevel suffered any injury. *(Id.).*

On November 30, 2023, the Court denied Defendants' summary judgment motion in its entirety, ruling that "there is a genuine issue of material fact in the matter *requiring submission to a jury*." (emphasis added). (R. pp. 6–8).

The trial court called this case for jury trial beginning February 11, 2025, and concluding February 13, 2025. (R. pp. 134–654). At trial, Sealevel elicited testimony generating conflicting evidence from various fact witnesses, including: Ben O'Hanlan, former President of Sealevel; Dr. David Cull[1], an early inventor of and visionary for part of the device at issue; Chad Clark, former engineer with CreatiVasc, Brookhaven Vascular/Brookhaven Merger Corp., and DiaxaMed; Tom O'Hanlan, founder of Sealevel; Savannah Forrester, former engineer for DiaxaMed; Steve Johnson, former executive for CreatiVasc, Brookhaven Vascular/Brookhaven Merger Corp., and DiaxaMed; John Feltman, executive for Brookhaven Vascular/Brookhaven Merger Corp.; and Brian McMurray, executive for DiaxaMed. (R. pp. 188–649).

After Sealevel rested its case, Sealevel moved for a directed verdict as to its request that the trial court declare the Supply Agreement exists and is ongoing. (R. p. 501, lines 18–20). Defendants moved for a directed verdict on each of Sealevel's causes of action, arguing the judge need not send the case to the jury because: (1) the Supply Agreement is not enforceable; (2) even if the Supply Agreement is enforceable, no evidence indicated Defendants breached it; (3) no evidence indicated Sealevel had suffered any damages; (4) without a breach of a valid agreement, intentional interference with contract fails, and even if the Supply Agreement is enforceable, no evidence showed any of the Defendants intentionally procured its breach; and (5) no evidence showed Sealevel conferred any benefit on Defendants, or that Defendants realized any benefit, or that Defendants made any unambiguous promise to Sealevel, so Sealevel's claims for quantum meruit and promissory estoppel must fail. (R. p. 502, line 18–p. 508, line 22). Additionally, at the

[1] In the transcript, Dr. Cull's name is misspelled "Cole."

directed verdict stage, Sealevel withdrew its claims against Feltman and Johnson. (R. p. 535, lines 2–6; R. pp. 9–11). And at this stage, the trial court limited Sealevel's (i) breach of contract claim to CreatiVasc, Brookhaven Vascular, and Brookhaven Merger Corp., and (ii) intentional interference with a contract claim to DiaxaMed. (R. p. 541, line 9–p. 543, line 2).

Ultimately, much like its ruling on Defendants' summary judgment motion, the trial court largely denied Defendants' directed verdict motions, ruling that much of this case "is something *that should go to the jury*" and that, specifically regarding breach of contract, "there is a . . . basis for that to go to the jury." (emphasis added). (R. p. 543, line 6; R. p. 546, lines 9–16). However, regarding Sealevel's quantum meruit cause of action, the Court granted Defendants' directed verdict motion, dismissing that cause of action. (R. p. 543, lines 14–18; R. p. 544, lines 3–6). Regarding Sealevel's promissory estoppel cause of action, the Court held its ruling thereon in abeyance, pending the jury's determinations. (R. p. 546, lines 5–6). Moreover, the Court declined to issue any declaratory ruling as to the parties' rights under the Supply Agreement. (R. p. 546, lines 6–8). Thereafter, Defendants opted not to advance any evidence of their own and thus rested their case. (R. p. 553, line 25–p. 554, line 2). Defendants renewed their motions for directed verdict which the trial court previously denied. (R. p. 554, lines 3–21). In response, the trial court denied those motions a second time. (R. p. 554, lines 22–24).

Therefore, the jury considered the facts in the record as to the following causes of action: (1) breach of contract as to CreatiVasc, Brookhaven Vascular, and Brookhaven Merger Corp.; and (2) intentional interference with a contract as to DiaxaMed. (R. pp.

12–13). Additionally, the jury considered whether punitive damages should be assessed against DiaxaMed. (*Id.*).

After considering the evidence, the jury unanimously found in Sealevel's favor on its breach of contract claim against CreatiVasc, Brookhaven Vascular, and Brookhaven Merger Corp. in the amount of $321,540.00. (R. p. 12; R. p. 651, lines 12–15). Next, the jury again unanimously found in Sealevel's favor on its claim against DiaxaMed for intentional interference with a contract in the amount of $400,000.00. (R. p. 13; R. p. 651, lines 16–19). And lastly, the jury unanimously assessed punitive damages against DiaxaMed in the amount of $2,500,000.00. (R. p. 13; R. p. 651, line 24–p. 652, line 1).

After trial, Defendants moved for judgment notwithstanding the verdict on February 24, 2025. (R. pp. 75–98). Additionally, Defendants argued they were entitled to a new trial under the thirteenth juror doctrine, and, in the alternative, Defendants sought a new trial absolute, and, in the alternative, DiaxaMed requested a new trial *nisi remittitur*. (*Id.*). Lastly, Defendants requested the Court dismiss Sealevel's claim for promissory estoppel, which the Court had held in abeyance. (*Id.*).

After a hearing on May 23, 2025, the Court revoked the jury's verdict and entered an Order granting Defendants' Motion for Judgment Notwithstanding the Verdict on June 24, 2025. (R. pp. 14–32).

On July 7, 2025, Sealevel timely filed a Motion to Reconsider the Order Granting Defendant's Motion for Judgment Notwithstanding the Verdict. However, on July 18, 2025, the Court entered an Order denying Sealevel's Motion to Reconsider. (R. pp. 33–34).

Sealevel timely filed its Notice of Appeal on August 15, 2025.

STANDARD OF REVIEW

Appellant Sealevel was entitled by law and the constitution to have a jury decide the facts of this case. *Erickson v. Jones Street Publishers*, 368 S.C. 444, 480, 629 S.E.2d 653, 672 (2006) (citing *Cooper v. Poston*, 326 S.C. 46, 483 S.E.2d 750 (1997)) ("parties in legal action for recovery of money damages are constitutionally entitled to a jury trial"). "A jury's resolution of factual issues in a law case is binding on trial and appellate courts." *Erickson*, 368 S.C. at 480, 629 S.E.2d at 672. The existence of a contract, particularly when disputed, is "a clear question of fact [for the jury]." *Price v. Bethea*, 167 S.C. 376, 380, 166 S.E. 409, 411 (1932); *see also Prestwick Golf Club v. Prestwick Ltd.*, 331 S.C. 385, 389, 503 S.E.2d 184 (Ct. App. 1998) ("if the evidence supports the existence of a contract, the issue should be submitted to a jury.").

A Judgment Notwithstanding the Verdict ("JNOV") encompasses the renewal and grant of a motion for directed verdict. Rule 50, SCRCP. "A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability." *Ecclesiastes Prod. Ministries v. Outparcel*, 374 S.C. 483, 490, 649 S.E.2d 494, 494 (Ct. App. 2007). In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight, and the evidence and inferences to be drawn from them must be considered in the light most favorable to the non-moving party. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272 (2003). When it is considering a JNOV, "neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Id.*

"The jury's verdict must be upheld unless no evidence reasonably supports the jury's findings." *Id.*; *see also McNaughton v. Charleston Charter Sch. for Math & Sci., Inc.*, 411 S.C. 249, 259–60, 768 S.E.2d 389, 395 (2015) ("A jury's factual finding will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings.").

