

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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 REPLY TO DIAXAMED, LLC

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IN REPLY TO DIAXAMED¹

DiaxaMed's arguments depend on *DiaxaMed's* version of the facts, underscoring the reality that this case belonged to the jury. The "TL;DR" of this briefing is that the trial court wrongly granted a JNOV because it lacked authority to decide credibility issues or resolve conflicting evidence. This Court should reinstate the jury's verdict, which resolved disputed facts based on witness testimony and documentary evidence.

Contrary to DiaxaMed's arguments, this case is not about an agreement to co-develop a medical device. It is not about a joint venture, or a partnership, or any other sort of undertaking between Sealevel and Respondents to jointly create and market medical equipment. Instead, this is a case about Sealevel's obligation to supply a widget—a component part—for *CreatiVasc's* medical device. At all times relevant to this lawsuit, CreatiVasc had sole control over the medical device for which Sealevel was obligated to supply the part. And, importantly, Brookhaven and DiaxaMed had control over CreatiVasc.

The relationship between Sealevel and CreatiVasc is governed by the Customer Supply Agreement (the "Agreement"), the UCC, and their course of dealing. In contrast to DiaxaMed's arguments, the Agreement contains no contingencies or conditions precedent; it is not predicated on CreatiVasc actually marketing its medical device—and the fact that CreatiVasc/Brookhaven (puppeteered by DiaxaMed) chose not to do so has no bearing whatsoever on CreatiVasc's obligation to pay for the widgets it ordered from Sealevel.

As to DiaxaMed: the evidence showed that DiaxaMed knew about the relationship between Sealevel and CreatiVasc/Brookhaven at the time that it chose to curtail CreatiVasc's

¹ "DiaxaMed" refers to Defendant Diaxamed, LLC. "Sealevel" refers to Plaintiff/Appellant Sealevel Systems, Inc. "CreatiVasc" refers to Defendant CreatiVasc Medical, Inc. "Brookhaven" refers to Brookhaven Vascular, Inc. and Brookhaven Merger Corp., collectively.

performance under the Agreement. And DiaxaMed took Sealevel's proprietary information from CreatiVasc, which the Agreement expressly requires CreatiVasc to protect. It was well within the province of the jury to decide that DiaxaMed thereby interfered with Sealevel's contract to Sealevel's detriment.

REPLY TO STATEMENT OF THE CASE

DiaxaMed's theory of the case depends on its fact-intensive argument that Sealevel and CreatiVasc never agreed on critical terms, including product specifications, price, and quantity. Notably though, in its chronological "Factual Background," DiaxaMed skips over the vast majority of the years 2015 - 2016, jumping in two sentences from the February 2015 merger of CreatiVasc with Brookhaven all the way to "late 2016" when CreatiVasc ostensibly was "unable to create a functional Gen Two System." (Diax. Br. at 7). By skipping past nearly two years, DiaxaMed conveniently omits evidence and testimony showing that in 2015-2016:

- CreatiVasc provided Sealevel with detailed specifications for the Product on February 16, 2016. (R. pp. 767-74; R. p. 232, lines 12-20; R. p. 234, line 10-p. 235, line 11); *see also* 35 U.S.C. § 110. DiaxaMed does not mention this evidence, nor the patents procured by CreatiVasc for the System, because it defeats its argument that the parties never agreed on specifications.
- CreatiVasc ordered six (6) of the Product from Sealevel in 2016. (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). DiaxaMed does not mention this evidence, because it defeats its argument that the parties never agreed on quantity.

- CreatiVasc made a \$10,000 advance payment on its order for the Product. (R. pp. 802-04). DiaxaMed fails to mention this, because it defeats its argument that there is no evidence the parties discussed price.
- Sealevel told CreatiVasc it had the Product available for delivery, but CreatiVasc did not respond. (R. p. 268, lines 5-9).
- When CreatiVasc/Brookhaven began finalizing its merger activity with DiaxaMed in late 2016, it ceased all communications with Sealevel. (R. p. 268, lines 5-22).
- DiaxaMed decided that CreatiVasc/Brookhaven would no longer work with Sealevel, in 2016/2017. (R. p. 238, line 22- p. 239, line 7).

Moreover, DiaxaMed's "Factual Background" mischaracterizes the relationship between Creativasc/Brookhaven and Sealevel – painting them as quasi-partners who were working together to "create a functional Gen Two System." (Diax. Br. at 5-7). DiaxaMed does this to make it seem like Sealevel had some responsibility for creating CreatiVasc's medical device – but in reality, responsibility for what the Agreement identifies as the "CreatiVasc Hemoaccess Valve System®" (*i.e.* the "System") belonged entirely to CreatiVasc/Brookhaven, which owned the patents for the System. (R. pp. 787-88). Further, the Agreement itself is clear that Sealevel was a mere supplier of a part for a System owned and controlled by CreatiVasc. (R. p. 743, § 18 ("Nothing herein shall be construed to create any partnership, joint venture, or similar relationship . . .")).

