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.

RECORD ON APPEAL
VOLUME I
(pp. 1 - 402)

FORD WALLACE THOMSON LLC
Ainsley F. Tillman (S.C. Bar No. 70551)
Robert E. Byrd (S.C. Bar No. 106284)
715 King Street
Charleston, South Carolina 29403
(843) 277-2011

WESLEY D. FEW LLC
Wesley D. Few (S.C. Bar No. 15565)
Post Office Box 9398
Greenville, South Carolina 29604
(864) 527-5906

Attorneys for Appellant
Sealevel Systems, Inc.

ADAMS AND REESE LLP
Kirby D. Shealy III (S.C. Bar No. 11556)
1221 Main Street, Suite 1200
Columbia, SC 29201
Telephone: (803) 254-4190
Facsimile: (803) 779-4749
Email: kirby.shealy@arlaw.com
Attorney for Respondents
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.

BUTLER SNOW, LLP
Robert E. Sumner IV (S.C. Bar No. 71728)
25 Calhoun St., Ste. 250
Charleston, SC 29401
Telephone: 843/277-3700
Email: robert.sumner@butlersnow.com
Attorney for Respondent DiaxaMed LLC

INDEX

VOLUME I

Orders

Pleadings and Motions

Transcripts

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT CASE No.: 2018-CP-23-04092
Sealevel Systems, Inc., Plaintiff, vs. 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., John D. Feltman, and James S. ("Steve") Johnson, Defendants.	)	**CONSENT ORDER OF DISMISSAL PURSUANT TO RULE 40(j)**

The parties to the above-captioned lawsuit have jointly requested that this action be dismissed pursuant to Rule 40(j), SCRCP. The Court notes that this case has not been stricken from the Court's docket previously. It is therefore

ORDERED that this action be stricken from the Court's docket. Plaintiff shall have one (1) year from the filing of this order to move to restore this action. If no motion to restore is filed within one year, the action will be deemed to be dismissed with prejudice.

AND IT IS SO ORDERED.

____
Perry H. Gravely
Chief Administrative Judge, Common Pleas
Thirteenth Judicial Circuit

March ____, 2021.

WE SO CONSENT:

<u>*s/Wesley D. Few*</u>
Wesley D. Few
WESLEY D. FEW, LLC
Post Office Box 9398
Greenville, South Carolina 29604
864-527-5906
wes@wesleyfew.com
Attorneys For Plaintiff

WE SO CONSENT

<u>*s/Kirby D. Shealy III*</u>
Kirby D. Shealy III
Luke M. Allen
ADAMS AND REESE LLP
1501 Main Street, Fifth Floor
Columbia, South Carolina 29201
Telephone: (803) 254-4190
Facsimile: (803) 779-4749
kirby.shealy@arlaw.com
luke.allen@arlaw.com
Attorneys For Defendants

Greenville Common Pleas

Case Caption: Sealevel Systems Inc vs. CreatiVasc Medical Inc , defendant, et al

Case Number: 2018CP2304092

Type: Order/Dismissal Rule 40J

So Ordered

s/ Honorable Perry H. Gravely, #2755

Electronically signed on 2021-03-08 15:35:12

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Sealevel Systems, Inc., Plaintiff, vs. 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., John D. Feltman, and James S. ("Steve") Johnson, Defendants.	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT CASE No.: 2018-CP-23-04092 **ORDER/RESTORE CASE TO COMMON PLEAS DOCKET PURSUANT TO RULE 40(j), SCRCP**

Plaintiff to the above-captioned lawsuit has requested that this action be restored pursuant to Rule 40(j), SCRCP. It is therefore

ORDERED that this action be restored to the Court's docket.

AND IT IS SO ORDERED.

____
The Honorable Letitia H. Verdin
Chief Administrative Judge
13th Judicial Circuit

March ____, 2022.

Greenville Common Pleas

Case Caption:	Sealevel Systems Inc vs. CreatiVasc Medical Inc , defendant, et al
Case Number:	2018CP2304092
Type:	Order/Restore Case To Active Docket

So Ordered

s/Letitia H. Verdin, SC Judge 2162

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Greenville
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP2301310

Sealevel Systems Inc
PLAINTIFF(S)

CreatiVasc Medical Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☑ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

At the call of the case, Attorney Wesley D. Few was present on behalf of the Plaintiff. Attorney Kirby Darr Shealy III was present on behalf of the Defendant. 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. Formal order is to follow from Mr. Few.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/30/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

Greenville Common Pleas

Case Caption: Sealevel Systems Inc vs. CreatiVasc Medical Inc , defendant, et al

Case Number: 2022CP2301310

Type: Order/Electronic Form 4

So Ordered

s/Alex Kinlaw, Jr., #2763

Electronically signed on 2023-11-30 13:48:05

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Greenville
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP2301310

Sealevel Systems Inc
PLAINTIFF(S)

CreatiVasc Medical Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

This case went to trial during the week of February 10, 2025. At the conclusion of the Plaintiff's case, the Plaintiff's attorney advised that he was withdrawing the claims as to Defendants James (Steve) Johnson and John D. Feltman. Therefore, the Court hereby dismisses the Complaint against these Defendants with prejudice.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 02/13/2025 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

Greenville Common Pleas

Case Caption: Sealevel Systems Inc vs. CreatiVasc Medical Inc , defendant, et al

Case Number: 2022CP2301310

Type: Order/Electronic Form 4

So Ordered

s/ Honorable Perry H. Gravely, #2755

Electronically signed on 2025-02-13 15:25:21 page 3 of 3

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Sealevel Systems, Inc., Plaintiff, vs. 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, Defendants.	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT CASE NO: 2022-CP-23-01310 **VERDICT**

Please answer the following questions:

1. For the claim of **Breach of Contract,** we, the jury, unanimously find for:

✓ the Plaintiff against Defendants CreatiVasc Medical Inc, Brookhaven Vascular, Inc., and Brookhaven Merger Corp.

Actual Damages: $321,540.00

-OR-

_______ the Defendants.

If you find for the Defendants, then you must stop here and do not answer Question #2.

2. For the claim **of Intentional Interference with a Contract**, we, the jury, unanimously find: (check one):

__✓__ the Plaintiff against Defendant Diaxamed, LLC

Actual Damages: __$400,000.00__

-OR-

_______ the Defendant Diaxamed, LLC.

Punitive Damages: (ANSWER THIS QUESTION ONLY IF YOU FIND PLAINTIFF HAS ESTABLISHED ACTUAL DAMAGES IN QUESTION #2 ABOVE). If you find that Plaintiff is entitled to actual damages against Defendant Diaxamed, LLC, then you can consider whether the Plaintiff has established by clear and convincing evidence that Plaintiff is entitled to punitive damages. We, the Jury, unanimously find that Plaintiff be awarded punitive damages in the amount of:

$__2,500,000.00__

-OR-

____________We find the Plaintiff is not entitled to punitive damages.

I certify that this is the unanimous decision of the jury.

Timothy W. Bishop

Timothy W. Bishop Foreperson, Juror #16

February 13, 2024

Greenville, South Carolina

When you have completed your deliberations, please notify the bailiff.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
	)	CASE NO: 2022-CP-23-01310
Sealevel Systems, Inc.,	)	
	)	**ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT**
Plaintiff,	)	
vs.	)	
	)	
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.,	)	
	)	
Defendants.	)	

The above-captioned action came before the Court for trial on February 10, 2025. At the close of the Plaintiff's case-in-chief, Defendants moved for a directed verdict as to all causes of action alleged in Plaintiff's Complaint. That motion was granted in part and denied in part, and the Court allowed Plaintiff's claim for Breach of Contract against Defendants Creativasc Medical, Inc., Brookhaven Vascular, Inc., Brookhaven Merger Corp. and its claim for Intentional Interference with a Contract against Diaxamed, LLC to be submitted to the jury. It held Plaintiff's promissory estoppel claim in abeyance pending the outcome of the jury's consideration of the other claims. After the jury returned verdicts for Plaintiff on both causes of action that were submitted to it on February 13, 2025, Defendants timely moved for judgment notwithstanding the verdict, or, in the alternative, for a new trial under the thirteenth juror doctrine, or, in the alternative, for a new trial absolute, or, in the alternative, for a new trial *nisi remittitur*. A hearing on these Motions was held on May 23, 2025. For the reasons that follow, the Court hereby GRANTS Defendants' motion for judgment notwithstanding the verdict. The Court likewise DISMISSES Plaintiff's claim for promissory estoppel based upon the rationale set forth at the conclusion of this Order.

Standard of Review

"[A] motion for JNOV under Rule 50(b), SCRCP is a renewal of a directed verdict motion."[1] "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict."[2]

"In ruling on motions for [JNOV], the Court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions . . . ."[3] However, viewing reasonable inferences in favor of the nonmoving party "does not authorize submission of speculative, theoretical, and hypothetical views to the jury."[4] "A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation."[5]

A. All of the evidence in the record indicates that the agreement between Sealevel Systems, Inc. and CreatiVasc is unenforceable.

The evidence introduced at trial was undisputed that in approximately 2007, Defendant CreatiVasc Medical, Inc. ("CreatiVasc") acquired the patent for and began developing the Hemoaccess Valve System (the "System"), an implanted medical device designed to address complications associated with hemodialysis. The System was intended to act as an accessory to an FDA-approved arteriovenous graft—a graft that connects an artery to a vein—which is prone

---

[1] *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006).

[2] *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000); *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

[3] *Strange v. S.C. Dep't of Highways and Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 400 (1994); *see also Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002) (court must determine whether a verdict for the opposing party "would be reasonably possible under the facts").

[4] *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997) (citing *Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997)).

[5] *Id.*

to clotting. Because clotting often necessitates surgical intervention to remove blood clots, the System was designed to mitigate this issue. It featured two inflatable balloon valves positioned on either side of the graft to monitor and regulate blood flow, with the goal of significantly reducing the need for such surgeries.

Once implanted, the original, or "Gen 1," version of the System could only be activated by puncturing the skin with a needle and injecting saline into the balloons to inflate them and flush the graft. After creating a working prototype and conducting clinical trials for the Gen 1 System, CreatiVasc spent several years researching ways to improve the design to enable activation without the use of needles. One potential solution was a magnetically activated saline pump capable of inflating the balloons remotely using a hand-held actuator.

By early 2014, as CreatiVasc was developing a remote activation mechanism for incorporation into a "Gen 2" version of the System, it began searching for a manufacturer to help finalize the circuit board and other electronic components necessary for remote activation. In September 2014, Steve Johnson, then CEO of CreatiVasc, was introduced to Thomas O'Hanlan, Plaintiff Sealevel Systems, Inc.'s ("Sealevel") Engineering and Creative Director. Although the technology had not yet been fully developed, Sealevel committed to producing and manufacturing an external handheld actuator and internal electronics to work in tandem with magnetic sensors inside the System to control the implanted balloon valves. Both companies were eager to explore the potential of a remote actuator and agreed to collaborate on its development and integration.

On October 28, 2014, Sealevel and CreatiVasc entered into a Customer Supply Agreement ("Supply Agreement" or "Agreement"), under which Sealevel agreed to design and manufacture the motor control and valve monitor electronics (the "Product") for use in CreatiVasc's System. Section 1 of the Supply Agreement defined the "Scope" as follows:

> Sealevel agrees to design, manufacture, sell and deliver to [CreatiVasc] hardware and software (the "Product") used in the System's handheld actuator and implanted balloon pressure monitoring devices in accordance with the specifications set forth in Exhibit A, which is attached hereto and incorporated herein by reference (such specifications, the "Specifications"). Sealevel shall be responsible for procuring all materials associated with the manufacture of the Product, as well as assembling and testing the Product.

(Plaintiff's Exh. 4, § 3). Under the Supply Agreement, CreatiVasc also agreed that Sealevel would be the "exclusive supplier of the Product" to CreatiVasc once the Gen 2 System went to market, and that CreatiVasc would not "directly or indirectly, purchase or order the Product, or any other good substantially similar to the Product, from any person or entity other than Sealevel." (Plaintiff's Exh. 4, § 1).

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.

As of the date the Agreement was executed, the "Specifications" identified as Exhibit A to the Agreement were still in development and did not yet exist. (Sealevel Depo. 36:8-14). In addition to the "Specifications," the Supply Agreement also incorporated by reference an Exhibit B ("Purchase Order"), Exhibit C ("Invoice"), and Exhibit D ("Quotation"), none of which existed at the time or were included in the Agreement. (Pl.'s Ex. 4). There was also no agreement on the price of the Product or the number of units of the Product that CreatiVasc had to purchase. Instead, the Supply Agreement contemplated that "the dates and quantities of the Product to be delivered and the current price for the Product" would be specified in separate Purchase Orders. As to the price, the Supply Agreement provided that the "price for the Product will be agreed upon in writing by the Parties and may not be changed except as agreed upon in writing by the Parties." (Pl.'s Ex. 4, § 3).

The elements required to form an enforceable contract are an offer, acceptance, and valuable consideration.[6] Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish an enforceable contract, the question becomes one of law.[7]

"In order for a contract to arise, there must be a meeting of the minds of the parties involved with regard to all essential and material terms of the agreement."[8] "Thus, for a contract to be binding, material terms cannot be left for future agreement."[9] "In a contract for services[,] two essential terms are the scope of the work to be performed and the amount of compensation."[10]

Here, the Supply Agreement amounted to nothing more than a fluctuating framework in which the parties agreed to proceed in good faith to attempt to design, manufacture, and sell a product that did not yet exist, under terms to be determined in the future. The Agreement lacked essential terms, including a fixed price of the Product, a minimum purchase obligation for CreatiVasc, or concrete delivery deadlines.