ARGUMENT

Because the evidence in the record supported the jury's decision, the trial judge wrongly set aside the jury's verdict, which was the product of its deliberation on lengthy testimony and numerous exhibits. The only instance in which a trial judge should take the drastic measure of nullifying a jury's verdict is when a party is clearly entitled to judgment as a matter of law and evidence on a question is non-existent. Here, the jury's decision was the result of conflicting testimony and exhibits going to the elements of Sealevel's claims, and the existence of this evidence made a grant of JNOV improper. Moreover, the trial judge was wrong about the law on which it based its decision, and it compounded that legal error by improperly endeavoring to apply disputed facts to that incorrect law.

This Court should reverse and reinstate the jury's verdict.

I. The trial court's grant of a JNOV was based on error of law as to contract formation.

There is little question that disputes of fact existed such that Respondents were <u>not</u>

entitled to judgment as a matter of law in this case. Indeed, the trial court made that very ruling, both at summary judgment[2] and on directed verdict.[3] (R. pp. 6–8; R. p. 543, lines 3–6; R. p. 546, lines 9–17). However—after the jury weighed the evidence to find that an enforceable contract existed between the parties—the trial judge held that "All of the evidence in the record indicates that the agreement between Sealevel and CreatiVasc is unenforceable." (R. p 15). The trial court went on to explain that it believed the Agreement to be altogether void for lack of certain terms:

> However, the Supply Agreement failed to establish key material terms, rendering it unenforceable as a matter of law. Specifically, the Supply Agreement lacked defined specifications, omitted essential terms, and left performance obligations undefined . . . Here, the Supply Agreement amounted to nothing more than a fluctuating framework in which the parties agreed to proceed in good faith to design, manufacture, and sell a product that did not yet exist, under terms to be determined in the future. ***The Agreement lacked essential terms, including [1] a fixed price of the Product, [2] a minimum purchase obligation for CreatiVasc, or [3] concrete delivery deadlines***.

(R. pp. 17–18) (emphasis added).

This ruling is incorrect as a matter of law and fact; the Supply Agreement manifests the parties' mutual intent to be bound, and it unequivocally establishes the relationship, duties, obligations, and rights of the parties, as well as the remedy for breach. The Agreement simply leaves for future determination precisely the sort of terms that South Carolina's Uniform Commercial Code – Sales ("UCC") permits parties to leave

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2 "After hearing the arguments of counsel for both sides, the Court finds that there is a genuine issue of material fact in the matter requiring submission to a jury. The court therefore denies Defendant's Motion for Summary Judgement." (R. pp. 6–8).

3 "I believe in the light most favorable to the Plaintiff and the evidence that I think that is something *that should go to the jury*. . . . there is a . . . basis for that to go to the jury." (R. p. 543 lines 3–6; R. p. 546, lines 9–17).

for future determination.

As an initial matter, the trial court itself recognized that the UCC applies to the Supply Agreement and to the sophisticated commercial parties to this case.[4] However, the trial court wrongly ignored the UCC's extensive provisions on contract formation, to which the UCC dedicates an entire article. S.C. Code §§ 36-2-201 *et seq*. ("Form, Formation, and Readjustment of Contract"). The UCC explicitly contemplates and allows contracts for the sale of goods to leave terms open for future agreement, as the parties to this case indisputably did:

> **S.C. Code § 36-2-204. Formation in general**
>
> (1) A contract for sale of goods **may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract**.
>
> (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
>
> **(3) 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.

(emphasis added). This section alone compels reversal of the trial court's error in finding the Agreement to be unenforceable because it "lacked essential terms." At a minimum, the UCC's specification that ***conduct*** and ***intent*** be considered in contract formation underscores the propriety of sending the evidence to the jury to decide whether the parties intended to form a contract. *Kincaid Cotton Co., Inc. v. Kesey Bros.*, 504 F.2d 976

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[4] Although the trial court applied the UCC's remedy provisions erroneously, as discussed in Section II.C below, it nonetheless held that the UCC governs the parties' relationship. (R. pp. 24–25, discussing the UCC's definitions of damages). The JNOV Order's internal inconsistency is a further indication of error and grounds for reversal.

(5th Cir. 1974) (under the UCC, where a contract leaves open the terms on price and time of performance, and questions of reasonableness and the parties' intent to make a contract exist, "a trial is required."). Here, the jury did just that, and its verdict should be reinstated.

Furthermore, the UCC is thorough and clear that when both parties conduct themselves in recognition of a contractual relationship—as the evidence established happened here—then that conduct *alone* "is sufficient to establish a contract," even if "the writings of the parties do not otherwise establish a contract":

S.C. Code § 36-2-207. Additional terms in acceptance or confirmation

> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.

S.C. Code § 36-2-207(3) (emphasis added). Here of course, Sealevel conducted itself by performing its obligations under the contract, including that it made the "Product" and attempted to deliver it. And CreatiVasc conducted itself by meeting with Sealevel regularly to evaluate the Product design, providing detailed specifications, making a $10,000 advance payment, monitoring Sealevel's progress, vetting the component part, negotiating and entering into amendments to the Supply Agreement—twice—and further specifying to Sealevel what CreatiVasc required Sealevel to manufacture. (*e.g.* R. pp. 733–51, 759–74, 794–96, 802–04). The fact-dependent question of whether the parties' conduct established a contract for sale is for the jury.[5] This Court should reinstate the jury's verdict.

Moreover, the UCC dictates that a contract for unique future goods, which the seller must specially create and manufacture, has less formal, and less stringent, requirements for enforceability. S.C. Code § 36-2-201(3)(a). This is particularly so, once the seller begins to perform to specially create the goods:

> A contract . . . is enforceable . . . **if the goods are to be specially manufactured for the buyer and are not suitable for sale to others** in the ordinary course of the seller's business **and the seller**, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, **has made either a substantial beginning of their manufacture** or commitments for their procurement;

S.C. Code § 36-2-201(3)(a) (emphasis added). The parties' Supply Agreement echoes this section of the UCC with the acknowledgment that the component parts to be supplied are unique and must be specially manufactured for the buyer (CreatiVasc), and would not be suitable for use by others; the Agreement states that CreatiVasc "desires to have Sealevel design and manufacture the motor control and valve monitor electronics [(the Product)] . . . for use in the CreatiVasc Hemoaccess Valve System." (R. p. 737, ¶ A). The evidence shows that CreatiVasc placed an order for six of the Products, providing detailed specifications for the same, and it made a $10,000 advance deposit. (R. pp. 767–74, 802–04). Moreover, after receiving the order, Sealevel performed by making and ultimately supplying this special Product, a highly specialized magnetic motor control wand, which could be used only in CreatiVasc's Hemoaccess Valve System. (R. p. 193,

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5 *See Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enterprises*, 625 S.W.2d 295 (Tex. 1981) (Applying the UCC and ruling that whether the parties' conduct indicates intent to contract is a question of fact).

lines 18–19 ("And we did deliver the device. And, in fact, Steve [Johnson, the President of CreatiVasc] leapt for joy when we delivered the device."); R. pp. 802–04 (invoice showing deduction for $10,000 paid in advance by CreatiVasc)). In other words, not only did Sealevel make "a *substantial beginning* of [the Product's] manufacture," as called for in the UCC, but it actually completed production and specially manufactured the requested Product, for which Respondents never compensated it. (R. pp. 802–04).