Lastly, DiaxaMed fails to mention that it subsequently bargained for and acquired Sealevel's confidential technical information, which was expressly protected under the Agreement. (R. p. 741, § 14; R. p. 787-88 (CreatiVasc/Brookhaven contributing "Computer files located on the computer equipment and storage devices" to DiaxaMed)). CreatiVasc

sold this valuable information to DiaxaMed without Sealevel's consent, in breach of the Agreement. Among other things, DiaxaMed took ownership of the intellectual property and patent application for the System, which patent application is the subject of the Second Amendment to CreatiVasc's Agreement with Sealevel. (Cf. R. p. 775-77 (referencing US Patent Application No. 146095241) *with* R. p. 787-88 (identifying Patent Application No. 146095241 as a "Contributed Asset" to DiaxaMed); *see also* R. p. 478, lines 9-19). Further, DiaxaMed's purchase of CreatiVasc expressly included all "Computer Files located on the computer equipment and storage devices transferred hereunder," which included the laptops of CreatiVasc/Brookhaven employees who had been exchanging information with Sealevel, including Steve Johnson. (R. p. 788; R. p. 428, lines 15-19). After purchasing all of CreatiVasc/Brookhaven's assets, DiaxaMed made the decision to stop working with Sealevel – a decision from which a jury could infer that DiaxaMed knew about the Agreement.

ARGUMENT IN REPLY

The record in this case is replete with evidence, including direct testimony, numerous documents, and circumstantial evidence, from which a reasonable jury could (and did) find breach of contract and interference with contract. DiaxaMed's arguments that there was "no evidence" of any element of Sealevel's claim against it strains credulity, particularly against the backdrop of a three-day trial with more than twenty documentary exhibits. The trial court was obligated to uphold the jury's verdict if there was *any* evidence to sustain the jury's implicit factual findings. Instead, the trial court wrongly invaded the province of the jury when it granted a JNOV in this case. Further, the trial court got the law wrong on contract formation, failing to recognize that the Agreement is a textbook contract for the sale of goods to which the UCC applies. This Court should reverse and reinstate the verdict.

I. The trial court erroneously granted JNOV on Sealevel's claim for intentional interference with contract against DiaxaMed because the Agreement is an enforceable contract, and evidence in the record supports each remaining element.

DiaxaMed defends the trial court's JNOV Order on the grounds that (1) the Agreement is unenforceable as a matter of law and (2) even if the Agreement is enforceable, no evidence in the record supports any other remaining element of intentional interference with contract. As set forth below, the Agreement is a contract for the sale of goods governed by, and enforceable under, the UCC. And as the trial judge recognized at the directed verdict stage of trial, the record included evidence on each of the other elements, requiring the claim be submitted to the jury. Accordingly, the trial court wrongly overturned the jury's verdict.

- a. The Agreement is an enforceable contract for the sale of goods governed by the UCC, under which Sealevel and CreatiVasc acted for years.

DiaxaMed argues the Agreement is unenforceable by contending, first, the Agreement lacks essential and material terms, and, second, the UCC is inapplicable because the Agreement is not one for the sale of goods. (Diax. Br. at 13–18). But DiaxaMed's brief dances around the entire purpose of the Agreement—for Sealevel to provide a good (the Product) to CreatiVasc—placing the Agreement neatly within the UCC's purview. And because the UCC permits certain gaps in contracts, like those existing in the Agreement at execution, DiaxaMed's brief improperly argues those gaps render the Agreement unenforceable, even if the UCC applies. Moreover, DiaxaMed's brief does not seem to dispute the fact that Sealevel and CreatiVasc acted pursuant to, and intended to be bound by, the Agreement.

i. *The UCC governs the Agreement.*

The "Customer Supply Agreement" had one purpose: for Sealevel to "supply" a good (the Product) to CreatiVasc. DiaxaMed argues that because Sealevel claimed damages based on its time and materials, the Agreement is accordingly a services contract governed by

common law rather than the UCC. (Diax. Br. at 16). But because DiaxaMed's argument does not match any part of the analysis of whether or not the UCC applies, DiaxaMed's argument is both telling and unconvincing.

The Agreement required Sealevel to create, develop, and sell to CreatiVasc the Product (a good). (R. p. 737, ¶ A, § 1). The Agreement is, notably, not a consulting agreement, nor is it a services agreement. The Agreement is, aptly, a supply agreement, under which Sealevel agreed to supply, and CreatiVasc agreed to purchase, a good. This arrangement can only be one for the sale of a good. As a result, the UCC applies. *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.”).

Even if the Agreement encompasses some level of services, the predominant and in fact ultimate purpose of the Agreement is for Sealevel to supply the Product (a good) to CreatiVasc. *See id.* Here, the Agreement may have involved some level of services as Sealevel and CreatiVasc met and corresponded on numerous occasions, and worked independently, to analyze how the Product could work with the ultimate System. (*See, e.g.*, R. p. 192, lines 3–10; R. p. 266, lines 7–25; R. p. 268, lines 5–22; R. p. 291, lines 15–20). But these services, to the extent they are services, pale in comparison to the actual purpose of the Agreement (for Sealevel to provide the Product, a good, to CreatiVasc). And it should be noted that no part of the Agreement contemplated Sealevel providing consulting or other services to CreatiVasc.

In contrast to DiaxaMed's main argument on the UCC's applicability, the fact that Sealevel's damages may be based off its time and materials does not render the Agreement a services contract because that analysis is outside the predominant purpose test. *See Plantation Shutter Co., Inc.*, 328 S.C. at 478–79, 492 S.E.2d at 406 (explaining the predominant purpose test); *see also* S.C. Code § 36-2-305(1) ("The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if . . . (b) the price is left to be agreed by the parties and they fail to agree."); *see also* S.C. Code § 36-2-710 ("Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions . . . otherwise resulting from the breach."). In any event, in analyzing damages, albeit incorrectly, and in contrast to DiaxaMed's argument, the trial court itself recognized the UCC applied to the Agreement. (R. pp. 24–25).