Critically, while the Agreement's core purpose was for Sealevel to "design, manufacture, sell and deliver" a Product for use in the Gen 2 System, it failed to specify how the Product would be designed, manufactured, or sold—or even what, exactly, CreatiVasc would be purchasing

---

[6] *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 581 S.E.2d 161, 166 (2003).

[7] *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C. 352, 362, 101 S.E. 838, 841 (1920).

[8] *Hardaway Concrete Co., Inc. v. Hall Contracting Corp.*, 647 S.E.2d 488, 492 (S.C. Ct. App. 2007) (citing *Player v. Chandler*, 382 S.E.2d 891, 893 (S.C. 1989)); *see also Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007).

[9] *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) (citing *Aperm of S.C. v. Roof*, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986)).

[10] *W.E. Gilbert & Assocs. v. S.C. Nat. Bank,* 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985).

beyond generic references to "hardware and software." Instead, the Supply Agreement deferred these crucial details to a nonexistent set of "Specifications" that were supposed to define the Product's design and manufacturing requirements. Similarly, a "Warranty" provision was intended to establish the "Sealevel Standards" for manufacturing the Product in compliance with those "Specifications." (Pl.'s Ex. 4, § 8). However, neither the "Specifications" nor the "Sealevel Standards" were ever agreed upon or incorporated into the Supply Agreement.

Moreover, fundamental commercial terms—including the price, quantities, delivery dates, and payment terms—remained undefined. The Agreement left these issues to be addressed through future "Purchase Orders," "Invoices," "Quotations," and other written agreements that were never drafted, let alone agreed upon. In short, the Supply Agreement failed to establish a binding contractual framework, instead leaving all essential terms open to future negotiation.

The South Carolina Supreme Court's decision in *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 762 S.E.2d 696 (2014), is instructive. There, the City of Columbia entered into a "Memorandum of Understanding" with various developers to collaborate on the "design, development, construction and delivery of the Hotel in accordance with the terms of the Development Management Agreement to be finalized between the City or [non-profit corporation] and the Developer."[11] When the City later abandoned the project, the developers sued for breach of contract and equitable relief.

On appeal, the Supreme Court reversed the Court of Appeals' holding that a genuine issue of material fact existed as to whether the Memorandum of Understanding ("MOU") constituted a valid and enforceable contract. The Supreme Court held the MOU was too indefinite to be enforceable, noting it failed to specify key terms such as price, the actual design process, and the

[11] *Id.* at 581, 762 S.E.2d at 702.

scope of duties, and that it merely contemplated future agreements.[12] The Supreme Court emphasized: "We cannot see how merely stating a forthcoming document will dictate the terms of the 'design, development, construction and delivery' does not plainly leave material terms undecided. The whole project *is* the design, development, construction, and delivery of the hotel."[13]

Similarly, the Supply Agreement in this case purports to "represent the entire agreement between the Parties with respect to the purchase and sale of the Product." (Pl.'s Ex. 4, § 26). Yet, like the MOU in *Stevens*, it lacks a meeting of the minds on multiple material terms yet to be defined and provides no mechanism for determining them with certainty. In sum, the Supply Agreement merely obligated CreatiVasc, at some undefined future date and at an undetermined price, to purchase an unspecified number of components for a device that was yet to be successfully developed or sold. Under these circumstances, no enforceable contract was formed, and Defendants are entitled to judgment notwithstanding the verdict on Sealevel's claim for breach of contract as a matter of law.

B. Even if the Supply Agreement were enforceable, there is no evidence in the record that it was breached.

The evidence was undisputed that the System has never been fully developed or sold to anyone. The only way CreatiVasc or any of its successors in interest[14] could have breached the Supply Agreement would have been to sell some version of the Product without purchasing the

[12] *Id*. at 580-81, 762 S.E.2d at 702.
[13] *Id.*

[14] It was undisputed at trial that the Brookhaven entities (Defendants Brookhaven Vascular, Inc. and Brookhaven Merger Corp. (collectively referred to as "Brookhaven")) are the successors-in-interest to CreatiVasc.

external wand from Sealevel. There is no evidence that such a transaction ever occurred. To the contrary, multiple witnesses confirmed that no such sale has ever taken place.

Under South Carolina law, "[t]he elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach."[15] A plaintiff bears the burden of proving each of these elements.[16] Here, there is a complete dearth of evidence establishing breach.

Sealevel's role as an "exclusive supplier" was always contingent on two critical conditions: (1) Sealevel creating a working Product that could be incorporated into the Gen 2 System, and (2) CreatiVasc actually being able to produce, market, and sell a commercially viable Gen 2 System. Furthermore, even if Sealevel had been able to create a Product that worked seamlessly with the Gen 2 System, nothing in the Supply Agreement *required* CreatiVasc to manufacture, market, and sell the System. Sealevel's own representative, Tom O'Hanlan, acknowledged this reality, testifying that the Supply Agreement imposed no obligation on CreatiVasc to purchase anything.

The record at trial was undisputed that no version of the System has ever been developed, marketed, or sold. There was also no evidence that CreatiVasc or its successors engaged with any company other than Sealevel to develop or purchase a handheld actuator. O'Hanlan conceded on the witness stand that Sealevel has no evidence that the Product has ever been sold to anyone.

Sealevel also asserted that CreatiVasc/Brookhaven breached the Confidentiality provision in the Supply Agreement. However, it introduced no evidence to substantiate this contention. During Sealevel's case-in-chief, its counsel asked Steve Johnson what happened to his laptop and

---

[15] *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009).
[16] *Maro v. Lewis*, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (Ct. App. 2010).

other storage media after his departure from Defendant DiaxaMed, LLC ("DiaxaMed"), the company that employed him for 90 days following DiaxaMed's purchase of CreatiVasc/Brookhaven's assets. Johnson testified that he was required to turn these items over to DiaxaMed. However, there was no testimony about what those devices contained, nor was there any other testimony or evidence indicating that CreatiVasc/Brookhaven disclosed Sealevel's confidential information to anyone. The record is, therefore, entirely devoid of evidence in support of Sealevel's claim.

C. Sealevel has no evidence of damages.

The only evidence Sealevel presented at trial regarding damages was a single invoice for $321,540.00, purportedly representing engineering services rendered as of June 13, 2017. (Pl.'s Ex. 26). Despite its admission into evidence, Tom O'Hanlan's undisputed testimony confirmed that the Supply Agreement contained no provision permitting Sealevel to bill CreatiVasc for research and development expenses. The jury's verdict against CreatiVasc and the Brookhaven entities for breach of contract matched exactly the amount of Sealevel's invoice, underscoring the absence of any other evidence of damages.

The Supply Agreement does not contain a liquidated damages provision or any clause assigning a specific monetary value to a breach. (Pl.'s Ex. 4). Instead, Sealevel's sole contractual remedy in the event of a breach by CreatiVasc is that CreatiVasc must "take delivery of and pay the full price for the remainder of open Purchase Orders (if any)." (Pl.'s Ex. 4, § 12(b)). Similarly, if CreatiVasc were to terminate the Agreement for convenience, it would be required to "take delivery of and pay the full price for the remainder of open Purchase Orders (if any)." (Pl.'s Ex. 4, § 12(b)). Given that no such open Purchase Orders exist, Sealevel's damages under the express terms of the contract amount to zero.

Under South Carolina law, "[t[he general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach."[17] "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."[18] "The measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach."[19]

While lost profits may, in some cases, serve as a measure of damages for breach of contract, they must be established with reasonable certainty. Recovery cannot be based on profits which are conjectural or speculative, though proof with mathematical certainty is not required.[20] Here, however, Sealevel introduced no evidence of lost profits. In fact, it was impossible to do so—no unit of the Gen 2 System was ever developed for commercial sale, no unit was ever sold, and CreatiVasc/Brookhaven never derived any benefit from Sealevel's work on the external actuator.[21] As courts have long recognized, "[i]t is a well settled rule of law that all damages must be susceptible of ascertainment with a reasonable degree of certainty, and that uncertain, contingent, or speculative damages cannot be recovered in any action ex contractu or ex delicto."[22]

O'Hanlan himself admitted that Sealevel's June 13, 2017 invoice was not a genuine

---

[17] *Maro v. Lewis*, 389 S.C. 216, 223, 697 S.E.2d 684, 688 (Ct. App. 2010) (quoting Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)).

[18] *Id.* (quoting *Minter v. GOCT, Inc.,* 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct.App.1996).

[19] *S.C. Fin. Corp. of Anderson v. W. Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960).

[20] *Minter v. GOCT, Inc.*, 473 S.E.2d 67 (S.C. App. 1996).

[21] *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) ("Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy.").

[22] *United Merchants & Mfrs. v. S.C. Elec. & Gas Co.*, 113 F. Supp. 257, 261 (W.D.S.C.), *aff'd*, 208 F.2d 685 (4th Cir. 1953) (citation omitted) (emphasis added).

demand for payment but rather an attempt to get CreatiVasc/Brookhaven's attention. The invoice—admitted over Defendants' objection—was nothing more than a retrospective tally of engineering and development time that Sealevel devoted to the project. However, it is undisputed that Sealevel would have incurred these same developmental costs regardless of whether the project was successful or not. The evidence was undisputed that *both* Sealevel and CreatiVasc/Brookhaven expended hundreds of hours trying to develop a product that worked. Sealevel focused on the external actuator component and the internal sensors integration, while CreatiVasc/Brookahaven worked on the internal valves, pump, and balloons.

Sealevel has taken the position that its invoice was some evidence of its "consequential" or "incidental" damages, but this is legally incorrect. Section 36-2-715 of the South Carolina code defines "incidental damages" as:

> Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

Sealevel put no evidence of incidental damages into the record, and there was no charge to the jury regarding such damages.

Similarly, section 36-2-715 defines "consequential damages" as:

> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
> (b) injury to person or property proximately resulting from any breach of warranty.

There is no evidence of injury to person or property in the record before the Court. Subsection (a) of the definition above has been explained by South Carolina courts as follows: "Consequential damages occasioned by the breach of a contract may be recovered where such damages may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made."[23] The only consequential damages contemplated by the parties were lost profits, as Tom O'Hanlan candidly admitted:

> Q: But you'd agree with me that [Pl.'s Ex. 4] [doesn't] contain any provisions that require CreatiVasc or any – any entity . . . standing in CreatiVasc's shoes to pay Sealevel for its engineering time.
>
> A: I would agree with that as stated, but the contract does provide for the exclusive rights to manufacture the product. So that's how a lot of companies make their money is **you forego the front-end cost in exchange for the manufacturing rights in anticipation that it's going to be a high volume, a profitable venture.**

(Depo. of Sealevel Systems, Inc., p. 51, ll. 11-23).[24]

Accordingly, Sealevel's damages claim under the Supply Agreement fails as a matter of law.

D. Sealevel's tortious interference with a contract claim against DiaxaMed lacks evidentiary support.

Sealevel's claim for tortious interference with contract against DiaxaMed fails for multiple reasons, all of which render the claim legally unsustainable. To succeed in a tortious interference claim, a plaintiff must establish: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages.[25] "[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties."[26]

In December 2016, Brian McMurray formed DiaxaMed for the purpose of purchasing the

[23] *Hutson v. Continental Assurance Company*, 269 S.C. 322, 332, 237 S.E.2d 375, 380 (1977), *overruled on other grounds*, *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993).
[24] Tom O'Hanlan was impeached on the stand with this testimony.
[25] *Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC*, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012) (quoting *Camp v. Springs Mort. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993)).
[26] *Id.* (alteration in original) (quoting *Threlkeld v. Christoph*, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984)).

assets and intellectual property of Brookhaven Vascular, Inc. (CreatiVasc's successor-in-interest). (McMurray Depo. 31:3-13, 32:9-25; Pl.'s Ex. 14). However, DiaxaMed did not take an assignment or otherwise assume Brookhaven Vascular's responsibilities under the Supply Agreement between CreatiVasc/Brookhaven and Sealevel. The Supply Agreement remained with Brookhaven Vascular, Inc., which acknowledged at trial that the Agreement had never been terminated.

Upon acquiring CreatiVasc's assets, DiaxaMed immediately shifted its focus to refining the Gen 1 version of the Hemoaccess Valve System—*a design that predated Sealevel's involvement* and relied on a needle and subcutaneous port to activate the balloon valves rather than a remote actuator. (McMurray Depo. 31:3-13, 34:9-17, 34:23-35:15, 51:1-16).

The evidence at trial was uncontradicted: DiaxaMed is not currently using and has never used or attempted to use any technology developed or designed by Sealevel in any of its work on the Hemoaccess Valve System. (McMurray Depo. 34:23 – 35:4). This is because DiaxaMed does not have and has never had any interest in using a magnetic wand or handheld actuator, or any other remote activation device similar to Sealevel's technology, in its development of the Hemoaccess Valve System. (McMurray Depo. 34:23 – 35:4, 49:5-17, 50:22 – 51:16).

A claim for tortious interference presupposes the existence of a valid, enforceable contract. [27] "The elements of a cause of action for tortious interference with a contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages."[28] Courts have emphasized, "[a]n essential element to the cause of action for tortious interference with

[27] *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993)
[28] *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993).

contractual relations requires the intentional procurement of the contract's breach. Where there is no breach of the contract, there can be no recovery."[29]

Here, the Supply Agreement remains intact but unenforceable, has never been breached, and Sealevel has suffered no damages. Absent evidence of the existence of an enforceable contract or its breach, Sealevel's tortious interference with a contract claim fails as a matter of law. Moreover, as South Carolina courts have recognized, "[t]he nexus between the two causes of action [breach of contract and tortious interference with contract] is the breach of the contract, for . . . breach of the contract is an element of both causes of action. This is the element from which the injured party's actual damages flow on both the contract and tort claims."[30] Because no enforceable contract was breached, Sealevel's tortious interference claim is legally unsustainable, even before analyzing the specific elements of the tort.