Despite applying the UCC elsewhere in the Order, the trial court wrongly characterizes the Supply Agreement as "a contract for services." This characterization is incorrect and inconsistent. Instead, as a matter of law, the Supply Agreement is an enforceable contract for the supply and sale of future goods under the UCC. S.C. Code § 36-2-102 ("this Chapter applies to transactions in goods"); *see also* S.C. Code § 36-2-105, -106 ("'Contract for sale' includes both a present sale of goods and a contract to sell goods at a future time."). The Supply Agreement obligates Sealevel to furnish goods, stating that Sealevel must "manufacture, sell, and deliver to [CreatiVasc] hardware and software (the 'Product')." (R. p. 737, § 1). It further obligates CreatiVasc to purchase the future goods, stating that "Orders for the Product <u>shall</u> be made by [CreatiVasc] . . ." (R. p. 737, § 3) (emphasis added); *see Southern Atl. Fin. Serv. v. Middleton*, 356 S.C. 444, 448, 590 S.E.2d 27 (2003), *citing Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002) (use of words such as "shall" or "must" indicates a mandatory requirement); *see also Ex Parte Tolbert*, 206 S.C. 300, 304, 34 S.E.2d 49, 50 (1945) (noting the word "shall" is mandatory.). By its plain terms, the Supply Agreement is predominantly a contract for the sale and purchase of goods (*i.e.* motor control and valve monitor components). *Plantation Shutter Co., Inc. v.*

Ezell, 328 S.C. 475, 478-79, 492 S.E.2d 404, 406 (Ct. App. 1997) ("[if] the contract's predominant factor is the sale of goods with labor incidentally involved, the UCC applies. . . . In most cases in which the contract calls for a combination of services with the sale of goods, courts have applied the UCC.") (*citing Kline Iron & Steel v. Gray Commc'ns Consultants, Inc.*, 715 F. Supp. 135 (D. S.C. 1989) (UCC applied to contract for construction of television tower)).

Because the Supply Agreement is an agreement for the sale of goods, the UCC's provisions on contract formation apply, and this Court should reverse the trial court's holding that it failed for lack of "essential terms" that the UCC expressly allows to be "left open." S.C. Code § 36-2-204(3) ("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."). The UCC's standards are broad: the UCC allows a contract to be made not only in writing but also by conduct. In this case, the evidence showed that not only did the parties manifest in writing their intent to be contractually bound, but their conduct unequivocally reflected that intent. After executing the Supply Agreement, Sealevel went on to perform as it required, and CreatiVasc likewise acted in recognition of the contract by, *inter alia*, dedicating itself to development of the System, by communicating frequently with Sealevel about the Product and the System, by placing an order for six of the Products, and by making a $10,000 deposit on its order. S.C. Code § 36-2-207 ("Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract."); *see also*

(R. pp. 767–74, 802–04).

At a minimum, the UCC's provisions on contract formation underscore the factual dispute over the agreement of the parties and the existence of their contract, which compelled jury determination in this case and should have thwarted a grant of JNOV. *See Columbia Hyundai, Inc. v. Carll Hyundai, Inc.*, 326 S.C. 78, 82, 484 S.E.2d 468, 470 (1997) (Holding the facts required submission to the jury of "the matter of the existence of a contract," where party argued that the UCC applied to mean that a contract existed as a matter of law).

Accordingly, this Court should reinstate the jury's verdict. The trial court erred as a matter of law and invaded the province of the jury when it found that no enforceable contract existed between the parties. As discussed next, the trial court further erred by granting a judgment of law in the teeth of conflicting evidence and factual disputes.

II. Conflicting evidence exists in each and every instance where the JNOV Order wrongly finds there is "no evidence," and the jury's verdict on the evidence must be reinstated.

In addition to its legal errors, the trial court improperly ignored evidence in the record, which should have prohibited its grant of a JNOV. Rule 50(a), SCRCP ("When upon a trial the case presents <u>only questions of law</u> the judge may direct a verdict.") (emphasis added). This Court should view with skepticism a post-jury-trial order that makes sweeping statements about evidence against the backdrop of a lengthty Record on Appeal. "When reviewing an order granting a [JNOV], the appellate court views the evidence and all reasonable inferences from the evidence in a light most favorable to the party against whom the [JNOV] was granted. If the evidence is susceptible of more than one reasonable inference, a jury issue is created and 'the court may not grant a directed verdict.'" *Heyward v. Christmas*, 352 S.C. 298, 305 573 S.E.2d 845 (Ct. App. 2002) (internal citations omitted).

The trial court's order is jarringly all-or-nothing when it comes to the voluminous testimony and exhibits, proclaiming:

- ***All of the evidence*** in the record indicates that . . . the agreement is unenforceable.
- Even if the Agreement were enforceable, ***there is no evidence*** in the record that it was breached.
- Sealevel ***has no evidence of*** damages.
- Sealevel's claim still fails due to ***the absence of any evidence*** supporting the third and fourth elements [of a claim for interference with contract].
- [T]here is ***no evidence*** that CreatiVasc made any representations with the expectation that Sealevel would act in reliance on them to its detriment.

(R. pp. 15, 20, 22, 27, 30) (emphasis added).

This Court must reverse the JNOV Order for the simple reason that its dramatic, extreme statements about the evidence are contradicted by the Record on Appeal. As set forth in the Statement of Facts, the Respondents conceded to the existence and enforceability of the Supply Agreement, right up to the midst of trial when they made the belated tactical decision to try to distance themselves from it. (*E.g.* R. p. 51, ¶ 28 ("Defendants admit that the Customer Supply Agreement was a valid and binding contract at the time the parties entered into such agreement.")). And certainly there was evidence of a breach — after all, the Respondents entirely failed to perform their duties under the contract, including non-payment for the Product that they actually ordered and failing to protect Sealevel's confidential information, notwithstanding the satisfactory fulfillment by Sealevel of its end of the bargain. (R. pp. 736–51, 767–74, 802–04; R. p. 192, lines 3–10; R. p. 231, line 8–p. 234, line 18; R. p. 268, lines 7–11; R. p. 291, lines 15–20; R. pp. 292–97; R. p. 355, lines 13–15; R. p. 403, line 19–p. 404, line 4; R. p. 450, lines 20-22). Beyond that, Sealevel testified to substantial costs and expenses incurred (and lost) due to Respondents' non-performance, thereby providing evidence of the very sort of damages that the Agreement itself contemplates. (*See* R. p. 741, § 13(e)(ii)) ("Damages means all losses, liability, damages . . . costs . . . expenses, and fees of whatever nature and kind."); (*see also* R. p. 192, lines 3–10; R. p. 291, line 15–p. 297, line 1; R. p. 377, line 8–p. 378, line 12). **Although Respondents disputed and contradicted it, this evidence manifesting the elements of a breach of contract was properly submitted to the jury, which weighed it and found that the facts tipped in favor of Sealevel**. This is precisely how trial by jury is meant to work, and it is why it is a substantive right and "the pillar of the judicial system." 9 C.J.S. Judgments § 83 (2009) ("The standard employed should be in recognition that nullifying a jury verdict is a matter for the utmost judicial circumspection because the province of a jury is a pillar of the justice system.").