Because the crux of the Agreement is for Sealevel to supply the Product (a good) to CreatiVasc, the Agreement is a goods contract under the UCC.

ii. *The Agreement is enforceable under the UCC.*

DiaxaMed makes much of the fact that, at execution, the Agreement left open for future determination a price term, detailed specifications, warranty, purchase order, and quotation. (Diax. Br. at 13–15). But three main issues stop DiaxaMed's theory in its tracks: first, the UCC permits these gaps and enforces contracts which feature them; second, the parties subsequently filled most of those gaps; and third, the parties' long-standing conduct evidences their intent to be bound by Agreement.

The UCC expressly allows parties to contract for the sale of goods "in any manner sufficient to show agreement, **including conduct** by both parties which recognizes the

existence of such a contract.” S.C. Code § 36-2-204(1) (emphasis added). And “[e]ven 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.” S.C. Code § 36-2-204(3). Even if “the writings of the parties do not otherwise establish a contract,” the “[c]onduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale . . .” S.C. Code § 36-2-207(3). These statutory guideposts trump the case law on which DiaxaMed relies. And the evidence in the record satisfies these statutory parameters.

Though DiaxaMed ignores this in its brief, Sealevel and CreatiVasc later filled in some of the gaps in the Agreement, including the specifications and the purchase order. At execution, the parties did not complete the specifications because the Product had not yet been invented. (*See* R. p. 737, § 1 (requiring Sealevel to create the Product)). But after Sealevel created the Product, the parties identified specifications in detail, including in patent applications. At that time, CreatiVasc submitted a written order for six (6) of the Product, including detailed written specifications. (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). Accordingly, the evidence shows the parties ultimately filled the gaps—precisely as the UCC permitted them to do.

And, though absent from DiaxaMed’s brief, the Agreement included other material provisions, including a confidentiality provision, indemnification provisions, and a limitation of liability in Sealevel’s favor. (R. pp. 739–40, § 13; R. p. 741, § 14; R. pp. 742–43, § 16). Thus, in contrast to DiaxaMed’s brief, the Agreement was not “completely devoid” of

all material terms. The remaining gaps in the Agreement are the sort contemplated and allowed by the UCC.

Lastly, Sealevel and CreatiVasc's years-long conduct evidenced their intent to enforce and be bound by the Agreement. The facts of this matter indisputably demonstrate they executed the Agreement in 2014, amended it twice, and, over the course of more than two (2) years, engaged in countless communications and meetings to advance the Product and the System. (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. 46-48, ¶ 2; R. p. 50, ¶ 23; R. p. 51, ¶¶ 28, 31; R. p. 52, ¶ 34). CreatiVasc even made a \$10,000.00 advance payment to Sealevel at some point for the Product. (R. pp. 802-04). Based on this conduct, it would be illogical, insincere, and unlawful for CreatiVasc to subsequently claim it had no enforceable contract with Sealevel, which it has nevertheless done.

At the very least, this extensive, bilateral conduct created a question for the jury on the parties' intent, which the trial judge acknowledged on the record. (R. pp. 6-8; *see also* R. p. 543, lines 5-6; R. p. 546, lines 9-16) ("Again, I think that's a close call of the way that all these facts fall out, but I think that there is a — a basis for that to go to the jury."); *see also* *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 the UCC applied to mean that a contract existed as a matter of law); *see also* *Benya v. Gamble*, 321 S.E.2d 57, 60 (Ct. App. 1984) ("A trial court should submit to the jury the issue involving the existence of a[n enforceable] contract where its existence is questioned and the evidence is either conflicting or admits of more than one inference.").

- b. Evidence exists as to the remaining elements of Sealevel's tortious interference with contract claim against DiaxaMed.

Next, DiaxaMed argues that even if the Agreement is enforceable, there is "no evidence supporting any other element of Sealevel's tortious interference with contract claim." (Diax. Br. at 18). This is a bold statement after a multi-day jury trial with more than twenty exhibits, and it contrasts with the trial court's own decision to deny directed verdict on the claim:

Okay. All right. So the intentional interference with a contract . . . Yeah, I looked at that – I – I – Mr. Shealy [trial counsel for DiaxaMed], it's a close call, but I believe in light most favorable to the Plaintiff and the evidence that I think that that is something that should go to the jury. . . . I'm going to deny your motions [for directed verdict] there.

(R. p. 542, line 22-p. 543, line 8).

Neither the trial judge nor DiaxaMed explain the mystery of how there *was* evidence in existence during the trial, but suddenly "no evidence" after the jury considered that evidence and found in favor of Sealevel. This Court should reverse the JNOV because it was not decided based on any "legal questions," as Rule 50, SCRCP requires, but instead was the result of the trial judge improperly weighing the evidence. A motion for JNOV is the renewal of a motion for directed verdict. Rule 50, SCRCP. "In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272 (2003) (emphasis added).

Contrary to DiaxaMed's arguments, Sealevel introduced evidence – and cited it in its Brief – supporting its claim. Not conjecture, but instead testimony and documents, show that DiaxaMed knew about the Agreement and intentionally procured its breach without justification, causing loss to Sealevel.

i. There is evidence of (multiple) breaches of the Agreement.