However, even if one looks past that fundamental infirmity, Sealevel's claim still fails due to the absence of any evidence supporting the third and fourth elements: intentional procurement of a breach and lack of justification.

In *Sea Island Food Grp., LLC v. Yaschik Dev. Co., Inc.*, 433 S.C. 278, 857 S.E.2d 902, (Ct. App. 2021), the Court of Appeals cited favorably federal authorities examining the third and fourth elements of the tort.[31] The Fourth Circuit has noted that "[w]hat constitutes improper means [of interference] may be somewhat difficult to distill as a rule of law . . . ."[32] Importantly, "[i]nterference with a contract is justified when it is motivated by legitimate business purposes."[33]

---

[29] *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007).
[30] *Collins Music Co. v. Smith,* 332 S.C. 145, 147, 503 S.E.2d 481, 481 (Ct. App. 1998) (quoting *Ross v. Holton,* 640 S.W.2d 166, 173 (Mo. Ct. App. 1982)).
[31] 433 S.C. 278, 287, 857 S.E.2d 902, 906.
[32] *Waldrep Bros. Beauty Supply v. Wynn Beauty Supply Co.*, 992 F.2d 59, 63 (4th Cir. 1993).
[33] *Gailliard v. Fleet Mortg. Corp.*, 880 F. Supp. 1085, 1089 (D.S.C. 1995).

In fact, "there can be no finding of intentional interference with . . . contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party."[34] Examples of improper methods include slander, sabotage, violence, fraud, and misrepresentation or deceit.[35]

Here, the only evidence introduced at trial was that DiaxaMed merely purchased certain assets from Brookhaven Vascular after Brookhaven had exhausted its operating capital and that DiaxaMed did not take an assignment of Brookhaven Vascular's rights under the Supply Agreement. (McMurray Depo. 49:5-17; Pl.'s Ex. 14). Purchasing assets in an arm's-length transaction is a legitimate business purpose, and this conduct alone cannot sustain a cause of action for tortious interference with a contract. There is absolutely no evidence of improper means, wrongful conduct, or an intent to induce a breach of the Supply Agreement.

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.

E. Sealevel's promissory estoppel claim fails.

Lastly, the Court has determined that Sealevel's promissory estoppel claim against Defendants should be dismissed.[36] The Court held Sealevel's promissory estoppel claim in abeyance pending the outcome of the claims that were triable by a jury. The parties agree that

[34] *Eldeco*, at 482, 642 S.E.2d at 732 (quoting *Southern Contracting, Inc. v. H.C. Brown Constr. Co.*, 317 S.C. 95, 102, 450 S.E.2d 602, 606 (Ct. App. 1994)).
[35] *See Waldrep Bros. Beauty Supply*, 992 F.2d at 63–64.
[36] Sealevel alleged this cause of action against all Defendants, but it would make no sense for it to apply to DiaxaMed, which admittedly had no interaction with Sealevel whatsoever.

promissory estoppel is an equitable claim, which is decided by the Court rather than the jury.

In South Carolina, a party asserting promissory estoppel must establish the following elements: "(1) an unambiguous promise by the promisor; (2) reasonable reliance on the promise by the promisee; (3) reliance by the promisee was expected by and foreseeable to the promisor; and (4) injury caused to the promisee by his reasonable reliance."[37] "The doctrine is designed for the rare instance when equity's aid is necessary to prevent the rank injustice that would ensue if a party could avoid being held to a clear promise he made on which the other party foreseeably and reasonably relied to his detriment."[38]

"Although promissory estoppel is a flexible doctrine that aims to achieve equitable results, it, like all creatures of equity, has limitations."[39] "To this end, and particularly because promissory estoppel applies without a contract, the promise to be enforced must be unambiguous with clearly articulated, definite terms, while the sustained injury must result from an inconsistent disposition by the promisor."[40] "Therefore, the presence of either an ambiguous promise or an injury not arising out of the inconsistent disposition precludes promissory estoppel's application, though perceived inequities may exist."[41]

Sealevel's promissory estoppel claim fails because the evidence does not satisfy the required elements. First, Sealevel has not identified any specific, definite, and unambiguous promise made by CreatiVasc upon which it allegedly relied. The mere existence of discussions or negotiations does not constitute a legally enforceable promise to support a promissory estoppel

[37] *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 379–80, 769 S.E.2d 237, 241 (2015) (citation omitted).

[38] *Cruz v. City of Columbia*, 443 S.C. 201, 205, 904 S.E.2d 451, 453 (2024)

[39] *Barnes v. Johnson*, 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct. App. 2013), *abrogated on other grounds by Cruz*, 443 S.C. 201, 904 S.E.2d 451.

[40] *Id.* at 470, 742 S.E.2d at 11.

[41] *Id.* at 470, 742 S.E.2d at 11-12.

claim.

Second, even assuming Sealevel subjectively relied on any representations by CreatiVasc, such reliance was not reasonable. The parties were engaged in commercial dealings where contractual terms were subject to negotiation, and Sealevel, a sophisticated business entity, had the opportunity to seek contractual protections rather than rely on alleged verbal assurances or undecided terms to be determined later.

Third, there is no evidence that CreatiVasc made any representations with the expectation that Sealevel would act in reliance on them to its detriment. To the extent that Sealevel made business decisions that resulted in financial consequences, such decisions were based on its own business judgment rather than any binding commitment by CreatiVasc.

Lastly, Sealevel has not demonstrated that it suffered a specific injury as a direct result of its reliance on a promise by CreatiVasc. Any losses it claims to have incurred stem from its own independent decisions to assume business risks rather than from an enforceable promise giving rise to promissory estoppel. Because Sealevel has failed to establish the necessary elements of promissory estoppel, this equitable claim should be dismissed. The doctrine cannot be used to circumvent contractual requirements or impose obligations where none exist.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that Defendants' motion for judgment notwithstanding the verdict pursuant to Rule 50(b), SCRCP is hereby GRANTED. Because this ruling disposes of Sealevel's breach of contract and tortious interference with a contract claims outright, Defendants' alternative motions for post-trial relief are rendered moot.

Additionally, for the reasons set forth above, Sealevel's promissory estoppel claim is hereby DISMISSED.

AND IT IS SO ORDERED.

Electronic Signature of Judge Gravely to follow

Greenville Common Pleas

Case Caption: Sealevel Systems Inc vs. CreatiVasc Medical Inc , defendant, et al

Case Number: 2022CP2301310

Type: Order/JNOV

So Ordered

s/ Honorable Perry H. Gravely, #2755

Electronically signed on 2025-06-24 15:09:00 page 19 of 19

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	THIRTEENTH JUDICIAL CIRCUIT
Sealevel Systems, Inc. Plaintiff,	C.A. No.: 2022CP2301310
v. CreatiVasc Medical, Inc., Diaxamed, LLC, et.al. Defendants.	**ORDER DENYING MOTION TO RECONSIDER**

This matter comes before the Court by way of a Motion for Reconsideration of the Order granting Defendants' Motion for Judgment Notwithstanding the Verdict issued on June 24, 2025. The Motion to Reconsider was timely filed on July 7, 2025. After review of the record and consideration of the arguments presented in Plaintiff's Motion, the Court finds that no basis has been presented to Alter or Amend the Order granting JNOV and all issues raised in Plaintiff's Motion to Reconsider were properly addressed in the referenced Order. Therefore, the Plaintiff's Motion to Reconsider is respectfully denied. Further, the Court has determined that, pursuant to Rule 59(f), no additional hearing or oral argument was needed to address this Motion.

It is so Ordered.

E-Signature of Judge Gravely to follow

Greenville Common Pleas

Case Caption: Sealevel Systems Inc vs. CreatiVasc Medical Inc , defendant, et al

Case Number: 2022CP2301310

Type: Order/JNOV

So Ordered

s/ Honorable Perry H. Gravely, #2755

Electronically signed on 2025-07-18 14:50:52 page 2 of 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT

Sealevel Systems, Inc.,

Plaintiff,

vs.

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., John D. Feltman, and James S. ("Steve") Johnson,

Defendants.

Case No: 2018-CP-23-______

SUMMONS

(jury trial demanded)

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to said Complaint upon the subscriber, at his office at Post Office Box 9398, Greenville, South Carolina 29604, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

WESLEY D. FEW, LLC

__s/Wesley D. Few/____________
Wesley D. Few, S.C. Bar No. 15565
Post Office Box 9398
Greenville, South Carolina 29604
(864) 527-5906 | wes@wesleyfew.com

ATTORNEYS FOR PLAINTIFF SEALEVEL SYSTEMS, INC.

Greenville, South Carolina
August 2, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
Sealevel Systems, Inc., Plaintiff,	)	Case No: 2018-CP-23-______
vs.	)	**COMPLAINT** (jury trial demanded)
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., John D. Feltman, and James S. ("Steve") Johnson, Defendants.	)	

The Plaintiff above-named, complaining of these Defendants, would respectfully show:

1. This action arises out of an email request made by representatives of CreatiVasc Medical, Inc. ("CreatiVasc") on or about September 25-26, 2014, which was forwarded / copied to Thomas B. O'Hanlan of the Plaintiff Sealevel Systems, Inc. ("Sealevel"). Shortly after this initial email exchange, representatives from CreatiVasc and Sealevel commenced discussions about how they could work together for each other's mutual benefit. As a result of those discussions, CreatiVasc and Sealevel executed their "Customer Supply Agreement" on October 28, 2014 ("Supply Agreement"). The Supply Agreement was then amended on April 10, 2015 and on again on March 9, 2016. Under the terms of this Supply Agreement, Plaintiff Sealevel was to be the "exclusive" supplier of the Product to CreatiVasc for its Hemoaccess Valve System® (the "Product").

THE PARTIES

2. The Plaintiff, Sealevel Systems, Inc. ("Sealevel") is a corporation organized and existing according to the laws of the state of South Carolina and having its place of business in Pickens County, South Carolina.

3. Upon information and belief, the Defendant, CreatiVasc Medical, Inc. ("CreatiVasc") is an entity formed and existing according to the laws of the State of South Carolina, and was operating and had offices in Greenville County, South Carolina. On information and belief, CreatiVasc merged into Brookhaven Medical in or around March 2015 and was subsequently named Brookhaven Vascular.

4. Upon information and belief, the Defendant Brookhaven Medical, Inc. ("Brookhaven Medical"), a/k/a Brookhaven Medical, LLC, is an entity formed and existing according to the laws of the State of Georgia. Upon information and belief, Brookhaven Medical, Inc. acquired CreatiVasc Medical, Inc. on or around March 10, 2015. Accordingly, Brookhaven Medical is a successor in interest to CreatiVasc.

5. Upon information and belief, the Defendant Brookhaven Merger Corp. ("Brookhaven Merger") is an entity formed and existing according to the laws of the State of South Carolina, and was operating and had offices in Greenville County, South Carolina, and is a successor in interest to CreatiVasc.

6. Upon information and belief, the Defendant Brookhaven Vascular, Inc. ("Brookhaven Vascular") is an entity formed and existing according to the laws of the State of South Carolina, and was operating and had offices in Greenville County, South Carolina, and is a successor in interest to CreatiVasc.

7. Upon information and belief, the Defendant, LLC ("Diaxamed") is an entity formed and existing according to the laws of the State of Delaware, operating and having offices in Greenville County, South Carolina. On information and belief, Diaxamed is operating out of the same offices previously used by CreatiVasc and is Diaxamed was most recently developing novel arteriovenous graft technology for hemodialysis.

8. Upon information and belief, Diaxamed is the direct or indirect successor in interest to one or more of the following: Defendant Creativasc Medical, Inc. ("CreatiVasc"), Defendant Brookhaven Merger Corp., Defendant Brookhaven Medical, Inc., a/k/a Brookhaven Medical, LLC ("Brookhaven Medical"), or Defendant Brookhaven Vascular, Inc. ("Brookhaven Vascular").

9. Defendant John D. Feltman ("Feltman"), on information and belief is a citizen and resident of Atlanta, Georgia.

10. Defendant and James S. ("Steve") Johnson (hereafter "Johsnon"), on information and belief is a citizen and resident of Greenville County, South Carolina.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action and venue is proper in Greenville County because the parties dealings were in Greenville County, and because Defendants reside in and / or operate in Greenville County, and because the parties' Supply Agreement provides for venue and jurisdiction in Greenville County.

FACTUAL ALLEGATIONS AND CLAIMS

12. On information and belief, Defendant Diaxamed is in the process of developing a a novel arteriovenous graft technology for hemodialysis, which is the same Product as defined in the parties' Supply Agreement.

13. On information and belief, Diaxamed is the successor in interest to Creativasc, and/or to the rights of Creativasc in their Hemoaccess Valve System, which received Fast Track approval from the FDA on or about April 9, 2012.

14. Diaxamed is shown on the U.S. Patent and Trademark office TESS data base as the owner / assignee of Trademark Registration No. 494,4136, for the mark, HEMOACCESS VALVE SYSTEM, which is the Product, for goods and services as follows: “Medical and surgical devices, namely, artificial arteriovenous grafts.”