The elements of the causes of action in this jury trial constituted archetypal questions of fact. Sealevel's claim for breach of contract depended on questions such as whether the parties intended to make a contract (although CreatiVasc conceded that they did), whether the Respondents acted in good faith and dealt fairly with Sealevel, whether Respondents breached the agreement, and whether and to what extent Sealevel was harmed by Respondents' breach. *See Small v. Springs Industries, Inc.*, 292 S.C. 481, 483, 357

S.E.2d 452, 454 (1986) ("[A] trial court should submit to the jury the issue of existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference."). Likewise, Sealevel's claim for tortious interference with contract hinges on intent and the justification of a parties' conduct. Disputed questions of intent, credibility, breach, good faith, and damages are fundamental jury matters. *DNR v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299 (2001) (determination of the parties' intent is a question of fact); *Youmans v. Youmans*, 128 S.C. 31, 36, 121 S.E. 674, 676 (1924) (whether a party acted in good faith is a question of fact). "The well-established rule in this state is that if there is ***<u>any</u> testimony whatever*** to go to the jury on an issue involved in a cause, or even if more than one inference can be drawn from the testimony then it is the duty of the judge to submit the cause to the jury. This is true, even if witnesses for the plaintiff contradict each other, or if a witness himself in his testimony makes conflicting statements. The credibility of witnesses is entirely for the jury." *Glover v. Columbia Hospital of Richland County*, 236 S.C. 410, 418, 114 S.E.2d 565, 569 (1960) (emphasis added); *see also Graham Law Firm, P.A., v. Makawi*, 396 S.C. 290, 298, 721 S.E.2d 430, 434–35; *see also Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) ("While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required."). The trial court wrongly invaded the jury's province when it disregarded evidence in the record.

A. The evidence supported a question of fact as to the existence of an enforceable agreement.

Although the trial court found that there was "no evidence" of an enforceable agreement, this ruling was contrary to the evidence—which included not only the testimony and admissions of the parties, but also documentary exhibits. *Sherman v. W & B Enterprises, Inc.*, 357 S.C. 243, 250, 592 S.E.2d 307 (Ct. App. 2003) ("When the existence of a contract is questioned and the evidence either conflicts or gives rise to more than one inference, the issue of the contract's existence becomes a question for the finder of fact."). "The elements necessary for the formation of any contract are (1) an offer, (2) acceptance of the offer, and (3) the mutual exchange of benefits the law calls 'consideration.'" *Lampo v. Amedisys Holding*, 445 S.C. 305, 311, 914 S.E.2d 139 (2025).

Initially, the Supply Agreement itself is evidence of offer, acceptance, an exchange of benefits, and a mutual intent to be bound. The Supply Agreement was signed by both parties and contains nine pages of negotiated terms governing the parties' performance, duties, and obligations. (R. pp. 736–51); *Lampo,* 445 S.C. at 311-12 ("Ordinarily, this indication of willingness and desire to enter into the contract—this 'manifestation of assent' as the Restatement calls it—is based on some action taken by the offeree. The typical action an offeree takes to accept an offer <u>is to sign a writing that sets forth the offer</u>, thereby clearly indicating a willingness and desire to form a contract.") (emphasis added). Moreover, the parties amended the Supply Agreement, two times, with each amendment bearing the signatures of the parties. (R. p. 41, ¶¶ 28–29; R. pp. 775–77). The amendments leave little doubt that the parties intended to be bound by the initial Supply Agreement; at a minimum it is evident that the parties were acting in recognition of an enforceable agreement, and inferences from their words and conduct required consideration by the jury. (R. pp. 775–77) ("in consideration of the Agreement and for other good and valuable consideration . . . ").

Beyond that, the evidence indicates that the parties continued to conduct themselves as though they were contractually bound to perform, including that CreatiVasc or Brookhaven placed an order and then put down an advance payment of $10,000[6]. (R. pp. 767–74, 802–04; R. p. 231, line 8–p.234, line 18; R. p. 268, lines 7–11; R. p. 355, lines 13–15; R. p. 450, lines 20–22). Moreover, although the contract contains clauses governing termination, the evidence showed that the parties did not terminate "upon a mutual written agreement of the Parties," or at all. (R. p. 739, § 12). Nor did CreatiVasc ever repudiate the contract – instead it quietly embarked on a series of mergers, from which the inference could be drawn that its successors were attempting to distance themselves from the contract, even while Sealevel spent its time and resources manufacturing the product that CreatiVasc had ordered. (R. p. 429, lines 11–13).

Because the evidence and the inferences to be drawn from it demonstrates that the parties intended to form a contract, and conducted themselves in recognition of an enforceable agreement, the question of the existence of a contract was for the jury, and its verdict should be reinstated. *See Columbia Hyundai, Inc.*, 326 S.C. at 81-82, 484 S.E.2d at

[6] The evidence is inconsistent and conflicting as to whether it was CreatiVasc or Brookhaven that placed the order. The emails in the record surrounding the transaction come from CreatiVasc folks, using Brookhaven signature blocks. This factually inconsistent evidence was for the jury to reconcile, which it did, and its verdict on conflicting evidence and inferences should be reinstated by this Court. (*See* R. pp. 767–74).

469-70 (disputed facts on the intent of parties after lengthy contract negotiations required submission to the jury of "the matter of the existence of a contract.").

B. Evidence of breach exists.

Sealevel performed its obligations under the Supply Agreement. It specially designed and manufactured the "Product," which was a unique component part of CreatiVasc's Hemoaccess Valve System. (R. p. 737, ¶ A, § 1). Significantly, CreatiVasc ordered six of the Product, but it is undisputed that it never fully paid for even one. (R. pp. 767–74, 798–804; R. p. 268, lines 5-22). Instead, CreatiVasc completely "ghosted" Sealevel, ceasing all communications, while it quietly tried to merge itself out of existence. (R. p. 268, lines 5–22). The fact that Creativasc/Brookhaven never paid for the Product it ordered is alone evidence of breach requiring submission to the jury.