Rather than address the actual evidence of breach which Sealevel cited in its Brief, DiaxaMed argues that the “Agreement contemplated future obligations *only if* certain conditions were met” and so “there was . . . no contractual obligation . . . that could be breached.” (Diax. Br. at 19–20). This is wrong, for the reasons discussed above, as well as because the Agreement itself contains no conditions precedent or contingencies whatsoever. (See generally R. pp. 736–51); see also *Ballenger Corp. v. City of Columbia*, 286 S.C. 1, 5, 331 S.E.2d 365, 368 (Ct. App. 1985) (stating that whether a contract contains a condition precedent is a question of construction dependent upon the parties’ intent to be gathered from the language they employ, and referencing words like “if,” “provided that,” “when,” “after,” “as soon as,” and “subject to” are typically used to indicate a condition precedent). Despite DiaxaMed’s argument, the fact that “no version of the System . . . was ever developed, marketed, or sold” does not affect the enforceability of the Agreement because the Agreement was not conditioned on the System going to market. (Diax. Br. at 20).

Instead, the Agreement contains mandatory provisions requiring mutual performance. These include, *inter alia*, that “Sealevel shall be responsible [for manufacturing] the Product” and “Orders for the Product shall be made by [CreatiVasc]”. (R. p. 737, §§ 1, 3). The Agreement also contains mandatory (“shall”) provisions protecting Sealevel’s confidential information:

14. Confidential Information.

(a) As to any technical information or other information exchanged by the Parties during this Agreement, any Party receiving information (the “Receiving Party”) from the other Party (the “Disclosing Party”) under this Agreement shall regard such information (whether written, oral, computer-based, or otherwise) as confidential and preserve the Disclosing Party’s proprietary rights as to such information. The Receiving Party shall not, without prior written consent from the Disclosing Party, disclose such information to any third party or use such information for its own benefit except for the purposes of this Agreement. The Receiving Party shall take all necessary precautions to ensure that all its employees, agents, officers, directors, and subcontractors treat such information as confidential and do not divulge such information. All such information provided to the Receiving Party shall remain the sole property of the Disclosing Party. The Receiving Party’s obligations under this Section shall survive the termination of this Agreement for a period of five (5) years following the termination date.

(R. p. 741, § 14). And the Agreement includes specific requirements for termination. (R. p. 739, § 12).

The record includes evidence of breaches of these provisions, and JNOV was therefore improper. “The jury’s verdict [should] not be overturned if any evidence exists that sustains the factual findings implicit in its decision.” *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000) (citing *Smalls v. South Carolina Dep’t of Educ.*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App.2000)) (emphasis added).

For starters, there was evidence that CreatiVasc/Brookhaven actually ordered the Product from CreatiVasc – this reality was acknowledged at trial by Defendants, and there are emails documenting it. (R. p. 355, lines 13-15 (“Q: And at one point in 2016, CreatiVasc did order six wands from Sealevel, didn’t it? A: I believe so.”); *see also* R. p. 268, lines 9-10; R. p. 450, lines 14-22; R. pp. 767-74, 802-04). Having ordered the Product, CreatiVasc breached the contract by failing to pay for it. Beyond its down payment (further evidence of the order), even the Respondents do not dispute that CreatiVasc never paid Sealevel for the Products it ordered. (R. pp. 797-98).

Further, there was significant evidence that CreatiVasc/Brookhaven breached the confidentiality requirements in the Agreement. Testimony by CreatiVasc employees showed that they carried the information with them when DiaxaMed took over, and DiaxaMed’s asset purchase agreement with Brookhaven shows that one such asset being acquired was “all of its intellectual property and other assets related to [the] System,” including “computer files” and the information on them, as well as “know-how associated with” the System. (R. pp. 779-80, 788; R. p. 403, line 21-p. 404, line 4; R. p. 428, lines 15-19).

Additionally, there was evidence that CreatiVasc breached the Agreement by

“ghosting” Sealevel, rather than properly terminating the Agreement pursuant to its specific Termination provisions and protections. (R. p. 268, lines 18–19; R. p. 429, lines 2–13; R. p. 501, lines 23–25).

For all these reasons, in addition to the evidence cited elsewhere in this Brief, DiaxaMed and the trial court are wrong that there was “no evidence” of breach. Where evidence exists, JNOV is improper, and this Court should so hold.

ii. There is evidence that DiaxaMed knew of the Agreement and intentionally procured its breach, making JNOV improper.

Next, DiaxaMed carries on with its claim that because it did not know about the Agreement, DiaxaMed could not have intentionally procured a breach of the Agreement. (Diax. Br. at 22–26). The jury did not find the evidence supported DiaxaMed’s argument, as indicated by the unanimous verdict against DiaxaMed. Indeed, there is ample evidence that DiaxaMed knew about the Agreement and orchestrated its breaches. This evidence is direct and circumstantial – both of which are perfectly legitimate categories of evidence by which a plaintiff may prove a claim.

The evidence shows: Brian McMurray owned DXM Holdings, LLC, the sole owner and manager of DiaxaMed. (R. p. 786; R. p. 482, lines 10–19). McMurray also owned ATEX Technologies, Inc. (“ATEX”), which had its own Supply Agreement with CreatiVasc to supply balloon valves related to the System. (R. p. 752–58 (signed by McMurray and Steve Johnson); R. p. 483, lines 3–7; R. p. 483, line 23–p. 484, line 14). McMurray was copied on multiple emails referencing Sealevel and the work it was doing to make the Product, and he attended a technology summit with Sealevel. (R. p. 759–61 (stating Johnson took a Product to ATEX); R. p. 762–66). Subsequently, DiaxaMed, through McMurray, formed for the sole purpose of buying the assets of CreatiVasc/Brookhaven, which it accomplished. (R. pp. 778–