15. On or about January 10, 2017, Creativasc assigned its rights in the above-referenced Trademark Registration No. 494,4136 to Defendant Brookhaven Vascular, Inc.

16. The next day, on or about January 11, 2017, Brookhaven Vascular, Inc. assigned its rights in the above-referenced Trademark Registration No. 494,4136 to Diaxamed.

17. After execution of the Supply Agreement between CreatiVasc and Sealevel, Sealevel committed significant resources and took action in reliance upon the representations and promises made by CreatiVasc and its representatives, including but not limited to Steve Johnson, John D. Feltman, and others, and also including the signatures of Steve Johnson on the amendments to the Supply Agreement.

18. Thomas B. O’Hanlan of Sealevel is listed as inventor on patent application serial no. 14/695241, along with Defendant Steve Johnson of CreatiVasc, and others for a patent application entitled, “MAGNETICALLY ACTIVATED ARTERIOVENOUS ACCESS VALVE SYSTEM AND RELATED METHODS,” filed April 24, 2015, and claiming priority to a provisional application filed April 24, 2014.

19. On information and belief, the above-referenced patent application is intended to pursue claims that would preclude others from making the Product known as the Hemoaccess Valve System, which is specifically identified as the subject of the parties' Supply Agreement.

20. Thomas B. O'Hanlan and other representatives from Sealevel collaborated and worked in good-faith to perform all of their obligations under the Supply Agreement.

21. Representatives of CreatiVasc touted the performance of Sealevel in relation to their development of the Product for the Hemoaccess Valve System and the Supply Agreement, privately and publicly.

22. On information and belief, the work of Sealevel was used by one or more Defendants, including specifically Feltman and Johnson, for purposes of raising money for CreatiVasc and its successors in interest.

23. On information and belief, at some point after the patent application was filed, CreatiVasc started looking for a way to get out from under its obligations to Sealevel under the Supply Agreement, specifically including but not limited to Sealevel's right to be the "exclusive supplier of the [Hemoaccess Valve System] Product to [CreatiVasc]."

24. On information and belief, at some point in time after the Supply Agreement was executed and substantial resources were dedicated to performance of the Supply Agreement by Sealevel, representatives of Creativasc and Defendants, including but not limited to Jonson and Feltman, realized or believed that the Supply Agreement with Sealevel was causing them problems in their fundraising efforts.

25. As a result of the above-described events, CreatiVasc and one or more Defendants, including but not limited to Feltman and Johnson, began sabotaging the efforts of

Sealevel under the Supply Agreement and, at a minimum, breached the implied covenant of good faith and fair dealing as it relates to the Supply Agreement.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment, S.C. Code Ann. § 15-53-10 - Breach of Contract, Exclusive Rights)

26. The Plaintiff re-alleges each and every allegation of the preceding Paragraphs as if set forth herein verbatim.

27. On October 28, 2014, CreatiVasc and Sealevel executed the Supply Agreement. This Supply Agreement was executed on behalf of CreatiVasc by Defendant James S. ("Steve") Johnson (hereafter "Johnson"), as CEO of CreatiVasc.

28. On April 10, 2015, CreatiVasc and Sealevel executed the First Amendment to the Supply Agreement. This amendment was executed on behalf of CreatiVasc by Johnson, as CEO of CreatiVasc.

29. On March 9, 2016, CreatiVasc and Sealevel executed the Second Amendment to the Supply Agreement. This amendment was executed on behalf of CreatiVasc by Johnson, as CEO of CreatiVasc.

30. Under the terms of the Supply Agreement, Plaintiff Sealevel was to be the "exclusive" supplier of the product to CreatiVasc.

31. On or about June 26, 2017, counsel to Sealevel sent a letter to CreatiVasc advising of a breach of the Supply Agreement by CreatiVasc and a dispute between the parties, and also enclosing an invoice for the costs of the services performed by Sealevel in relation to the Supply Agreement.

32. In response, remarkably attorney Robert E. Altenbach, stating he was acting as General Counsel to Brookhaven Medical, Inc., responded as follows, denying the very existence of the Supply Agreement:

I acknowledge receipt of your correspondence dated June 26, 2017 to me with Invoice No 150195 (the "Invoice") from Sealevel Systems Incorporated ("Sealevel"). Please be advised that Brookhaven Medical, Inc. ("Brookhaven") acquired all of the outstanding shares of CreatiVasc Medical, Inc. ("CreatiVasc") by merger effective March 5, 2015. While Brookhaven is the parent company of its wholly owned subsidiary that acquired CreatiVasc, Brookhaven did not and has not assumed any outstanding liabilities of the CreatiVasc entity that existed immediately prior to the merger. Moreover, CreatiVasc also denies any liability for the items set forth on the Invoice. It does not have a copy of any purported supply agreement supporting the Invoice. If in fact one exists, please send a copy to me.

After discussions with Steve Johnson, it is also apparent that Sealevel was unable to produce a working device capable of any commercialization.

Accordingly, please consider this correspondence as a complete denial of any liability of either Brookhaven or CreatiVasc for your Invoice.

33. A recent web-page for Brookhaven Medical lists Mr. Altenbach as its Secretary / General Counsel.

34. The Supply Agreement between CreatiVasc and Sealevel was a binding contract.

35. The above described actions of CreatiVasc and those set forth herein establish a breach of the Supply Agreement and an intent to avoid CreatiVasc's obligations under the Supply Agreement, specifically CreatiVasc's obligation to make Sealevel its "exclusive supplier of the Product" to CreatiVasc.

36. Based upon the above, Sealevel is entitled to an order from this Court declaring its rights under the Supply Agreement, including but not limited to its right to be the exclusive supplier of the Hemoaccess Valve System Product to CreatiVasc and/or its successors/assignees.

SECOND CAUSE OF ACTION
(Breach of Contract – Damages – CreatiVasc and Successors)

37. The Plaintiff re-alleges each and every allegation of the preceding Paragraphs as if set forth herein verbatim.

38. Plaintiff and Defendant CreatiVasc are bound by a valid and binding contract between them. Defendant CreatiVasc through its actions set forth herein, has unjustifiably breached said contract with Plaintiff, denying Plaintiff of its benefits under the Supply Agreement.

39. As a direct and proximate result of this unjustifiable breach by the Defendants, Plaintiff is entitled to judgment in an amount that will compensate Plaintiff for its damages suffered because of Defendants' breach, including but not limited to its lost profits.

THIRD CAUSE OF ACTION
(Intentional Interference with Contract)

40. The Plaintiff re-alleges each and every allegation of the preceding Paragraphs as if set forth herein verbatim.

41. Plaintiff and Defendant CreatiVasc were bound by a valid and binding contract between them.

42. Defendants, including but not limited to Feltman and Johnson, through their actions as set forth herein, knew of the existence of this contract, namely the Supply Agreement.

43. Defendants unjustifiably procured a breach of said contract with Plaintiff, causing the Plaintiff damages.

44. As a result of these actions by Defendants, Plaintiff is entitled to recover its damages resulting from the breach, including its lost profits, as well as punitive damages due to the intentional conduct of the Defendants.

FOR A FOURTH CAUSE OF ACTION
(*Quantum Meruit* – In the Alternative)

45. The Plaintiff re-alleges each and every allegation of the preceding Paragraphs as if set forth herein verbatim.

46. Plaintiff conferred a benefit upon Defendants by its performance as set forth herein.

47. Defendants have realized the benefit and retained the benefits conferred by Plaintiff and, on information and belief, are using same to produce the product known as the Hemoaccess Valve System.

48. As a result of these actions by Defendants, Plaintiff is entitled to recover the value of its efforts in conferring these benefits to Defendants, along with prejudgment interest on same.

FOR A FIFTH CAUSE OF ACTION
(*Promissory Estoppel* – In the Alternative)

49. The Plaintiff re-alleges each and every allegation of the preceding Paragraphs as if set forth herein verbatim.

50. Defendants promised Plaintiff they would use Plaintiff as their exclusive supplier of the Product.

51. Plaintiff reasonably relied upon Defendants' repeated promises and assurances.

52. Defendants intended to induce Plaintiff to perform in reliance upon their promises and assurances.

53. Plaintiff suffered injury based upon its reliance on the Defendants' promises.

54. As a result of these actions and inactions by Defendants, Plaintiff is entitled to recover its losses in reliance upon the Defendants' promises.

WHEREFORE, having fully set forth its claims against the Defendants, the Plaintiff prays that the Court award it judgment as follows:

(a) Declaring the rights of Sealevel in the Product as set forth herein;

(b) Actual damages for breach of contract, including its lost profits;

(c) Punitive damages;

(d) An amount to compensate Plaintiff for the benefits unjustly conferred upon Defendants;

(e) An amount to compensate Plaintiff for its reliance damages; and

(f) For such other and further relief as the Court may deem just and proper under the circumstances presented at trial.

WESLEY D. FEW, LLC

s/Wesley D. Few/
Wesley D. Few, S.C. Bar No. 15565
Post Office Box 9398
Greenville, South Carolina 29604
(864) 527-5906 | wes@wesleyfew.com

ATTORNEYS FOR PLAINTIFF SEALEVEL SYSTEMS, INC.

Greenville, South Carolina
August 2, 2018

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
	)	CASE No.: 2018-CP-23-04092
Sealevel Systems, Inc., Plaintiff, vs.	)	**DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT** **(Jury Trial Demanded)**
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., John D. Feltman, and James S. ("Steve") Johnson, Defendants.	)	

Defendants CreatiVasc Medical, Inc., DiaxaMed, LLC (improperly identified in Plaintiff's Complaint as Diaxamed, LLC), Brookhaven Vascular, Inc., Brookhaven Merger Corp., John D. Feltman, and James S. "Steve" Johnson (collectively, "Defendants"), by and through their undersigned attorneys, hereby answer the Complaint filed by Plaintiff Sealevel Systems, Inc. ("Plaintiff") as follows:

FOR A FIRST DEFENSE

1. Defendants deny the allegations contained in each and every paragraph of Plaintiff's Complaint not specifically admitted, qualified, or explained herein.

2. Defendants deny the allegations contained in Paragraph One (1) of Plaintiff's Complaint as stated. Defendants admit that Defendant CreatiVasc Medical, Inc. and Sealevel Systems, Inc. entered into a Customer Supply Agreement dated October 28, 2014 and that the parties to the Customer Supply Agreement amended such agreement on or around April 10, 2015

and on or around March 9, 2016. The Customer Supply Agreement and its amendments speak for themselves.

3. Defendants admit the allegations contained in Paragraph Two (2) of Plaintiff's Complaint upon information and belief.

4. Defendants deny the allegations contained in Paragraph Three (3) of Plaintiff's Complaint as stated. Defendants admit that Defendant CreatiVasc Medical, Inc. was formed and previously existed pursuant to the laws of the State of South Carolina, which at one time operated in Greenville County, South Carolina. By way of further answer to said allegations, Defendants allege that Brookhaven Merger Corp., a South Carolina corporation and a wholly-owned subsidiary of Brookhaven Medical, Inc., merged into CreatiVasc Medical, Inc. in March 2015, and further allege that CreatiVasc Medical, Inc. subsequently changed its name to Brookhaven Vascular, Inc.

5. Defendants deny the allegations contained in Paragraph Four (4) of Plaintiff's Complaint as stated. Defendants admit that Brookhaven Medical, Inc. is an entity formed and existing under the laws of the State of Delaware and that it acquired CreatiVasc Medical, Inc. through merger of CreatiVasc Medical, Inc. into its wholly-owned subsidiary, Brookhaven Merger Corp., in March 2015.

6. Defendants deny the allegations contained in Paragraphs Five (5) and Six (6) of Plaintiff's Complaint. Defendants admit the Brookhaven Merger Corp. was an entity formed and existing according to the laws of South Carolina and that it merged into CreatiVasc Medical, Inc. and no longer exists. Defendants further admit that CreatiVasc Medical, Inc.changed its name to Brookhaven Vascular, Inc. on or about June 16, 2016.

7. Defendants deny the allegations contained in Paragraph Seven (7) of Plaintiff's Complaint as stated. Defendants admit that DiaxaMed, LLC is a limited liability company organized and existing under the law of the State of Delaware which does business in Greenville County, South Carolina.

8. Defendants deny the allegations contained in Paragraph Eight (8) of Plaintiff's Complaint.

9. Defendants admit the allegations contained in Paragraphs Nine (9) and Ten (10) of Plaintiff's Complaint with respect to residency and admit that Feltman and Johnson are each citizens of the United States.

10. Defendants are informed and believe that the allegations contained in Paragraph Eleven (11) of Plaintiff's Complaint merely state legal conclusions that do not require a response from Defendants. To the extent a response to said allegations is deemed to be required of Defendants, they deny this Court has subject matter jurisdiction due to a valid and enforceable arbitration provision in the Customer Supply Agreement that forms the predicate for this lawsuit.

11. Defendants deny the allegations contained in Paragraph Twelve (12) of Plaintiff's Complaint.

12. Answering the allegations contained in Paragraph Thirteen (13) of Plaintiff's Complaint, Defendants admit that Defendant DiaxaMed, LLC currently owns the intellectual property previously owned by Defendant CreatiVasc Medical, Inc. Defendants further admit that CreatiVasc Medical, Inc. was selected for the Innovation Pathway Program by the United States Food and Drug Administration in April 2012. Defendants deny the remailing allegations contained in this paragraph.

13. Defendants admit the allegations contained in Paragraph Fourteen (14) of Plaintiff's Complaint.

14. Defendants deny the allegations contained in Paragraph Fifteen (15) of Plaintiff's Complaint but admit that CreatiVasc Medical, Inc. changed its name to Brookhaven Vascular, Inc. on or about June 16, 2016 and such name change was recorded in the United States Patent and Trademark Office on January 10, 2017.