As "evidence" of there being "no evidence" of breach, the Order leans on the fact that Respondents never successfully developed the Hemoaccess Valve System. (R. pp. 20–21) ("The evidence was undisputed that the [CreatiVasc Hemoaccess Valve] System has never been fully developed or sold to anyone [by Respondents]."). In other words, the JNOV Order holds that Respondents did not breach the Agreement because they secretly decided not to sell their System, and so they did not really need the Product that they had ordered for their System, after all. This upside down and backward argument did not pass the smell test with the jury, which had the benefit of hearing first-hand the testimony of the witnesses and was in the best position to evaluate their credibility. *In re Trustgard Ins. Co.,* 900 S.E.2d 448, 459 (2023) ("Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal.") (internal citation omitted).

Indeed, the fact pattern in this case is no different than if a homebuilder were to order ten windows to be designed and specially manufactured for installation in a home that the builder subsequently decided not to construct, after all, but also chose to hide this decision from the window manufacturer. Whether or not the home was actually built is immaterial to the reality that the window manufacturer specially designed and created windows at the request of the contractor. *See* S.C. Code § 36-2-201(3)(a) ("A contract . . . is enforceable . . . if the goods are to be specially manufactured for the buyer . . . and the seller, before notice of repudiation is received . . . has made [] a substantial beginning of their manufacture."). Failure to pay for the windows would be a breach, regardless of whether the home was built. Moreover, it would be unfair and in bad faith to hide from the window manufacturer the decision not to build the house, while allowing the window manufacturer to spend time and resources specially making windows which would otherwise be useless apart from the particular home.

Here, the JNOV Order wrongly ignores that—at a minimum—there was evidence of breach of the covenant of good faith and fair dealing. Under South Carolina law, the implied covenant of good faith and fair dealing is viewed "as merely another term of the contract at issue," the breach of which may support a claim for breach of contract. *See King v. Carolina First Bank*, 26 F. Supp. 3d 510, 517-18 (D. S.C. 2014) (*quoting RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 597 S.E.2d 881, 884 (2004)). Whether Respondents breached the covenant of good faith and fair dealing was absolutely a jury question, given the evidence that CreatiVasc and Brookhaven concealed their mergers from Sealevel and encouraged Sealevel to expend massive amounts of time and resources creating the requested component for a System that CreatiVasc secretly decided not to produce. The UCC defines "good faith" as an issue that hinges on credibility, the facts, and reasonableness. S.C. Code § 36-1-201 ("'Good faith' . . . means honesty in fact and the observance of reasonable commercial standards of fair dealing."). Credibility, facts, and reasonableness are for the jury. *Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920 (2011) (finding breach of duty of good faith was a question of fact); *see also Murray v. Holnam, Inc.*, 344 S.C. 129, 140, 542 S.E.2d 743 (Ct. App. 2001) (noting, "[f]actual inquiries, such as whether the defendants acted in good faith … [are] … generally left in the hands of the jury …").

In addition to evidence of breach by non-payment, bad faith, and unfair dealing, there was also evidence that Respondents never bothered to terminate the Supply Agreement in writing, as required by the Agreement. (R. p. 739, § 12; R. p. 429, lines 11–13). And, there was evidence—including testimony, documents, and the inferences to be drawn from the same—that CreatiVasc did not seek Sealevel's "prior written consent" before it disseminated Sealevel's confidential, technical information to third parties, nor did it "take all necessary precautions to ensure that all its employees, agents, [etc.] treat such information as confidential and do not divulge such information." (R. p. 741, § 14). Instead, particularly taken in the light most favorable to Sealevel, the evidence demonstrated that CreatiVasc's president (and Brookhaven's CEO), Steve Johnson, who possessed confidential, proprietary information belonging to Sealevel, wrongly turned this proprietary information over to DiaxaMed when he was terminated by that company. (R. pp. 792–96; R. p. 403, line 19–p. 404, line 4; R. p. 428, lines 15–19). DiaxaMed professed itself to be a stranger to the Supply Agreement, which means that DiaxaMed was not entitled to the confidential information that was a product of the agreement. CreatiVasc was in breach by not taking "all necessary precautions to ensure that all its . . . agents . . . do not divulge such information." (R. p. 741, § 14). In particular, Steve Johnson's credibility on this issue was peculiarly for the jury, given the non-disparagement and non-disclosure agreement that he signed with DiaxaMed and his admitted reticence to state anything negative about DiaxaMed or Brookhaven. (R. p. 793; R. p. 413, line 18-p. 415, line 1).

Taking the evidence, and all inferences to be made from it, in the light most favorable to Sealevel, the trial court was wrong to find "there is no evidence in the record that [the Supply Agreement] was breached." (R. pp. 20–21). This Court should reverse the grant of JNOV and reinstate the jury's verdict.

C. Evidence of damages exists, and the grant of JNOV was improper under both the facts and the law.

On page 9 of the JNOV Order, under its heading that "Sealevel has no evidence of damages," the trial court's very first sentence <u>describes existing evidence</u>, and it goes on to relay conflicting testimony (also evidence) about that evidence, including testimony by Sealevel. This sort of dissonance on the existence of evidence has no place in an order setting aside a jury verdict. "The well-established rule in this state is that if there is ***<u>any</u> testimony whatever*** to go to the jury on an issue involved in a cause, or even if more than one inference can be drawn from the testimony then it is the duty of the judge to submit the cause to the jury. This is true, even if witnesses for the plaintiff contradict each other, or if a witness himself in his testimony makes conflicting statements." *Glover* at 418, 114 S.E.2d at 569 (emphasis added); *see also Graham Law Firm, P.A.*, 396 S.C. at 298, 721 S.E.2d at 434 ("The result advanced by Graham would deny the fact finder's right to accept all, some, or none of the testimony of a particular witness.").

"The 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. The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach." *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996). In this case, the evidence showed that—at Respondents' request and order therefor—Sealevel undertook to design and manufacture a complex, unique device, which could only be used as a component of CreatiVasc's Hemoaccess Valve System. CreatiVasc/Brookhaven submitted specifications for this unique device and ordered that six of them be made. (R. pp. 767–74; R. p. 231, line 8–p. 234, line 18; R. p. 268, lines 7–11; R. p. 355, lines 13–15; R. p. 450, lines 20–22). Sealevel made more than a substantial beginning of the devices' manufacture; ***it in fact made the device*** at significant expense. (R. pp. 802–04; *see also* R. p. 192, lines 3–17; R. p. 193, lines 15–19; R. p. 262, line 25–p. 263, line 5; R. p. 266, lines 7–25; R. p. 268, lines 5–9; R. p. 377, line 25–p. 378, line 12). And then Respondents went silent, refusing to communicate at all with Sealevel. Respondents did not pay Sealevel for the product it made. Respondents kept hidden from Sealevel their apparent decision to discontinue the project for which the device was a component part.

These were breaches of the contract, including its covenant of good faith and fair dealing. *Minter*, 322 S.C. at 529, 473 S.E.2d at 70 ("a breach of contract cause of action does not fail where the precise amount of damages are difficult to ascertain because of the wrongful act of the defendant."). Under South Carolina law, damages for breach of contract may arise from breach of the contract's implied covenant of good faith and fair dealing. *See Boddie Noell Properties v. 42 Magnolia*, 352 S.C. 437, 444, 574 S.E.2d 726 (2002) (affirming jury verdict for breach of contract claim because "by withholding information from [plaintiff], [defendant] breached the express provisions of the purchase agreement as well as the implied covenant of good faith and fair dealing.").