91 (Contribution Agreement signed by McMurray for DiaxaMed and Steve Johnson for Brookhaven); *see also* R. p. 486, lines 6–9). CreatiVasc was pretty much a one-trick pony, having as its primary reason for existence the development of the System that is the subject of the Agreement and its two amendments, one of which was put into place just nine months prior to the DiaxaMed asset purchase. (R. pp. 775–77; *see* R. p. 230, lines 7–24 (Clark, an employee of CreatiVasc/Brookhaven and DiaxaMed, testifying that he and the companies were solely focused on the System)). Before buying CreatiVasc/Brookhaven’s assets, DiaxaMed did due diligence on the purchase. (R. p. 408, lines 20–25; R. p. 642, line 8–p. 643, line 5). Indeed, DiaxaMed did enough due diligence that it was able to itemize its acquisition of six Registered Marks and twenty-three specifically identified patents for the System including at least one patent application that is referenced in the Amendment to the Agreement that took place less than a year before DiaxaMed swooped in. (R. pp. 787–88; R. pp. 775–77 (Second Amendment, signed by Steve Johnson for CreatiVasc)).

After the acquisition, DiaxaMed continued to employ certain CreatiVasc/Brookhaven engineers who had been working on the System. (R. p. 228, lines 3–17). DiaxaMed also employed and had significant communications with Steve Johnson. (R. pp. 794–96 (email from Johnson on behalf of DiaxaMed to Sealevel)). Johnson was, previously, CreatiVasc/Brookhaven’s CEO, and he was the driving force behind (and signatory to) the Agreement with Sealevel. (R. pp. 736–51). Johnson was also, for CreatiVasc, the driving force behind and signatory to the asset purchase agreement by DiaxaMed of Brookhaven/Creativasc. (R. pp. 778–91). A few months after taking over CreatiVasc, however, DiaxaMed instructed employees to stop working on the version of the System for which Sealevel created the Product. (R. p. 229, line 9–p. 230, line 6; R. p. 238, line 22–p. 239,

line 7). DiaxaMed then terminated Steve Johnson's employment, requiring him to surrender all of his files and computer equipment and to sign a non-disparagement and non-disclosure agreement in DiaxaMed's favor. (R. pp. 792-93; R. p. 413, line 18-p. 415, line 1).

This evidence, and the many inferences to be drawn from it, as well as the credibility of Johnson's and McMurray's testimony that DiaxaMed knew nothing about the Agreement, absolutely belonged to the jury. The trial judge initially recognized that the evidence was sufficient to defeat directed verdict on the claims against DiaxaMed and to send those claims to the jury. (R. p. 542, line 22-p. 543, line 8).

This Court has been clear: "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict," and "[t]he jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision." *Welch* at 300, 536 S.E.2d at 419 (emphasis added). The existing evidence in the record requires reversal of the trial court's JNOV and reinstatement of the jury verdict.

iii. The evidence in the record shows that DiaxaMed damaged and prejudiced Sealevel.

DiaxaMed again asks this Court to ignore evidence, and reasonable inferences, in arguing that "no evidence" supported Sealevel's claim that DiaxaMed damaged Sealevel. (Diox. Br. at 26-29). And, again, the trial judge initially recognized that evidence existed, requiring submission to the jury. (R. p. 542, line 22-p. 543, line 8). The jury then properly saw through DiaxaMed's arguments when, after carefully considering the evidence, it came down with the verdict. DiaxaMed may not agree with the jury's decision, but the evidence unequivocally put the decision squarely within the jury's province. The trial judge wrongly revoked the verdict.

As DiaxaMed seems to recognize, damages need not be proven to a mathematical

certainty. *Johnston v. Brown*, 290 S.C. 141, 348 S.E.2d 391, 393–94 (Ct. App. 1986) (*rev'd on other grounds by Johnston v. Brown*, 357 S.E.2d 450 (1987) (“[M]athematical certainty of the amount of loss is not required. . . . Where it is reasonably certain that damage has resulted, mere uncertainty as to the exact amount will not preclude the right of recovery. . . .Perplexity attending the determination of the question and amount of damages rarely, if ever, defeats a cause of action. In such cases courts ordinarily depend upon the wisdom and fairness of the good men and true who compose the jury”); see also *Vortex Sports & Entertm’t, Inc. v. Ware*, 662 S.E.2d 444, 450 (Ct. App. 2008) (stating that when reviewing a damages award, appellate courts determine if any evidence supports the award and do not weigh the evidence).

In contrast to DiaxaMed’s argument that the jury’s damages award was “untethered to any evidence at trial,” the jury heard testimony which supported Sealevel’s claim that DiaxaMed’s interference prejudiced Sealevel. (Diox. Br. at 27). The testimony showed DiaxaMed formed with the sole purpose of acquiring CreatiVasc/Brookhaven. (R. p. 486, lines 6–9). Additionally, DiaxaMed made the decision to, after acquiring CreatiVasc/Brookhaven, focus on the first generation, fully implanted System to the exclusion of the second generation of the System, thereby excluding Sealevel and the Agreement. (R. p. 238, line 22–p. 239, line 7). At that time, Sealevel was trying to deliver a working Product, but CreatiVasc/Brookhaven—under the influence of DiaxaMed—would not respond to Sealevel to provide a place for delivery or, more importantly, inform Sealevel that it would no longer be working on the System under the Agreement. (R. p. 268, lines 5–22; R. p. 269, line 24–p. 270, line 17).