15. Defendants deny the allegations contained in Paragraph Sixteen (16) of Plaintiff's Complaint but admit that on or about December 30, 2016 Brookhaven Vascular, Inc. assigned its rights in the above-referenced Trademark Registration No. 494,4136 to DiaxaMed, LLC and such assignment was recorded with the United States Patent and Trademark Office on January 11, 2017.

16. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph Seventeen (17) of Plaintiff's Complaint.

17. Answering the allegations contained in Paragraph Eighteen (18) of Plaintiff's Complaint, Defendants admit that Thomas B. O'Hanlan was originally listed as an inventor on the referenced patent application, but Defendants are informed and believe that Mr. O'Hanlon was subsequently removed as an inventor on such application.

18. Defendants deny the allegations contained in Paragraph Nineteen (19) of Plaintiff's Complaint as stated. Defendants admit that the patent application referenced in this paragraph pertains to the intellectual property rights associated with a hemoaccess valve system that is also the subject of the agreement which forms the predicate for this lawsuit.

19. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph Twenty (20) of Plaintiff's Complaint.

20. Defendants deny the allegations contained in Paragraph Twenty-One (21) of Plaintiff's Complaint as stated. Defendants would admit that Defendants complimented Plaintiff publicly regarding its efforts to develop the Product as described in the Customer Supply Agreement until it became clear that Plaintiff was not able to deliver a component which met the engineering specifications or worked as promised by Plaintiff.

21. Defendants deny the allegations contained in Paragraphs Twenty-Two (22), Twenty-Three (23), Twenty-Four (24) and Twenty-Five (25) of Plaintiff's Complaint.

22. Answering the allegations contained in Paragraph Twenty-Six (26) of Plaintiff's Complaint, Defendants hereby reallege and incorporate herein by reference the preceding allegations of their Answer.

23. Defendants admit the allegations contained in Paragraphs Twenty-Seven (27), Twenty-Eight (28), and Twenty-Nine (29) of Plaintiff's Complaint.

24. Answering the allegations contained in Paragraph Thirty (30) of Plaintiff's Complaint, Defendants are informed and believe the Customer Supply Agreement and its amendments speak for themselves.

25. Defendants deny the allegations contained in Paragraph Thirty-One (31) of Plaintiff's Complaint as stated. Defendants would admit that Plaintiff's counsel sent a letter dated June 26, 2017 to Brookhaven Medical, Inc. to the attention of Bob Altenbach and that it included an invoice in relation to the Customer Supply Agreement. Defendants deny the remaining allegations of this paragraph.

26. Answering the allegations contained in Paragraph Thirty-Two (32) of Plaintiff's Complaint, Defendants admit that Robert E. Altenbach responded to the June 26, 2017 letter from Plaintiff's and are informed and believe that the response speaks for itself.

27. Defendants deny the allegations contained in Paragraph Thirty-Three (33) of Plaintiff's Complaint as stated. Defendants would admit that the following website lists Mr. Altenbach as General Counsel and Secretary of Brookhaven Medical, Inc.: http://brookhavenmedical.com/about.html.

28. Defendants deny the allegations contained in Paragraph Thirty-Four (34) of Plaintiff's Complaint as stated. Defendants admit that the Customer Supply Agreement was a valid and binding contract at the time the parties entered into such agreement. By way of further answer to said allegations, Defendants are informed and believe the Customer Supply Agreement and its amendments speak for themselves.

29. Defendants deny the allegations contained in Paragraphs Thirty-Five (35) and Thirty-Six (36) of Plaintiff's Complaint.

30. Answering the allegations contained in Paragraph Thirty-Seven (37) of Plaintiff's Complaint, Defendants hereby reallege and incorporate herein by reference the preceding allegations of their Answer.

31. Defendants deny the allegations contained in Paragraph Thirty-Eight (38) of Plaintiff's Complaint as stated. Defendants admit that the Customer Supply Agreement was a valid and binding contract at the time the parties entered into such agreement. Defendants deny the remaining allegations contained in said paragraph.

32. Defendants deny the allegations contained in Paragraph Thirty-Nine (39) of Plaintiff's Complaint.

33. Answering the allegations contained in Paragraph Forty (40) of Plaintiff's Complaint, Defendants hereby reallege and incorporate herein by reference the preceding allegations of their Answer.

34. Defendants deny the allegations contained in Paragraph Forty-One (41) of Plaintiff's Complaint as stated. Defendants admit that the Customer Supply Agreement was a valid and binding contract at the time the parties entered into such agreement.

35. Defendants deny the allegations contained in Paragraph Forty-Two (42) of Plaintiff's Complaint. Defendants admit that all Defendants, except for DiaxaMed, LLC, knew of the existence of the Customer Supply Agreement before May 16, 2017.

36. Defendants deny the allegations contained in Paragraphs Forty-Three (43) and Forty-Four (44) of Plaintiff's Complaint.

37. Answering the allegations contained in Paragraph Forty-Five (45) of Plaintiff's Complaint, Defendants hereby reallege and incorporate herein by reference the preceding allegations of their Answer.

38. Defendants deny the allegations contained in Paragraphs Forty-Six (46), Forty-Seven (47) and Forty-Eight (48) of Plaintiff's Complaint.

39. Answering the allegations contained in Paragraph Forty-Nine (49) of Plaintiff's Complaint, Defendants hereby reallege and incorporate herein by reference the preceding allegations of their Answer.

40. Defendants deny the allegations contained in Paragraph Fifty (50) of Plaintiff's Complaint as stated. By way of further answer to said allegations, Defendants are informed and believe the Customer Supply Agreement and its amendments speak for themselves.

41. Defendants deny the allegations contained in Paragraphs Fifty-One (51), Fifty-Two (52), Fifty-Three (53), and Fifty-Four (54) of Plaintiff's Complaint.

42. Defendants deny that Plaintiff is entitled to any damages.

<u>FOR A SECOND DEFENSE</u>

43. The Court lacks subject matter jurisdiction over this dispute due to a valid and binding arbitration agreement between the parties. This case should therefore be dismissed Pursuant to Rule 12(b)(1), SCRCP.

<u>FOR A THIRD DEFENSE</u>

44. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against Defendants and should be dismissed pursuant to Rule 12(b)(6), SCRCP.

<u>FOR A FOURTH DEFENSE</u>

45. Plaintiff has failed to comply with the terms of the agreement it seeks to enforce and it has committed a prior material breach of the same; therefore, it is barred from recovery under the agreement between the parties.

<u>FOR A FIFTH DEFENSE</u>

46. Plaintiff has knowingly and intentionally waived whatever rights it claims to have under the agreement it seeks to enforce in this action.

<u>FOR A SIXTH DEFENSE</u>

46. Plaintiff is estopped from seeking to enforce whatever rights it claims to have under the agreement is seeks to enforce in this action.

<u>FOR A SEVENTH DEFENSE</u>

47. Plaintiff's claim for punitive damages violates both the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in one or more of the following particulars:

a. that the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of a meaningful standard and is inconsistent with due process guarantees;

b. that, even if a standard governing the award of punitive damages does exist, this standard is void for vagueness or arbitrariness; and

c. that the amount of punitive damages awarded is based upon the wealth of Defendant in violation of its right to equal protection of the laws.

FOR AN EIGHTH DEFENSE

48. Defendants reserve the right to raise additional affirmative defenses based upon additional evidence that may be discovered while this case is pending.

WHEREFORE, having fully and completely answered the allegations of Plaintiff's Complaint, Defendants pray:

A. That it be dismissed;

B. For the taxable costs of this action;

C. For such other and further relief that the Court may deem just and proper.

Respectfully submitted,

s/ Kirby D. Shealy III
Kirby D. Shealy III
Justine M. Tate
ADAMS AND REESE LLP
1501 Main Street, Fifth Floor
Columbia, South Carolina 29201
Telephone: (803) 254-4190
Facsimile: (803) 779-4749
kirby.shealy@arlaw.com
justine.tate@arlaw.com

Attorneys for Defendants

October 12, 2018.

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Sealevel Systems, Inc., Plaintiff, vs. 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., John D. Feltman, and James S. ("Steve") Johnson, Defendants.	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT CASE No.: 2022-CP-23-01310 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT**

TO: WESLEY D. FEW, ESQUIRE, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that Defendants CreatiVasc Medical, Inc., DiaxaMed, LLC (improperly identified in Plaintiff's Complaint as Diaxamed, LLC), Brookhaven Vascular, Inc., Brookhaven Merger Corp., John D. Feltman, and James S. "Steve" Johnson (collectively, "Defendants"), by and through their undersigned attorneys, will move ten (10) days hence, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 56 of the *South Carolina Rules of Civil Procedure*, granting them summary judgment as to all causes of action set forth in the Complaint of Plaintiff Sealevel Systems, Inc. ("Sealevel" or "Plaintiff") on the basis that there is no genuine dispute as to any material fact and Defendants are entitled to judgment in their favor as a matter of law.

This motion is supported by the Customer Supply Agreement, as amended (**Exhibit 1**), excerpts from Plaintiff's 30(b)(6) deposition (**Exhibit 2**), excerpts from the deposition of James S. "Steve" Johnson (**Exhibit 3**), and the following memorandum of law. For the reasons set forth below, Defendants are entitled to judgment as a matter of law and respectfully request that this Court grant judgment in their favor.

SUMMARY OF ARGUMENTS

This dispute arises out of a 2014 Customer Supply Agreement entered into between Sealevel and CreatiVasc Medical, Inc. ("CreatiVasc"). Under the terms of the agreement, Sealevel agreed to design and manufacture a handheld actuator and electronics for use in a proprietary medical device known as the Hemoaccess Valve System, which CreatiVasc was then in the process of developing. Upon the successful development of a marketable device, Sealevel was to be the exclusive supplier of that product to CreatiVasc if its device were to ever go to market. The agreement in question contained no terms regarding specifications for the product, the price of the product, the number of units that CreatiVasc had to purchase, or dates for delivering the product.

Eventually, after several years of attempting to develop a working device, CreatiVasc and its successors came to the conclusion that the device as envisioned was simply not commercially or practically feasible. CreatiVasc thereafter abandoned its plan to develop a device that used a remote actuator such as the one Sealevel had tried to develop. Upon learning of this, Sealevel sent CreatiVasc an invoice in the amount of $321,540.00 for engineering services allegedly rendered by Sealevel and filed suit accusing CreatiVasc of breaching the exclusivity provision in the Customer Supply Agreement. However, to date, neither CreatiVasc nor any of its successors have ever produced or sold a working device for commercial use, either with the handheld actuator or without it. Now, after five years of protracted litigation, this matter is ripe for disposition on the following grounds:

1. The Customer Supply Agreement that is the subject of this action lacked all the material and essential terms for there to be a meeting of the minds as to the formation of a contract and, therefore, the agreement is unenforceable;

2. Even if the Customer Supply Agreement is an enforceable contract, Plaintiff has failed as a matter of law to establish a breach or that it suffered damages; and

3. Plaintiff has failed to establish that it conferred any tangible benefit on Defendants such that it would be unjust for Defendants to retain that benefit without paying Plaintiff for it.

UNDISPUTED FACTS

Sealevel is a South Carolina corporation formed in 1986 that provides electronic, design, and manufacturing services to large corporations. (Sealevel Depo. 15:12 – 16:8). CreatiVasc is a company that specializes in developing and manufacturing advanced biomedical technology. (Exhibit 1; Johnson Depo. 30:8 – 33:9). The remaining parties named as defendants in this case are the successors in interest to CreatiVasc and two individuals that were affiliated with CreatiVasc or its successors. (Johnson Depo. 10:15-18; Complaint ¶¶ 3-8, 11-16).

In approximately 2007, CreatiVasc acquired the patent to and began development of an implanted medical device known as the Hemoaccess Valve System (the "System"). The System was intended to act as an accessory to an FDA-approved arteriovenous graft – a graft that connects an artery to a vein – to help address complications associated with hemodialysis. (Johnson Depo. 56:8-10). In particular, because arteriovenous grafts are prone to clotting, dialysis patients frequently have to undergo surgeries to remove blood clots. (Johnson Depo. 56:11-17). The System, which consisted of two inflatable balloon valves on either side of the graft to monitor and regulate blood flow, was designed with the goal of significantly reducing the need for these surgeries. (Johnson Depo. 56:14 – 57:11).

Once implanted, the original, or "Gen 1," version of the System could only be activated by puncturing the skin with a needle and injecting saline into the balloons to inflate them and flush the graft. (Johnson Depo. 56:18-23). After creating a working prototype and conducting clinical trials for the Gen 1 System, CreatiVasc spent several years researching ways to improve the System such that it could be activated without the use of needles. (Johnson Depo. 55:4-20). One potential method they identified was a magnetically-activated saline pump that could inflate the balloons remotely using a hand-held actuator. (Johnson Depo. 57:24 – 58:2). In early 2014, as CreatiVasc was developing a remote activation design that could be incorporated into a "Gen 2" version of the System, they began searching for a manufacturer to help finalize the circuit board and other electronic components that would allow the System to be activated remotely. (Johnson Depo. 67:13 – 68:12).