Rather than calling Sealevel's actual damages, incurred in making a product that Respondents ordered but never paid for, what they are (*i.e.* "actual damages"), the trial court inaccurately labeled them as mere "research and development expenses." (R. p. 22). The trial court then wrongly decided that Sealevel was not entitled to the "engineering and development time that Sealevel devoted to the project." **This was error in light of conflicting testimony, the plain language of the contract, and the law.**

As an initial matter, "research and design expenses" are a legitimate and proper method of pricing the Product that Respondents ordered under the Supply Agreement, and the detailed quantification of those expenses by Sealevel is evidence of the damage it actually suffered as a result of Respondents' breach. "[E]ngineering, design, fabrication and inspection should not be characterized as separate services. **The price of virtually every product sold includes charges for such 'services.'**" *Kline Iron & Steel v. Gray Com. Consultants, Inc.*, 715 F. Supp. 135, 139 (D.S.C. 1989) (emphasis added) ("For these reasons, the Court concludes the cost of these services should be characterized as part of the cost of the goods. The same reasoning applies to the charges for 'machined parts' and 'overhead' costs which should also properly be considered part of the price of the goods."), *citing Valley Farmers' Elevator v. Lindsay Bros. Corp.*, 398 N.W. 2d 553, 556 (Minn.1987) ("Services are always required to convert raw material into a useful product."). This Court should reverse the trial court's holding that "Sealevel has no evidence of damages," because (at a minimum) Sealevel submitted detailed evidence of the expense it suffered as a result of Respondents' breach, in the form of testimony and the Invoice. (R. p. 192, lines 3–10; R. p. 193, lines 8–12; R. p. 197, lines 12–22; R. p. 198, line 14–p. 199, line 1; R. p. 291, lines 15–20; R. p. 292, line 1–p. 297, line 1; R. p. 377, line 25–p. 378, line 12; R. pp. 802–04).

Troublingly, the JNOV Order also misstates the evidence, describing it as "a single invoice for $321,540, purportedly representing engineering services rendered as of June 13, 2017." (R. p. 22). First, this was not the "only evidence Sealevel presented at trial regarding damages." (*Id.*, emphasis added). There was testimonial evidence on damages, from several witnesses, in addition to the invoice, as well as other documentary evidence of the same. (R. p. 192, lines 3–10; R. p. 193, lines 8–12; R. p. 197, lines 12–22; R. p. 198, line 14–p. 199, line 1; R. p. 291, lines 15–20; R. p. 292, line 1–p. 297, line 1; R. p. 377, line 25–p. 378, line 12; R. pp. 797–804).

Second, in reality, the invoice does not only reflect engineering services (discussed above), but it also contains a line item for "Material Costs" in the amount of $23,290.00. (R. p. 804). The trial court was wrong to entirely disregard this evidence of material costs incurred by Sealevel in the production of the devices ordered by Respondents, as well as the testimony of witnesses to the losses Sealevel suffered. "In ruling on a motion for a directed verdict or JNOV, the trial court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny either motion when the evidence yields more than one inference or its inference is in doubt." *McNaughton*, 411 S.C. at 259, 768 S.E.2d at 395. This was more than "any evidence" of actual damages to which Sealevel was entitled, which compelled submission to the jury. *Id*. at 262, 768 S.E.2d at 396. ("this Court's task in reviewing a damages award is not to weigh the evidence, but **to decide if any evidence exists** to support the damages award.").

Further, the JNOV Order wrongly construes the Supply Agreement as providing "Sealevel's sole contractual remedy in the event of a breach . . . is that CreatiVasc must 'take delivery of and pay the full price for the remainder of open Purchase Orders.'" (R. p. 22). Instead, the Supply Agreement states that "Customer shall indemnify and hold harmless Sealevel . . . from and against any and all Damages . . . Damages means all losses . . . interest, costs, . . . expenses and fees of whatever nature and kind . . . ". (R. pp. 739–41, §§ 13(a), (e)).

And, even if the trial court were correct that Sealevel's sole contractual remedy was to require CreatiVasc and/or Brookhaven to take delivery and pay for the open purchase orders, there was evidence in the record showing that CreatiVasc and/or Brookhaven ordered six of the Product, the cost for one of which was $321,540.00. (R. pp. 767–74, 802–04). Again, the trial court was required to review this existing evidence, and the inferences to be drawn from it, in the light most favorable to Sealevel. This Court should reverse the improper grant of JNOV and reinstate the jury's verdict, which is supported by the evidence.

The trial court attempts on pages 10-11 of its JNOV Order to justify its decision to set aside the jury's verdict in several additional ways, which bear debunking. As discussed above, the court wrongly compartmentalizes as "developmental costs" Sealevel's damages in fulfilling CreatiVasc's order under the Supply Agreement, and then wrongly proclaims:

> The invoice . . . was nothing more than a retrospective tally of engineering and development time that Sealevel devoted to the project. However, it is undisputed[7] that Sealevel would have incurred these same developmental costs regardless of whether [CreatiVasc's] project was successful or not.

(R. p. 24). **In addition to being legally incorrect, this is nonsense.** Sealevel did not, on a mere lark, undertake to spend hundreds of thousands of dollars' worth of its own time and resources creating an (otherwise useless) specially made component for CreatiVasc's System, and nor did it do so out of the goodness of its corporate heart. Instead, Sealevel devoted that corporate effort to CreatiVasc, in response to CreatiVasc's specifications and its order to Sealevel to deliver the product requested in the Supply Agreement. The cost of the Product that CreatiVasc demanded under the Supply Agreement, is a proper measure of Sealevel's actual damages. *See Kline Iron & Steel*, 715 F. Supp. at 139 ("[E]ngineering, design, fabrication and inspection should not be characterized as

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[7] The JNOV Order cites nothing as the basis for its proclamation here that "it is undisputed," and of course the entire point of Sealevel's lawsuit was that Sealevel very much disputed CreatiVasc's position that it was entitled to order products from Sealevel without recompense, go radio silent, resurface as a new entity, secretly abandon its project, and then pass the fruits of Sealevel's confidential, proprietary engineering design along to strangers to the Supply Agreement.

separate services. The price of virtually every product sold includes charges for such 'services.'"); *see also* S.C. Code § 36-2-708, -709; *see also Minter*, 322 S.C. at 528.

Furthermore, the JNOV Order errs as a matter of law on damages, because ***it cites the wrong section*** of the UCC in its effort to eliminate Sealevel's claim for incidental and consequential damages. On page 11, the trial court identifies Section 36-2-715 as controlling Sealevel's right to claim incidental and consequential damages. But that Section is titled "Buyer's Incidental and Consequential Damages," and it describes "damages resulting from ***seller's*** breach." S.C. Code § 36-2-715 (emphasis added). This section governing "Buyer's" damages is inapplicable to Sealevel. Under the Agreement, CreatiVasc was the buyer ("Customer") and Sealevel was the seller.