Additionally, the testimony and documentary evidence demonstrated DiaxaMed unlawfully took possession of Sealevel’s proprietary information related to the Product,

violating the Agreement's confidentiality provision. (R. p. 428, lines 15–19 (Steve Johnson testifying that he could not “send . . . a copy of the [S]upply [A]greement because [he] didn't have it because [DiaxaMed] took it when they took everything that was on [his] computer on March 30, 2017 . . .”); *see also* R. p. 741, § 14; *see also* R. pp. 779–80, § 1.1(a) (CreatiVasc/Brookhaven “contributing, assigning and transferring all of its rights, title and interest in and to any know-how associated with” its business to DiaxaMed without excluding the know-how it obtained from Sealevel)).

Moreover, the evidence shows DiaxaMed, armed with Sealevel's technical and proprietary information, can develop the System without obligation to Sealevel under the Agreement. To recap: McMurray owned ATEX. (R. p. 483, lines 3–7). McMurray also owned DXM Holdings, which owned DiaxaMed. (R. p. 482, lines 10–19). McMurray was also Brookhaven's largest investor and an advisor on its Board. (R. p. 465, lines 21–24). ATEX was party to its own supply agreement with CreatiVasc/Brookhaven related to the System. (R. pp. 752–58; R. p. 405, lines 14–23; R. p. 483, line 23–p. 484, line 14). Under that agreement, ATEX would supply certain balloon valves to CreatiVasc/Brookhaven. (R. pp. 752–58; R. p. 405, lines 14–23). Accordingly, ATEX (and thus McMurray) are financially interested in the System going to market as quickly as possible; whether the System was the first generation or the second generation (related to Sealevel) does not matter to ATEX.

Now, DiaxaMed (and thus McMurray) own the System. (R. pp. 779–80, § 1.1; R. pp. 787–88). As a result, DiaxaMed can develop the System. And since CreatiVasc/Brookhaven conveyed all its computers, computer files, and know-how to DiaxaMed, DiaxaMed controls Sealevel's technical information related to the Product and the System. (R. pp. 779–80, § 1.1; R. pp. 787–88). In theory, DiaxaMed could thus use Sealevel's knowledge and information,

without Sealevel's permission, to develop and market the System to Sealevel's financial exclusion. Regardless, the evidence shows DiaxaMed possesses and is receiving value from Sealevel's information.

Further, the jury heard testimony which provided reasonable metrics upon which it could base a damages calculation against DiaxaMed. Specifically, Tom O'Hanlan testified as to a conservative estimate of the amount of time he dedicated to performing under the Agreement. (R. p. 291, lines 15–20; R. p. 292, lines 1–19 (conservatively, O'Hanlan spent 300 to 400 hours working on the Product under the Agreement at a conservative hourly rate of \$125 per hour)). Moreover, Mr. O'Hanlan testified as to conservative estimates of time worked, and hourly rates for, his colleagues' work on the Product. (R. p. 292, line 20–p. 294, line 8 (two other key colleagues worked, respectively, about 400 hours at about \$100 per hour and about 500 to 600 hours at about \$75 per hour to make the Product)). The jury also heard testimony that Sealevel's invoice, on which the jury based the damages for the breach of contract claim against CreatiVasc/Brookhaven, did not fully encompass all the time Sealevel spent working under the Agreement. (R. p. 377, line 25–p. 378, line 12 (the invoice, in the amount of \$321,540, is a conservative statement)). Further, the jury considered evidence, discussed above, that DiaxaMed purchased and retained Sealevel's protected and confidential technical information related to the Product. Accordingly, the jury had evidence on which it could calculate additional damages caused by DiaxaMed and suffered by Sealevel.

These damages are distinguishable from those arising out of the breach of contract claim. As referenced above, the jury awarded \$321,540, the amount reflected in the invoice, to Sealevel on the breach of contract claim. (R. p. 12; *see also* R. p. 372, lines 21–23). But this

amount is only a conservative estimate of the time Sealevel spent working to deliver the Product under the Agreement, and it does not fully account for the value of Sealevel's protected technical work product. (R. p. 377, line 25–p. 378, line 12). Thus, the evidence demonstrated that the invoice amount does not fully compensate Sealevel, and the jury had the discretion and the tools to award further damages.

Based on this evidence, the jury's reasoned determination that DiaxaMed damaged Sealevel in the amount of \$400,000.00 was not "pulled from a hat" merely because Sealevel did not present mathematically certain evidence that DiaxaMed damaged Sealevel in that exact amount. (Diax. Br. at 27). But the evidence *did* show DiaxaMed damaged Sealevel. The evidence also gave the jury a reasonable way to determine the extent of that damage. The jury did just that, and the trial court wrongly took the jury's well-reasoned and carefully considered verdict out of its hands.

II. Alternatively, the trial court wrongly granted a directed verdict on Sealevel's equitable claim of quantum meruit because evidence showed DiaxaMed wrongly obtained—and benefitted from—Sealevel's confidential technical information.

The trial court wrongly granted a directed verdict on quantum meruit, holding (somewhat equivocally), "I do not believe there is any—there has been evidence of value of that product actually that was conferred on the Defendants," and "there really hasn't been any evidence of retention [of the value] . . . so I'm going to direct the verdict as to quantum meruit." (R. p. 543, line 9–p. 544, line 6). DiaxaMed parrots this holding, urging the Court to find that there was "no evidence DiaxaMed obtained any benefit from Sealevel's work on the Product," essentially because DiaxaMed never turned around and sold the Product or the System. (Diax. Br. at 29–30). To start, the benefit to DiaxaMed was not solely achievable by

a subsequent sale of the Product or System – DiaxaMed wants this Court to discount entirely the indirect value of Sealevel’s technical work, which, among other things, DiaxaMed used to calculate which version of the System to pursue.