In September 2014, Steve Johnson, then the CEO of CreatiVasc, was introduced to Thomas O'Hanlan, the Engineering and Creative Director of Sealevel. (Johnson Depo. 43:14-17, 67:3-20; Sealevel Depo. 27:18 – 28:13). Although the technology had yet to be developed, Sealevel claimed that it could produce and manufacture an external hand-held actuator and internal electronics to work in tandem with magnetic sensors inside the System to open and close the System's internally implanted balloon valves. (Johnson Depo. 80:3-7; Sealevel Depo. 34:19-25, 65:17-20). Both companies were excited by the potential of developing a remote actuator, and they agreed to work together in developing and incorporating it into CreatiVasc's System. (Sealevel Depo. 27:18 – 28:8; 34:7-25).

On October 28, 2014, Sealevel and CreatiVasc entered into a Customer Supply Agreement[1] ("Supply Agreement"), pursuant to which Sealevel agreed to design and manufacture the motor control and valve monitor electronics (the "Product") for use in CreatiVasc's System. (Sealevel Depo. 23:17 – 25:2). Section 1 of the Supply Agreement defined the "Scope" as follows:

> Sealevel agrees to design, manufacture, sell and deliver to [CreatiVasc] hardware and software (the "Product") used in the

[1] The Supply Agreement was subsequently amended on April 10, 2015, and again on March 9, 2016, to add additional patent protections for Sealevel and CreatiVasc. (Sealevel Depo. 25:9 – 26:18; 41:16 – 42:9).

> System's handheld actuator and implanted balloon pressure monitoring devices in accordance with the specifications set forth in Exhibit A, which is attached hereto and incorporated herein by reference (such specifications, the "Specifications"). Sealevel shall be responsible for procuring all materials associated with the manufacture of the Product, as well as assembling and testing the Product.

(Exhibit 1, § 3). Under the Supply Agreement, CreatiVasc also agreed that Sealevel would be the "exclusive supplier of the Product" to CreatiVasc once the Gen 2 System went to market, and that CreatiVasc would not "directly or indirectly, purchase or order the Product, or any other good substantially similar to the Product, from any person or entity other than Sealevel." (Exhibit 1, § 1).

As of the date the Agreement was executed, the "Specifications" identified as Exhibit A to the Agreement were still in development and did not yet exist. (Sealevel Depo. 36:8-14). In addition to the "Specifications," the Supply Agreement also incorporated by reference an Exhibit B ("Purchase Order"), Exhibit C ("Invoice"), and Exhibit D ("Quotation"), none of which existed at the time or were included in the Agreement. (Exhibit 1; Sealevel Depo. 36:8 – 38:15). There was also no agreement on the price of the Product or the number of units of the Product that CreatiVasc had to purchase. Instead, the Supply Agreement contemplated that "the dates and quantities of the Product to be delivered and the current price for the Product" would be specified in separate Purchase Orders. As to the price, the Supply Agreement provided that the "price for the Product will be agreed upon in writing by the Parties and may not be changed except as agreed upon in writing by the Parties." (Exhibit 1, § 3).

Because the sole difference between the Gen 1 and Gen 2 Systems was its needleless function, the creation of the Gen 2 System was contingent on the successful development of an external handheld device that could couple with the System's internal valve pump. (Johnson Depo.

55:4-20, 117:7-13). Sealevel and CreatiVasc eventually designed a single prototype of a device (called a "wand") that was supposed to interact with the internal valve pump system using magnets and an internal sensor. (Sealevel Depo. 61:14-62:14). Sealevel's proposal for making the device work was to install a remotely-powered sensor inside the System that could send a signal to the external hand-held device, which would relay information about the pressure in the balloon valves. (Johnson Depo. 80:4-7; Sealevel Depo. 62:22 – 63:25). However, CreatiVasc and Sealevel soon discovered that any internal sensor would need to be saline-proof due to the System's use of saline in the balloon valves. (Sealevel Depo. 65:17-20; Johnson Depo. 118:21 – 119:12).

According to both CreatiVasc and Sealevel, the prospect of developing a saline-proof magnetic sensor proved to be an insurmountable hurdle for the Gen 2 System. Johnson, CreatiVasc's then CEO, described this issue as follows:

> [A]s far as coming up with a finished device that would couple an internal device with an external device, on our side we failed to make a device that would work on the inside that would pump the fluid. I would say – I think it's fair to say that despite their best efforts, the external device that Sealevel worked on could never function as we had hoped in the Supply Agreement, and so the idea of a Gen 2 needle-less device never materialized. We never could find a sensor that could couple and read. Sealevel looked for it and we looked for it. We worked with [another company], I believe, at one point, looking for a sensor, we looked for other sensors, but we were never able to make the Gen 2 work.

(Johnson Depo. 80:24 – 81:12). O'Hanlan, Sealevel's CEO, agreed that there was no "commercially available" sensor that could meet the design requirements and that the Gen 2 System faced significant hurdles that could not be overcome. (Sealevel Depo. 65:17-20, 66:23 – 67:11).

As of late 2016, Sealevel and CreatiVasc had spent nearly two years working on the device and were unable to create a functional Gen 2 System. (Johnson Depo. 80:24 – 81:12). It was also apparent that neither Sealevel nor CreatiVasc could engineer their way around the internal sensor issue. It was around this time that the initial funding that CreatiVasc had received to develop the System was quickly being depleted. (Johnson Depo. 54:21 – 55:16, 74:24 – 77:25). As CreatiVasc had not been able to produce a Product or System capable of being sufficiently reliable and functional to sell commercially, CreatiVasc's focus on the development of the Gen 2 System, as well as its relationship with Sealevel, began to wane. (Johnson Depo. 116:21-25).

In December 2016, DiaxaMed purchased CreatiVasc and acquired the patent rights related to both the Gen 1 and Gen 2 System. (Johnson Depo. 71:18-20). Sealevel became aware around the same time of the purchase by DiaxaMed and the uncertainty of what would happen with the development of the Gen 2 System. (Johnson Depo. 83:19-22; Sealevel 48:20-23, 49:20 – 51:10). On March 30, 2017, Johnson, who had helped spearhead the development of the Gen 2 System and had created the relationship with Sealevel on behalf of CreatiVasc, was fired by DiaxaMed. (Johnson Depo. 6:10-22). According to Johnson, DiaxaMed made the decision to fire him because the new owners wanted to focus solely on developing the Gen 1 System, which had used needles instead of a hand-held actuator. (Johnson Depo. 85:20 – 86:15)

On June 26, 2017, Sealevel sent a letter to CreatiVasc advising of a breach of the Supply Agreement by CreatiVasc and enclosing an invoice, dated June 13, 2017, for $321,540.00 for engineering services and costs incurred by Sealevel. (Sealevel Depo. 50:4-10). This was despite the fact Sealevel agreed that the Supply Agreement and subsequent amendments "don't contain any provisions that require CreatiVasc, or any – any entity that is standing in CreatiVasc's shoes to pay Sealevel for its engineering time." (Sealevel Depo. 51:11-17). Instead, according to Sealevel, "the invoice was sent as a way to get their attention and just say, 'Hey, what about us?'"

(Sealevel Depo. 51:5-7). During his deposition, Mr. O'Hanlan explained Sealevel's justification for sending the invoice as follows:

> [T]o be perfectly honest, we wouldn't have had a problem if the thing had just fizzled out due to natural causes, or say Pfizer came out with a wonder valve all of a sudden overnight that would have killed this, that we would not have sought any kind of recourse. The invoice was a form of seeking recourse for work done because we were basically cut off.

(Sealevel Depo. 52:9-16). According to Mr. O'Hanlan, the invoice was:

> A summary of the work we had done because it appeared that they were terminating our work without even notification. There was, you know, they – they didn't write to us and say, "We don't need you anymore." They did write to us and say, "Diaxamed is now, you know, in charge of the whole development process, so your – your work while appreciated is not required." We – we received no notification.

(Sealevel Depo. 53:2-10). When asked in his deposition what difference it would have made if CreatiVasc or DiaxaMed had sent a formal notice terminating the Supply Agreement, Mr. O'Hanlan responded: "If it had happened in the normal course of business, then I agree that we would have no recourse." (Sealevel Depo. 53:11-20).

To date, no version of the System has been developed, marketed or sold, nor has CreatiVasc, or any of its successors, purchased or worked with any other company apart from Sealevel to develop a remote actuator similar to the one Sealevel had developed. (Johnson Depo. 85:8-23, 86:6-9). Sealevel has conceded that it does not have "any evidence that the product . . . has been developed, marketed, and sold by anyone[.]" (Sealevel Depo. 49:1-6). According to Sealevel, "[i]t would be a breakthrough if it had been." (Sealevel Depo. 49:17).

On August 2, 2018, Sealevel filed a lawsuit against Defendants, asserting claims for declaratory judgment, breach of contract, intentional interference with a contract, *quantum meruit* and promissory estoppel. Each of these claims is based on Defendants' alleged breach of the exclusivity provision in the Supply Agreement. Defendants filed an answer to the complaint denying liability. After a lengthy discovery period, this matter is now ripe for disposition.

LEGAL STANDARD

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. "The proper standard [under Rule 56(c)] is the genuine issue of material fact standard." *Kitchen Planners, LLC v. Friedman*, Op. No. 28173, —— S.C. ——, —— S.E.2d ——, 2023 WL 5420401 (S.C. Sup. Ct. filed Aug. 23, 2023) (Howard Adv. Sh. No. 33, 11, 17) (internal quotations omitted) (rejecting the "mere scintilla" standard for summary judgment). When determining whether genuine issues of material fact exist as to all elements of a claim, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002).

"To survive summary judgment, the evidence presented [by the non-movant] must amount to more than mere speculation and conjecture." *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) (Hearn, J., concurring in part and dissenting in part) (*citing McKnight v. S.C. Dep't of Corrs.*, 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App. 2009)). "[I]dle speculation, which has no basis in the record, is clearly insufficient to overcome" summary judgment. *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 854 F. Supp. 400, 424 (D.S.C. 1994). A party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Id.* (citation omitted).

ARGUMENT

Sealevel's claims for a declaratory judgment, breach of contract, intentional interference with a contract, as well as Sealevel's alternative causes of action for quantum meruit and promissory estoppel, all fail as a matter of law. Each of these claims is based on Defendants' alleged breach of the Supply Agreement and Sealevel's alleged resulting damages. However, because Sealevel has failed to show the existence of a breach of the Supply Agreement or resulting damages, or that the Supply Agreement is a binding contract in the first instance, Defendants are entitled to judgment in their favor as a matter of law.

I. Sealevel's claim for breach of contract fails as a matter of law because there was no meeting of the minds as to the essential terms for the formation of a contract.

The elements required for formation of a contract are an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 581 S.E.2d 161, 166 (2003). "In order for a contract to arise, there must be a meeting of the minds of the parties involved with regard to all essential and material terms of the agreement." *Hardaway Concrete Co., Inc. v. Hall Contracting Corp.*, 647 S.E.2d 488, 492 (S.C. Ct. App. 2007) (citing *Player v. Chandler*, 382 S.E.2d 891, 893 (S.C. 1989)).

Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law. *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C. 352, 362, 101 S.E. 838, 841 (1920). A valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement. *Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007). "Thus, for a contract to be binding, material terms cannot be left for future agreement." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) (citing *Aperm of S.C. v. Roof*, 290 S.C. 442, 447, 351

S.E.2d 171, 173 (Ct. App. 1986)). "In a contract for services[,] two essential terms are the scope of the work to be performed and the amount of compensation." *W.E. Gilbert & Assocs. v. S.C. Nat. Bank,* 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985).

Here, the Supply Agreement was nothing more than a fluctuating framework under which the parties agreed to proceed in good faith to attempt to design, manufacture, and sell a product that had not yet been produced, under terms to be agreed upon in the future. The Agreement contained no fixed terms for the price of the Product, the number of units that CreatiVasc had to purchase, or dates for delivering the Product. Importantly, although the crux of the Agreement was for Sealevel to "design, manufacture, sell and deliver" to CreatiVasc a Product for use in the Gen 2 System, it failed to dictate how the Product was to be designed, manufactured, and sold, or even what, exactly, CreatiVasc would be purchasing other than "hardware and software."

Instead, the Supply Agreement referred to a nonexistent set of "Specifications" that would set forth the actual details of how the Product would be designed and manufactured. This was to be accompanied by a "Warranty" that would define the "Sealevel Standards" for manufacturing the Product to the "Specifications." (Exhibit 1, Section 8). However, neither the terms of the "Specifications" nor what constituted "Sealevel Standards" were ever agreed upon or made a part of the Supply Agreement. (Sealevel Depo. 36:8 – 38:15). Likewise, the price, quantities, delivery dates, and terms of payment were all undetermined, leaving it to forthcoming "Purchase Orders," "Invoices," "Quotations," and other written agreements to set forth the actual details for purchasing and selling the Product. (Sealevel Depo. 36:8 – 38:15). These, too, fail to provide any definitive guidelines for how the parties would operate under the Agreement, as those documents were never drafted and their terms never agreed upon.

The case of *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568 762 S.E.2d 696 (2014) is instructive. There, the City of Columbia entered into a "Memorandum of Understanding" with various developers to collaborate on the "design, development, construction and delivery of the Hotel in accordance with the terms of the Development Management Agreement to be finalized between the City or [non-profit corporation] and the Developer." *Id.* at 581, 762 S.E.2d at 702. The City eventually abandoned its plan under the MOU, and the developers brought suit for breach of contract and equitable relief.