Therefore, the proper measure of Sealevel's incidental damages is defined by Section 36-2-710, governing a Seller's damages:

> **S.C. Code § 36-2-710. Seller's incidental damages**
>
> Incidental damages to an aggrieved seller include 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***.

S.C. Code § 36-2-710. In other words, under this Section, the UCC permits a **seller** to recover from a breaching buyer not only its actual damages, but also incidental damages, which include "any commercially reasonable charges, expenses or commissions . . . otherwise resulting from the breach." *Id.* Moreover, the UCC contains no express limitation on consequential damages to a seller, and neither does the Supply Agreement. (R. pp. 736–51). Instead, significantly, Paragraph 16 of the Supply Agreement contains a one-way limitation on Sealevel's liability to CreatiVasc, while deliberately leaving ***unlimited*** the measure of CreatiVasc's liability to Sealevel. The plain language of the contract therefore supports the jury's verdict, which should be reinstated.

The JNOV Order's section on damages is legally incorrect and contrary to the facts in the record. This Court should reverse the trial court's JNOV Order.

D. Evidence of tortious interference with contract by DiaxaMed exists.

The trial court's grant of a JNOV, setting aside the jury's verdict against DiaxaMed for its interference with the Supply Agreement, primarily hinged on its erroneous opinion that no contract existed with which DiaxaMed could have interfered, and moreover that the contract had "never been breached, and Sealevel has suffered no damages." (R. pp. 26–27). For all the reasons discussed above, the trial court was both legally and factually wrong about the existence of the contract, its breach, and the resulting losses to Sealevel. Moreover, as far as DiaxaMed is concerned, it *admitted* in its Answer that the Supply Agreement "was a valid and binding contract." (R. p. 51, ¶ 28). This pillar of the trial court's order therefore falls, including for all the reasons set forth above.

The remainder of the trial court's grant of JNOV on contractual interference takes only about three pages to entirely discount voluminous testimony, more than twenty exhibits, and hours of careful deliberation by the jury. (R. pp. 25–28). But the JNOV Order wrongly hinges on conflicting testimony and credibility determinations that properly belonged only to the jury. As above, the trial court's sweeping, all-or-nothing statements about the evidence are steeped in improper evidentiary determinations about intent, conduct, and the facts:

> Therefore, Sealevel's claim for tortious interference with a contract fails for multiple independent reasons: (1) the absence of an enforceable contract or any breach; (2) the ***lack of evidence*** that DiaxaMed **intentionally** procured a breach; and (3) ***the fact*** that DiaxaMed's **conduct**—purchasing assets—is a legitimate business activity that does not constitute wrongful interference.

(R. p. 28) (emphasis added).

It was not for the trial judge to decide DiaxaMed's intent and conduct as a matter of law, and particularly not when the evidence showed that DiaxaMed (1) knew about the Supply Agreement, (2) is itself using CreatiVasc's resources (which it bought) to design a dialysis system that is awfully similar but a little bit different from the very CreatiVasc Hemoaccess Valve System that is the subject of the Supply Agreement, and (3) obtained from CreatiVasc/Brookhaven all its "assets," at least inferentially including Sealevel's valuable, confidential, proprietary engineering analysis and design that were specifically to be protected under the Supply Agreement. (R. p. 741, § 14, "Confidential Information"; *see* R. p. 779 ("Whereas . . . [CreatiVasc/Brookhaven] wishes to contribute all of its intellectual property and other assets related to the HemoAccess Valve System . . . in exchange for an equity interest in [DiaxaMed]")).

Coupled with DiaxaMed's claim that it obtained everything CreatiVasc possessed, *except* the obligations under the Supply Agreement, and the apparent reality that CreatiVasc really had no corporate purpose *other than* the creation of the CreatiVasc Hemoaccess Valve System, which is the subject of the Supply Agreement, there is at a minimum an inference to be drawn that DiaxaMed intended to foist on Sealevel the cost of CreatiVasc's failed efforts, while benefitting from Sealevel's research and engineering.[8]

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[8] Even ***if*** DiaxaMed's decision to develop a different (but quite similar) dialysis product was the result of its conclusion that the CreatiVasc system would be better without Sealevel's component, that

The case cited by the JNOV Order actually supports the inference of unjustified behavior by DiaxaMed:

> What constitutes improper means **may be somewhat difficult to distill as a rule of law** [meaning, it is more properly a question of fact], but the perspective of consumer welfare provides some guidance. Business rivalry that promotes lower prices, better products, or more efficient services is justified, **while business conduct that seeks to impose costs on rivals in order to gain an advantage in the market is not**. It is the latter conduct **that constitutes improper means** under the law of civil conspiracy **and cannot serve as justification under the law of intentional interference with contractual relations**.

Waldrep Bros. Beauty Supply, Inc. v. Wynn Beauty Supply Co., Inc., 992 F.2d 59 (4th Cir. 1993)[9]; *Collins Entertainment v. Coats*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003) (applying deferential review to factfinder's finding of interference with contract when evidence showed party purchased all assets of business but excluded plaintiff's exclusive lease). For example, the evidence showed that CreatiVasc and its successor, Brookhaven, had no purpose **other than** developing the Hemoaccess Valve System, which is the subject of the Supply Agreement, and of which the Sealevel Product was a component. And yet, when DiaxaMed merged with Brookhaven, it apparently assumed all its assets (including valuable, confidential information on the complex, highly specialized, unique component

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decision nonetheless would have had to have been based on analysis of (confidential, proprietary) information about Sealevel's component. For example, the testimony showed that DiaxaMed made the choice to "focus[] on other devices that we thought had more potential," which indicates a conscious comparison between models, inferentially based on protected information about Sealevel's component. (R. p. 394, lines 14-25). At a minimum, a jury could infer an improper motive and benefit, here.

9 In all other regards, the *Waldrep Bros.* case is inapposite and should not have been relied upon by the trial court. It pertains to at-will contracts, and it was analyzing South Carolina law on "intentional interference with an at-will contract." *Id*. 992 F.2d at 63. In contrast, the Supply Agreement between CreatiVasc and Sealevel could be terminated only "upon the mutual written agreement of the Parties," which in fact never happened in this case. (R. p. 739, § 12).

that Sealevel had designed) and liabilities, with the deliberate exception of the Supply Agreement. (R. pp. 778–91; R. p. 494, line 25–p. 495, line 9). Inferences of impropriety are compounded by the overlap of Steve Johnson, the former President of CreatiVasc and CEO of Brookhaven, who worked closely with Sealevel, received Sealevel's proprietary information, and then spearheaded the asset sale to DiaxaMed. The evidence showed that DiaxaMed subsequently terminated Johnson, took away his laptop computer, and required him to sign an NDA. (R. p. 403, line 19–p. 404, line 4; R. p. 413, line 18–p. 415, line 1; R. p. 428, lines 15–19; R. p. 792–93). DiaxaMed then denied any knowledge of the Supply Agreement. (R. p. 489, line 13–p. 490, line 10; R. p. 492, line 14–p. 493, line 12; R. pp. 797–801). It was for the jury to evaluate the veracity and credibility of testimony by both Steve Johnson and DiaxaMed.