The Contribution Agreement, whereby Brookhaven/CreatiVasc “contribute[d] all of its intellectual property and other assets related to its HemoAccess Valve System,” is evidence that DiaxaMed gained Sealevel’s technical engineering information related to the Product. (R. pp. 778–91). The Contribution Agreement: (1) itemizes patents and patent applications related to the System; (2) states that CreatiVasc/Brookhaven “is also hereby contributing, assigning and transferring all of its rights, title and interest in and to and know-how associated with the . . . Contributed Assets”; and (3) is clear that CreatiVasc/Brookhaven is providing DiaxaMed with all “Computer files located on the computer equipment and storage devices transferred hereunder. (R. pp. 779–80, § 1.1(a), R. pp. 787–88). Moreover, Brookhaven/CreatiVasc’s President and CEO testified that the Agreement and other Sealevel materials were on his laptop, which he surrendered to DiaxaMed when it fired him and had him sign an NDA. (R. p. 403, line 21–p. 404, line 4; R. p. 413, line 18–p. 415, line 1; R. p. 428, lines 15–19; R. pp. 792–93). Because DiaxaMed is in possession of Sealevel’s knowledge and information related to the Product, and because DiaxaMed owns the System, DiaxaMed retained value by now having the ability to develop the System using Sealevel’s knowledge and information. Thus, there was more than sufficient evidence of retention of value by DiaxaMed to satisfy the low bar that is the “any evidence” standard needed to thwart directed verdict.

Moreover, there was *significant* evidence of the value of Sealevel’s engineering work creating the Product, now possessed by DiaxaMed. As discussed above, Sealevel’s Tom

O'Hanlan testified at length as to the worth of Sealevel's work—quantifying it “conservatively” by testifying to the hundreds of hours spent by himself and various engineers, and his hourly rates and that of those engineers, for similar work. (R. p. 291, lines 15–20; R. p. 292, line 1–p. 297, line 1). As every attorney knows, an hourly billable rate is a perfectly legitimate measure of value and loss.

The trial judge wrongly disregarded that evidence on directed verdict – its mere existence required submission of the question to the jury. “When ruling on a [directed verdict] motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury.” *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 734 S.E.2d 177 (Ct. App. 2012) (reversing trial court's JNOV on quantum meruit claim because of conflicting evidence as to payment).

Both the trial judge and DiaxaMed wrongly focused on the reality that the value of what Sealevel provided was (in part) in the nature of services, and the court mistakenly believed that the law does not provide compensation for services under a quantum meruit theory. (Diax. Br. 29–30; R. p. 543, line 14–p. 544, line 6). This was wrong. “Under the theory of implied contract, when there is no agreement as to the price to be paid for services, one is entitled to recover the fair or reasonable value of the services rendered.” *Johnston v. Brown*, 292 S.C. 478, 481, 357 S.E.2d 450, 452 (1987). Moreover, in the absence of an agreement as to value, it is “for the jury to determine what compensation was reasonable.” *Id.*

Further, DiaxaMed argued that the Agreement does not contemplate payment for services, ostensibly leaving Sealevel plain-out-of-luck for having spent years developing a

highly technical working Product. (DiAx. Br. 29–30). For the reasons discussed above, this is incorrect. However, if Respondents are right that *the Agreement* does not encompass compensation for services, then their arguments support recovery under a theory of quantum meruit. “If the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the plaintiff may not recover under quantum meruit.” *Skelly* at 327, 734 S.E.2d at 182 (citing 66 Am. Jur. 2d Restitution and Implied Contracts § 81 (2001)) (“[I]t is a defense to an action in quantum meruit that there is an express contract covering the issue of compensation for services or materials furnished.”). However, “[t]he law is well settled in this nation that where an express contract has been rescinded or abandoned, one furnishing labor or materials in part performance may recover in quantum meruit unless the original contract remains in force.” *Strickland v. Coastal Design Associates, Inc.*, 294 S.C. 421, 424, 365 S.E.2d 226, 228 (Ct. App. 1987).

Sealevel’s proprietary information was the end-product of hundreds, if not thousands, of hours of engineering time, and the evidence demonstrates that that proprietary information was valuable to DiAxMed – which specifically obtained, as an asset, the hard drives of CreatiVasc employees and the technical information (including Sealevel’s) that was on them. (R. p. 403, line 21–p. 404, line 4). Particularly at the directed verdict stage, the trial judge erred in discounting this evidence, and in removing the question from the jury’s province. For these reasons, this Court should reverse the trial court’s directed verdict in favor of DiAxMed as to Sealevel’s quantum meruit claim.

III. Alternatively, DiaxaMed stands in the shoes of Brookhaven and CreatiVasc, both of whom made promises on which Sealevel relied to its detriment and loss, entitling Sealevel to relief under the equitable claim of promissory estoppel.

DiaxaMed argues that “none of the elements of promissory estoppel could conceivably apply to DiaxaMed.” (Diax. Br. at 30). This argument is based in part on its claim that it never interacted with Sealevel and also on its argument that it had no knowledge of the Agreement. However, the Contribution Agreement whereby CreatiVasc/Brookhaven “contribute[d] all of its intellectual property and other assets related to its HemoAccess Valve System [to DiaxaMed]” at a minimum means that DiaxaMed stands in the shoes of CreatiVasc/Brookhaven with regards to the System. And Sealevel’s alternative promissory estoppel claim obviously does not encompass the terms of the Agreement – promissory estoppel is an equitable claim made in the event that there is no contract governing the parties. *Satcher v. Satcher*, 351 S.C. 477, 483, 570 S.E.2d 535 (Ct. App. 2002).