On appeal, the South Carolina Supreme Court reversed a finding from the Court of Appeals that held a genuine issue of material fact existed as to whether the MOU was a valid and enforceable contract. The Supreme Court noted that the MOU lacked any definitive agreements as to price, the actual design process, the scope of duties, and that it contemplated the parties entering future agreements regarding the same. *Id*. at 580-81, 762 S.E.2d at 702. In reversing the lower court's ruling, the Supreme Court wrote, "We cannot see how merely stating a forthcoming document will dictate the terms of the 'design, development, construction and delivery' does not plainly leave material terms undecided. The whole project *is* the design, development, construction, and delivery of the hotel." *Id.*

Here, the Supply Agreement purports to "represent the entire agreement between the Parties with respect to the purchase and sale of the Product." (Exhibit 1, Section 26). Yet, like the MOU in *Stevens*, it lacks the same meeting of the minds on numerous material terms yet to be defined and it provides no way to determine those terms with any degree of certainty. In sum, the Supply Agreement merely bound CreatiVasc to purchase, at an undefined point in the future, at a price to be agreed upon later, no particular number of units of certain component pieces of a device, if the device were ever successfully developed and sold. There can be no binding contract under those circumstances, and Defendants are entitled to judgment on Sealevel's claim for breach of contract as a matter of law.

1. Sealevel's claim for Intentional Interference with a Contract fails as a matter of law in the absence of an enforceable contract or breach.

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). "An essential element to the cause of action for tortious interference with contractual relations requires the intentional procurement of the contract's breach. Where there is no breach of the contract, there can be no recovery." *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007).

Sealevel's claim for intentional or tortious interference with a contract is wholly reliant on the existence of an enforceable contract, the intentional breach thereof, and resulting damages. *Sea Island Food Grp., LLC v. Yaschik Dev. Co., Inc.*, 433 S.C. 278, 286, 857 S.E.2d 902, 906 (Ct. App. 2021). As set forth above, the Supply Agreement is not a valid contract capable of forming the predicate for this cause of action. As set forth below, Sealevel has failed to establish an intentional procurement of a breach or damages resulting therefrom. As a result, this claim must fail.

II. Even if the Supply Agreement constitutes an enforceable contract, Sealevel has failed to establish a breach or that it suffered damages recoverable under the agreement.

To the extent this Court finds that a genuine issue of material fact exists as to whether the parties had the requisite meeting of the minds to form a contract, Sealevel has failed to establish that Defendants breached that contract when it made the decision to abandon its pursuit of a Gen 2 System that utilized a handheld actuator, or that Sealevel suffered damages recoverable under the Agreement as a result.

1. Defendants cannot be in breach of the Supply Agreement because neither CreatiVasc, nor any of its successors, have ever produced, marketed, or sold any version of the System.

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). Under South Carolina law, in order to recover for breach of contract, "the burden [is] upon the plaintiff to prove the contract, its breach, and the damages caused by such breach." *Maro v. Lewis*, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (Ct. App. 2010).

Sealevel asserts that Defendants breached the provision of the Supply Agreement that requires CreatiVasc to make Sealevel its "exclusive supplier of the Product" to CreatiVasc. (Compl. Para. 35). This is a befuddling accusation given that Sealevel's role as an "exclusive supplier" was always contingent on (1) Sealevel creating a working Product that could be incorporated into the Gen 2 System and (2) CreatiVasc actually being able and deciding to produce, market, and sell a commercially-viable Gen 2 System. Furthermore, even if Sealevel was able to create a Product that worked seamlessly with the Gen 2 System, nothing in the Supply Agreement *required* CreatiVasc to manufacture, market, and sell the System. Sealevel acknowledged as much when it agreed that the Supply Agreement and its amendments "do not obligate CreatiVasc to purchase anything."[2] (Sealevel Depo. 54:15-21).

More importantly, no version of the System has been developed, marketed or sold, nor has CreatiVasc purchased or worked with any company other than Sealevel to develop a hand-held actuator that is even remotely similar to the one Sealevel had attempted to develop. (Johnson Depo. 85:8-23, 86:6-9). Sealevel concedes that it does not have "any evidence that the product . . . has

[2] "Yes, sir. I'd have to agree with that. I mean 'cause I can read, and it doesn't say they will purchase this, right?" (Sealevel Depo. 54:15-21).

been developed, marketed, and sold by anyone," and believes that "[i]t would be a breakthrough if it had been." (Sealevel Depo. 49:1-6).

As Sealevel also acknowledges, there are any number of reasons why a company would abandon developing a novel, complex technology. These reasons include market conditions, economic and technical feasibility, and capital requirements, among others. (Sealevel Depo. 51:25 – 52:9). Parties to a contract that calls for ongoing and indefinite performance generally need not continue performance when the circumstances that originally motivated the agreement's formation have changed. *New York v. New Jersey*, 143 S. Ct. 918 (2023). That is precisely what has happened here. Defendants had no duty to expend endless time and resources in an attempt to develop a potentially unworkable device just so they could give Plaintiff something to sell them.

In short, because Defendants have not produced, nor are currently producing, a version of the System that employs any technology or product that Sealevel developed, and because CreatiVasc is not bound to purchase anything from Sealevel, there can be no breach under these circumstances. Sealevel does not assert the breach of any other provision of the Supply Agreement or of another contract. (Sealevel Depo. 69:21 – 70:1). Therefore, the failure of those allegations is dispositive.

2. Even in the presence of a breach, Sealevel has failed to establish damages recoverable under the Supply Agreement.

Sealevel seeks damages in the range of $321,540.00 for engineering services it rendered as of June 13, 2017 while working on the handheld actuator for the Gen 2 System, along with lost profits of indeterminate value. Sealevel cannot point to any provision in the Supply Agreement that would entitle it to the damages it is seeking, even to the extent the existence of a contract and breach are established. The Supply Agreement does not contain a liquidated damages provision, nor does it otherwise assign any specific monetary value to a breach. Sealevel also concedes the

Supply Agreement does not authorize Sealevel to charge, or CreatiVasc to pay, for the time and costs spent developing the Product. (Sealevel Depo. 38:3-8, 51:11-23).

Instead, Sealevel's sole remedy under the agreement in the event of a breach by Sealevel is that CreatiVasc must "take delivery of and pay the full price for the remainder of open Purchase Orders (if any)." Similarly, Section 12(b) of the Supply Agreement provides: "If Customer terminates for convenience, Customer will take delivery of and pay the full price for the remainder of open Purchase Orders (if any)." Given that no such open Purchase Orders exist, the only monetary value that can be assigned to Sealevel's damages claim is zero.

"The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.* (quoting *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." *Id.* (quoting *S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 303 S.C. 74, 77, 399 S.E.2d 8, 10 (Ct. App. 1990)). "The measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach." *S.C. Fin. Corp. of Anderson v. W. Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960). When lost profits are contemplated as measure of damages for breach of contract, they should be established with reasonable certainty since recovery cannot be had for profits which are conjectural or speculative; however, proof with mathematical certainty is not required. *Minter v. GOCT, Inc.*, 473 S.E.2d 67 (S.C. App. 1996).

Sealevel acknowledges that the June 13, 2017 invoice to Defendants was less of a demand for payment than it was "a way to get their attention and just say, 'Hey, what about us?'" (Sealevel Depo. 51:5-7). At the same time, Sealevel admits that it "wouldn't have had a problem if the thing had just fizzled out due to natural causes, or say Pfizer came out with a wonder valve all of a sudden overnight that would have killed this, that we would not have sought any kind of recourse." (Sealevel Depo. 52:9-16). Again, this raises the question of what difference it would have made if CreatiVasc or DiaxaMed had sent a formal notice terminating the Supply Agreement. The answer, according to Sealevel, is that it would not have changed anything. (Sealevel Depo. 53:11-20, "If it had happened in the normal course of business, then I agree that we would have no recourse.").

Likewise, Sealevel has put forth no evidence of any amount of lost profits to which it would otherwise have been entitled. Nor could it, as no unit has ever been developed for commercial sale, no unit has ever been sold, and Defendants have not benefitted in any way from Sealevel's contributions to the development of an actuator for the Gen 2 System. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) ("Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy."). As one court has stated, "[i]t is a well settled rule of law that all damages must be susceptible of ascertainment with a reasonable degree of certainty, and that *uncertain, contingent, or speculative damages* cannot be recovered in any action ex contractu or ex delicto." *United Merchants & Mfrs. v. S.C. Elec. & Gas Co.*, 113 F. Supp. 257, 261 (W.D.S.C.), aff'd, 208 F.2d 685 (4th Cir. 1953) (citation omitted) (emphasis added).

Accordingly, Sealevel's claim for damages under the Supply Agreement fails as a matter of law.

III. Sealevel's alternative equitable claims for promissory estoppel and quantum meruit are equally unavailing.

Lastly, Sealevel asserts, in the alternative, claims for relief under equitable theories of promissory estoppel and quantum meruit. The lack of evidence of any benefit conferred on Defendants, or injury on the part of Sealevel, are dispositive of these claims.

Quantum meruit is an equitable doctrine which allows recovery for unjust enrichment under a quasi-contract theory. *Columbia Wholesale Co. v. Scudder May N.V.,* 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). "The elements of a quantum meruit claim are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value." *Earthscapes Unlimited, Inc. v. Ulbrich,* 390 S.C. 609, 616-17, 703 S.E.2d 221, 225 (2010).

"The elements of promissory estoppel are (1) an unambiguous promise by the promisor; (2) reasonable reliance on the promise by the promisee; (3) reliance by the promisee was expected by and foreseeable to the promisor; and (4) injury caused to the promisee by his reasonable reliance." *N. Am. Rescue Prod., Inc. v. Richardson*, 769 S.E.2d 237, 241 (2015) (citing *Davis v. Greenwood Sch. Dist. 50,* 620 S.E.2d 65, 67 (2005)). "The applicability of the doctrine depends on whether the refusal to apply it 'would be virtually to sanction the perpetration of a fraud or would result in other injustice.'" *Citizens Bank v. Gregory's Warehouse, Inc.*, S.E.2d 316, 318 (S.C. Ct. App. 1988)). However, "the presence of either an ambiguous promise or an injury not arising out of the inconsistent disposition precludes promissory estoppel's application, though perceived inequities may exist." *Barnes v. Johnson*, 742 S.E.2d 6, 12 (Ct. App. 2013).

Defendants do not deny that Sealevel expended significant time and resources working to develop a Product that worked with the Gen 2 System, just as CreatiVasc did. Any benefit the other party would receive was always contingent on both parties being able to create a working product able to be sold for financial gain. That never happened, so the benefits of the agreement never materialized—for anybody. Under the circumstances of this case, and in the absence of evidence to the contrary, Defendants cannot be said to have been unjustly enriched at Sealevel's expense.

Sealevel also cannot seriously contend that the amounts represented in the June 13, 2017 invoice for $321,540.00 were incurred in reliance on Defendants' promises that they would continue to invest in developing the Gen 2 System using Sealevel's Product. For starters, the invoice did not contain any detailed breakdown of the services rendered – either by date, task, or quantity – making it impossible to tell when those services were rendered, for what purpose, and in what amount. Regardless, Sealevel knew, or should have known, as early as January 2017 – approximately the same time CreatiVasc themselves learned – that DiaxaMed would no longer be focusing resources on the development of the Gen 2 System or a hand-held actuator. As such, both the alleged inducement and alleged injury are too ambiguous for Sealevel to recover under a promissory estoppel theory.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court grant their motion for summary judgment.

Respectfully submitted,

s/ Luke M. Allen
Kirby D. Shealy III (S.C. Bar No. 11556)
Luke M. Allen (S.C. Bar No. 102645)
ADAMS AND REESE LLP
1221 Main Street, Suite 1200
Columbia, South Carolina 29201
Telephone: (803) 212-4966
kirby.shealy@arlaw.com
luke.allen@arlaw.com

Attorneys for Defendants

October 3, 2023.

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Sealevel Systems, Inc., Plaintiff, vs.	)	CASE NO: 2022-CP-23-01310
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., Defendants.	)	**DEFENDANTS' POST-TRIAL MOTIONS**

TO: WESLEY D. FEW, ESQUIRE, ATTORNEY FOR PLAINTIFF:

Defendants hereby move pursuant to Rules 50(b) and 59(a), SCRCP for the following relief:

ARGUMENTS

I. DEFENDANTS ARE ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT.

"[A] motion for JNOV under Rule 50(b), SCRCP is a renewal of a directed verdict motion."[1] "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict."[2]

"In ruling on motions for [JNOV], the Court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the party

[1] *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006).

[2] *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000); *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

opposing the motions . . . ."[3] However, viewing reasonable inferences in favor of the nonmoving party "does not authorize submission of speculative, theoretical, and hypothetical views to the jury."[4] "A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation."[5]

A. All of the evidence in the record indicates that the agreement between Sealevel Systems, Inc. and CreatiVasc is unenforceable.

The evidence introduced at trial was undisputed that in approximately 2007, Defendant CreatiVasc Medical, Inc. ("CreatiVasc") acquired the patent for and began developing the Hemoaccess Valve System (the "System"), an implanted medical device designed to address complications associated with hemodialysis. The System was intended to act as an accessory to an FDA-approved arteriovenous graft—a graft that connects an artery to a vein—which is prone to clotting. Because clotting often necessitates surgical intervention to remove blood clots, the System was designed to mitigate this issue. It featured two inflatable balloon valves positioned on either side of the graft to monitor and regulate blood flow, with the goal of significantly reducing the need for such surgeries.

Once implanted, the original, or "Gen 1," version of the System could only be activated by puncturing the skin with a needle and injecting saline into the balloons to inflate them and flush the graft. After creating a working prototype and conducting clinical trials for the Gen 1 System, CreatiVasc spent several years researching ways to improve the design to enable

---

[3] *Strange v. S.C. Dep't of Highways and Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 400 (1994); *see also Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002) (stating the court must determine whether a verdict for the opposing party "would be reasonably possible under the facts").