DiaxaMed's intent, its credibility on its claim of justification, as well as the factual question of whether it had improper motives, rightly belonged to the jury—which apparently found DiaxaMed <u>not</u> to be credible or properly motivated. (R. pp. 12–13). In any event, South Carolina law does not permit the questions of intent, credibility, and motive to be decided as a matter of law when the evidence, and inferences to be drawn from it, is disputed. *See State v. Hess,* 279 S.C. 14, 17, 301 S.E.2d 547, 549 (1983) (Where evidence susceptible of more than one reasonable inference, "the key issue of fact for determination by the jury was the true intent or motive behind appellant's actions."); *DNR v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (determination of the parties' intent is a question of fact); *Mixson, Inc. v. American Loyalty Ins.,* 349 S.C. 394, 397-98, 562

S.E.2d 659 (Ct. App. 2002) (The questions of a party's bad faith and the reasonableness of its conduct are questions of fact).

III. Alternatively, the trial court erred by directing a verdict in Respondents' favor on Sealevel's claim for quantum meruit.

If this Court affirms the trial court's ruling that the Supply Agreement is unenforceable, this Court should reverse the trial court's directed verdict for Respondents on Sealevel's quantum meruit claim because Sealevel provided value to Respondents by developing and providing a working Product, and Respondents have retained that Product without paying Sealevel. Quantum meruit is an equitable doctrine which allows recovery for unjust enrichment. *Rose Elec., Inc. v. Cooler Erectors of Atl., Inc.*, 418 S.C. 424, 429, 794 S.E.2d 382, 384 (Ct. App. 2016). If the Supply Agreement is unenforceable, Sealevel would be entitled to recovery on a quantum meruit claim where (1) Sealevel conferred a benefit upon Respondents; (2) Respondents realized that benefit; and (3) Respondents retained that benefit under circumstances making it inequitable to retain that benefit without paying Sealevel for the benefit's value. *Id.* at 431, 794 S.E.2d at 386.

First, Sealevel conferred a benefit upon Respondents by developing and delivering the Product. (R. p. 39, ¶ 17; *see also* R. p. 262, line 25–p. 263, line 5; R. p. 266, lines 7–25 (testimony regarding S. Johnson being impressed with Sealevel's work on creating a working Product); R. p. 268, lines 5–22; R. p. 377, line 25–p. 378, line 12). By developing and delivering the Product to Respondents in furtherance of Respondents' longstanding, and potentially ongoing, effort to develop the System, Sealevel conferred a benefit upon

Respondents by assisting with the efforts to develop the System. This inherently provides a benefit to Respondents in their own research and development efforts related to the Product, the System, or similar projects.

Second, Respondents realized this benefit. Respondents now have the Product, or information and materials related to the Product, which they could use in the future for the System, or something similar to the System, as Respondents continue to focus on developing hemodialysis products. (R. p. 230, lines 15–24; R. p. 238, line 22–p. 239, line 5; R. p. 486, lines 10–12).

Third, equity requires that Respondents compensate Sealevel for this benefit. Here, Respondents apparently anticipated they would be compensating Sealevel as Respondents paid a $10,000.00 deposit to Sealevel for its work. (R. p. 803). Then, after expending much time and effort, Sealevel created and delivered a working Product to Respondents as requested; however, Respondents did not pay Sealevel for that work. (R. p. 39, ¶ 17; *see also* R. p. 192, lines 12–17; R. p. 262, line 25–p. 263, line 5; R. p. 266, lines 7–25; R. p. 268, lines 5–22; R. p. 377, line 25–p. 378, line 12). Thus, Sealevel submitted an invoice to Respondents reflecting a conservative estimate of Sealevel's time and expenses incurred in developing the Product. (R. pp. 802–04; R. p. 192, lines 3–10; R. p. 292, line 1–p. 297, line 1; R. p. 377, line 25–p. 378, line 12). Respondents have refused to compensate Sealevel for any portion of that invoice. (R. pp. 797–98; *see also* R. p. 192, lines 11–17). Because Sealevel created and delivered the Product to Respondents as requested, equity requires Respondents pay Sealevel for its benefit.

For these reasons, if this Court affirms the trial court's ruling that the Supply Agreement is unenforceable, this Court should reverse the trial court's directed verdict for Defendants on Sealevel's claim for quantum meruit.

IV. Alternatively, the trial court erred by denying Sealevel relief under the doctrine of promissory estoppel.

If this Court affirms the trial court's ruling that the Supply Agreement is unenforceable, this Court should reverse the trial court's ruling denying Sealevel's claim for promissory estoppel. Courts use the doctrine of promissory estoppel to virtually sanction the perpetration of a fraud or where the refusal to apply promissory estoppel would result in other injustice. *N. Am. Rescue Prods. Inc. v. Richardson*, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015) Sealevel would successfully assert a claim for promissory estoppel by establishing: (1) an unambiguous promise by Respondents; (2) Sealevel's reasonable reliance upon that promise; (3) Respondents expected Sealevel to rely on the promise, and Sealevel's reliance thereon was foreseeable; (4) Sealevel suffered injury by relying on Respondents' promise. *Id.* at 379–80, 769 S.E.2d at 241.

First, the evidence shows that Respondents made an unambiguous promise to Sealevel by ordering six (6) of the Products via email with product specifications. (R. p. 767–74; R. p. 231, line 8–p. 234, line 18; R. p. 268, lines 7–11; R. p. 355, lines 13–15). Second, Sealevel reasonably relied upon Respondents' unambiguous request for six (6) of the Products and thus devoted much time and expense to successfully fulfilling Respondents' request. (R. p. 39, ¶ 17; *see also* R. p. 192, lines 3–10; R. p. 193, lines 18–19; R. p. 262, line 25–p. 263, line 5; R. p. 266, lines 7–25; R. p. 268, lines 5–22; R. p. 291, lines

15–20; R. p. 292, line 1–p. 297, line 1). Third, Respondents expected Sealevel to rely on this request; Respondents were in the midst of attempting to develop the System which partially hinged on Sealevel successfully developing and delivering the Product, and Respondents ordered six (6) Products with specifications. (R. pp. 724–32, 767–74). Thus, Sealevel's reliance was foreseeable. Additionally, at some point, the evidence shows Respondents made a $10,000.00 down payment to Sealevel for its work on the Product. (R. p. 803). Fourth, Sealevel suffered injury by relying on Respondents' promise by expending much time and expense on developing the Product without being adequately compensated. (R. p. 802–04; R. p. 192, lines 3–10; R. p. 292, line 1–p. 297, line 1; R. p. 377, line 25–p. 378, line 12).

Accordingly, if this Court affirms the trial court's ruling that the Supply Agreement is unenforceable, this Court should reverse the trial court's ruling that Sealevel failed to make an adequate claim for promissory estoppel.

CONCLUSION

For the reasons set forth herein, including the trial court's errors of law as to contract formation and damages, as well as its factual errors in disregarding ample evidence that supports the jury's verdict, this Court should reverse the trial court's JNOV Order and reinstate the jury's verdict in Sealevel's favor.

[*Signature Page Follows*]

Respectfully submitted,

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