Sealevel filed the promissory estoppel claim as an alternative remedy. The jury found that a contract existed, which was breached by CreatiVasc/Brookhaven and interfered with by DiaxaMed. The trial court’s decision—that there was *neither* an enforceable contract nor a promise made and broken—is completely at odds with the evidence (discussed above) and the factual findings and conclusions of the twelve reasonable men and women who spent nearly a week of their lives considering the testimony and exhibits before them. If this Court affirms the trial court’s JNOV, it should reverse the dismissal of Sealevel’s claim for promissory estoppel.

IV. In no event is DiaxaMed entitled to a new trial – a request which even the trial court rejected.

The final part of DiaxaMed’s brief asks this Court to accept certain arguments that the trial court itself considered and implicitly rejected, and which DiaxaMed has not appealed.

In DiaxaMed's view, if this Court reverses the JNOV Order, then it will have rendered ripe for the trial court's determination the question of whether DiaxaMed is entitled to a new trial in whole or in part because, according to DiaxaMed, the jury did not properly weigh and decide the evidence.¹ DiaxaMed is wrong; if this Court reverses the JNOV Order, it should reinstate the jury's verdict, which was the appropriate product of conflicting evidence. In no event should this Court accept DiaxaMed's invitation to weigh the evidence. *Curcio* at 320, 585 S.E.2d at 274 ("In considering a JNOV, the [court] is concerned with the existence of evidence, not its weight.").

After the jury returned verdicts for Sealevel on both causes of action that were submitted to it, the Respondents filed Post-Trial Motions. (R. pp. 75-98). In addition to making arguments about the evidence, which wrongly propelled the trial court to grant JNOV, the Respondents also argued that they were entitled to a new trial "under the thirteenth juror doctrine . . ." and "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of this State," or to a new trial *nisi remittitur*. (R. pp. 89-96). Of the relief sought in the Post-Trial Motions, the trial judge made the calculated choice to grant JNOV.

In South Carolina, the standard for granting a new trial is the thirteenth juror doctrine, wherein the trial judge has complete discretion to order a new trial for factual grounds. *Norton v. Norfolk Southern Ry. Co.*, 350 S.C. 473, 477-79 (2002) (citing *Folkens v. Hunt*, 387 S.E.2d 265, 267 (1990)). "South Carolina's thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not

¹ For example, DiaxaMed asserts that the verdict is "contrary to the fair preponderance of the evidence," and that punitive damages were not proven "by clear and convincing evidence." (Diax. Br. at 32). Both arguments go to the weight of the evidence, which is the exclusive province of the jury.

justify the verdict,’ and then to grant a new trial based solely ‘upon the facts.’” *Id.* at 478.

What matters here is that the trial judge obviously chose not to grant a new trial on the facts, deciding instead to grant a JNOV – a choice that entails a standard at odds with the right to grant a new trial for factual reasons. See *Worrell v. South Carolina Power Co.*, 186 S.C. 306, 195 S.E. 638, 641 (1938) (“Nor does it follow that because under the law the trial judge is compelled to submit the issues to the jury, he cannot grant a new trial absolute.”). Significantly, the choice to act as a ‘thirteenth juror’ and grant a new trial on the facts is a discretionary decision that is nearly impervious on appeal, whereas a decision to grant JNOV is to be cautiously exercised, and only when there is no evidence supporting the jury’s verdict and the movant is entitled to judgment as a matter of law. Rule 50, SCRCP (“Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury **subject to a later determination of the legal questions** raised by the motion.”) (emphasis added). As discussed above, the trial court erred as a matter of law and fact when it granted JNOV in the teeth of conflicting evidence and despite the UCC.

This would be a very different appeal if the judge had seen fit to grant a new trial on the facts (which he chose not to do). “[T]here can be no doubt that a trial judge has the discretionary power to grant a new trial absolute or Nisi in a law case upon his disapproval of the verdict on factual grounds, and in this role he has been recognized and designated as the thirteenth juror . . . [and] the trial judge, when acting as thirteenth juror, . . . ‘possess[es] the veto power to the Nth degree.’” *Norton*, 350 S.C. at 480. Had the trial judge here done so, this Court would review his decision for abuse of discretion, as the granting of a new trial on the facts is beyond the jurisdiction of the appellate court. *Worrell*, 195 S.E. at 642 (“The matter

of granting a new trial on the grounds stated is left under our law to the discretion of the trial judge, who hears the evidence, sees the witnesses, and who is in much better position than this court to judge of the righteousness of verdicts.”).

But the trial judge did not exercise his veto power, and this Court “must . . . *presume* [that the trial judge] recognize[d] and appreciate[d] his responsibility, and exercise[d] the discretion vested in him with fairness and impartiality.” *Id.* (emphasis on *presume* in original). In other words, if the trial judge had believed a new trial on the facts was proper, or if he had believed that the verdicts were excessive, then this Court must *presume* that he would have granted that relief, rather than a JNOV. He did not, and this Court may not second-guess that choice. *Worrell*, 195 S.E. at 641 (“This court has no jurisdiction to review matters of fact in an action at law, except to determine if a verdict is wholly unsupported by evidence.”).

Reinstatement of the jury verdict is the proper remedy upon reversal of the trial court’s erroneous JNOV.

CONCLUSION

For the reasons set forth above and in Sealevel’s other briefing, 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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