[4] *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997) (citing *Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997)).

[5] *Id.*

activation without the use of needles. One potential solution was a magnetically activated saline pump capable of inflating the balloons remotely using a hand-held actuator.

By early 2014, as CreatiVasc was developing a remote activation mechanism for incorporation into a "Gen 2" version of the System, it began searching for a manufacturer to help finalize the circuit board and other electronic components necessary for remote activation. In September 2014, Steve Johnson, then CEO of CreatiVasc, was introduced to Thomas O'Hanlan, Plaintiff Sealevel Systems, Inc.'s ("Sealevel") Engineering and Creative Director. Although the technology had not yet been fully developed, Sealevel committed to producing and manufacturing an external handheld actuator and internal electronics to work in tandem with magnetic sensors inside the System to control the implanted balloon valves. Both companies were eager to explore the potential of a remote actuator and agreed to collaborate on its development and integration.

On October 28, 2014, Sealevel and CreatiVasc entered into a Customer Supply Agreement ("Supply Agreement" or "Agreement"), under which Sealevel agreed to design and manufacture the motor control and valve monitor electronics (the "Product") for use in CreatiVasc's System. Section 1 of the Supply Agreement defined the "Scope" as follows:

> Sealevel agrees to design, manufacture, sell and deliver to [CreatiVasc] hardware and software (the "Product") used in the System's handheld actuator and implanted balloon pressure monitoring devices in accordance with the specifications set forth in Exhibit A, which is attached hereto and incorporated herein by reference (such specifications, the "Specifications"). Sealevel shall be responsible for procuring all materials associated with the manufacture of the Product, as well as assembling and testing the Product.

(Plaintiff's Exh. 4, § 3). Under the Supply Agreement, CreatiVasc also agreed that Sealevel would be the "exclusive supplier of the Product" to CreatiVasc once the Gen 2 System went to market, and that CreatiVasc would not "directly or indirectly, purchase or order the Product, or any other good substantially similar to the Product, from any person or entity other than Sealevel."

(Plaintiff's Exh. 4, § 1).

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.

As of the date the Agreement was executed, the "Specifications" identified as Exhibit A to the Agreement were still in development and did not yet exist. (Sealevel Depo. 36:8-14). In addition to the "Specifications," the Supply Agreement also incorporated by reference an Exhibit B ("Purchase Order"), Exhibit C ("Invoice"), and Exhibit D ("Quotation"), none of which existed at the time or were included in the Agreement. (Pl.'s Ex. 4). There was also no agreement on the price of the Product or the number of units of the Product that CreatiVasc had to purchase. Instead, the Supply Agreement contemplated that "the dates and quantities of the Product to be delivered and the current price for the Product" would be specified in separate Purchase Orders. As to the price, the Supply Agreement provided that the "price for the Product will be agreed upon in writing by the Parties and may not be changed except as agreed upon in writing by the Parties." (Pl.'s Ex. 4, § 3).

The elements required to form an enforceable contract are an offer, acceptance, and valuable consideration.[6] Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish an enforceable contract, the question becomes one of law.[7]

"In order for a contract to arise, there must be a meeting of the minds of the parties

[6] *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 581 S.E.2d 161, 166 (2003).
[7] *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C. 352, 362, 101 S.E. 838, 841 (1920).

involved with regard to all essential and material terms of the agreement."[8] "Thus, for a contract to be binding, material terms cannot be left for future agreement."[9] "In a contract for services[,] two essential terms are the scope of the work to be performed and the amount of compensation."[10]

Here, the Supply Agreement amounted to nothing more than a fluctuating framework in which the parties agreed to proceed in good faith to attempt to design, manufacture, and sell a product that did not yet exist, under terms to be determined in the future. The Agreement lacked essential terms, including a fixed price of the Product, a minimum purchase obligation for CreatiVasc, or concrete delivery deadlines.

Critically, while the Agreement's core purpose was for Sealevel to "design, manufacture, sell and deliver" a Product for use in the Gen 2 System, it failed to specify how the Product would be designed, manufactured, or sold—or even what, exactly, CreatiVasc would be purchasing beyond generic references to "hardware and software." Instead, the Supply Agreement deferred these crucial details to a nonexistent set of "Specifications" that were supposed to define the Product's design and manufacturing requirements. Similarly, a "Warranty" provision was intended to establish the "Sealevel Standards" for manufacturing the Product in compliance with those "Specifications." (Pl.'s Ex. 4, § 8). However, neither the "Specifications" nor the "Sealevel Standards" were ever agreed upon or incorporated into the Supply Agreement.

Moreover, fundamental commercial terms—including the price, quantities, delivery dates,

---

[8] *Hardaway Concrete Co., Inc. v. Hall Contracting Corp.*, 647 S.E.2d 488, 492 (S.C. Ct. App. 2007) (citing *Player v. Chandler*, 382 S.E.2d 891, 893 (S.C. 1989)); *see also Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007).

[9] *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) (citing *Aperm of S.C. v. Roof*, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986)).

[10] *W.E. Gilbert & Assocs. v. S.C. Nat. Bank,* 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985).

and payment terms—remained undefined. The Agreement left these issues to be addressed through future "Purchase Orders," "Invoices," "Quotations," and other written agreements that were never drafted, let alone agreed upon. In short, the Supply Agreement failed to establish a binding contractual framework, instead leaving all essential terms open to future negotiation.

The South Carolina Supreme Court's decision in *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 762 S.E.2d 696 (2014), is instructive. There, the City of Columbia entered into a "Memorandum of Understanding" with various developers to collaborate on the "design, development, construction and delivery of the Hotel in accordance with the terms of the Development Management Agreement to be finalized between the City or [non-profit corporation] and the Developer."[11] When the City later abandoned the project, the developers sued for breach of contract and equitable relief.

On appeal, the Supreme Court reversed the Court of Appeals' holding that a genuine issue of material fact existed as to whether the Memorandum of Understanding ("MOU") constituted a valid and enforceable contract. The Supreme Court held the MOU was too indefinite to be enforceable, noting it failed to specify key terms such as price, the actual design process, and the scope of duties, and that it merely contemplated future agreements.[12] The Supreme Court emphasized: "We cannot see how merely stating a forthcoming document will dictate the terms of the 'design, development, construction and delivery' does not plainly leave material terms undecided. The whole project *is* the design, development, construction, and delivery of the hotel."[13]

[11] *Id.* at 581, 762 S.E.2d at 702.
[12] *Id*. at 580-81, 762 S.E.2d at 702.
[13] *Id.*

Similarly, the Supply Agreement in this case purports to "represent the entire agreement between the Parties with respect to the purchase and sale of the Product." (Pl.'s Ex. 4, § 26). Yet, like the MOU in *Stevens*, it lacks a meeting of the minds on multiple material terms yet to be defined and provides no mechanism for determining them with certainty. In sum, the Supply Agreement merely obligated CreatiVasc, at some undefined future date and at an undetermined price, to purchase an unspecified number of components for a device that was yet to be successfully developed or sold. Under these circumstances, no enforceable contract was formed, and Defendants are entitled to judgment notwithstanding the verdict on Sealevel's claim for breach of contract as a matter of law.

B. Even if the Supply Agreement were enforceable, there is no evidence in the record that it was breached.

The evidence was undisputed that Sealevel never successfully developed a commercially viable product for integration with the System. Because the sole difference between the Gen 1 and Gen 2 Systems was the needleless function, the creation of the Gen 2 System was entirely dependent on the successful development of an external handheld device capable of coupling with the System's internal valve pump. Sealevel and CreatiVasc eventually designed a single prototype of such a device (called a "wand") that was intended to interact with the internal valve pump system using magnets and an internal sensor. Sealevel's proposal for making the device work was to install a remotely powered sensor inside the System that could send a signal to the external handheld device, which would relay information about the pressure in the balloon valves. However, CreatiVasc and Sealevel quickly discovered that any internal sensor would need to be saline-proof due to the System's use of saline in the balloon valves.

The undisputed testimony and documentary evidence established that developing a saline-proof magnetic sensor proved to be an insurmountable obstacle, effectively rendering the Gen 2

System unworkable.

It is also undisputed that no version of the Product—whether controlled by external wand or by needles—has ever been marketed or sold to anyone. While seemingly self-evident, it bears repeating: the only way CreatiVasc or any of its successors in interest[14] could have breached the Supply Agreement would have been to sell some version of the Product without purchasing the external wand from Sealevel. There is no evidence that such a transaction ever occurred. To the contrary, multiple witnesses confirmed that no such sale took place.

Under South Carolina law, "[t]he elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach."[15] A plaintiff bears the burden of proving each of these elements.[16] Here, there is a complete dearth of evidence establishing breach.

Sealevel's role as an "exclusive supplier" was always contingent on two critical conditions: (1) Sealevel creating a working Product that could be incorporated into the Gen 2 System, and (2) CreatiVasc actually being able to produce, market, and sell a commercially viable Gen 2 System. Furthermore, even if Sealevel had been able to create a Product that worked seamlessly with the Gen 2 System, nothing in the Supply Agreement *required* CreatiVasc to manufacture, market, and sell the System. Sealevel's own representative, Tom O'Hanlan, acknowledged this reality, testifying that the Supply Agreement imposed no obligation on CreatiVasc to purchase anything.

More importantly, no version of the System has ever been developed, marketed, or sold.

---

[14] It was undisputed at trial that the Brookhaven entities (Defendants Brookhaven Vascular, Inc. and Brookhaven Merger Corp. (collectively referred to as "Brookhaven")) are the successors-in-interest to CreatiVasc.

[15] *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009).

[16] *Maro v. Lewis*, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (Ct. App. 2010).

Nor has CreatiVasc or its successors engaged with any company other than Sealevel to develop or purchase a handheld actuator. O'Hanlan further conceded on the witness stand that Sealevel has no evidence that the Product has ever been sold to anyone.

Sealevel also asserted that CreatiVasc/Brookhaven breached the Confidentiality provision in the Supply Agreement. However, it introduced no evidence to substantiate this contention. During Sealevel's case-in-chief, its counsel asked Steve Johnson what happened to his laptop and other storage media after his departure from Defendant DiaxaMed, LLC ("DiaxaMed"), the company that employed him for 90 days following DiaxaMed's purchase of CreatiVasc/Brookhaven's assets. Johnson testified that he was required to turn these items over to DiaxaMed. However, there was no testimony about what those devices contained, nor was there any other testimony or evidence indicating that CreatiVasc/Brookhaven disclosed Sealevel's confidential information to anyone. The record is, therefore, entirely devoid of evidence in support of Sealevel's claim.

C. Sealevel has no evidence of damages.

The only evidence Sealevel presented at trial regarding damages was a single invoice for $321,540.00, purportedly representing engineering services rendered as of June 13, 2017. (Pl.'s Ex. 26). Despite its admission into evidence, Tom O'Hanlan's undisputed testimony confirmed that the Supply Agreement contained no provision permitting Sealevel to bill CreatiVasc for research and development expenses. The jury's verdict against CreatiVasc and the Brookhaven entities for breach of contract matched exactly the amount of Sealevel's invoice, underscoring the absence of any other evidence of damages.

The Supply Agreement does not contain a liquidated damages provision or any clause assigning a specific monetary value to a breach. (Pl.'s Ex. 4). Instead, Sealevel's sole contractual remedy in the event of a breach by CreatiVasc is that CreatiVasc must "take delivery of and pay the full price for the remainder of open Purchase Orders (if any)." (Pl.'s Ex. 4, § 12(b)). Similarly, if CreatiVasc were to terminate the Agreement for convenience, it would be required to "take delivery of and pay the full price for the remainder of open Purchase Orders (if any)." (Pl.'s Ex. 4, § 12(b)). Given that no such open Purchase Orders exist, Selevel's damages under the express terms of the contract amount to zero.

Under South Carolina law, "[t[he general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach."[17] "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."[18] "The measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach."[19]

While lost profits may, in some cases, serve as a measure of damages for breach of contract, they must be established with reasonable certainty. Recovery cannot be based on profits which are conjectural or speculative, though proof with mathematical certainty is not required.[20] Here, however, Sealevel introduced no evidence of lost profits. In fact, it was impossible to do so—no unit of the Gen 2 System was ever developed for commercial sale, no unit was ever sold, and CreatiVasc/Brookhaven never derived any benefit from Sealevel's work on the external actuator.[21] As courts have long recognized, "[i]t is a well settled rule of law that all damages must

---

[17] *Maro v. Lewis*, 389 S.C. 216, 223, 697 S.E.2d 684, 688 (Ct. App. 2010) (quoting Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)).

[18] *Id.* (quoting *Minter v. GOCT, Inc.,* 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct.App.1996).

[19] *S.C. Fin. Corp. of Anderson v. W. Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960).

[20] *Minter v. GOCT, Inc.*, 473 S.E.2d 67 (S.C. App. 1996).

[21] *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010)

be susceptible of ascertainment with a reasonable degree of certainty, and that uncertain, contingent, or speculative damages cannot be recovered in any action ex contractu or ex delicto."[22]

O'Hanlan himself admitted that Sealevel's June 13, 2017 invoice was not a genuine demand for payment but rather an attempt to get CreatiVasc/Brookhaven's attention. The invoice—admitted over Defendants' objection—was nothing more than a retrospective tally of engineering and development time that Sealevel devoted to the project. However, it is undisputed that Sealevel would have incurred these same developmental costs documented on its invoice regardless of whether the project was successful or not. The evidence was undisputed that *both* Sealevel and CreatiVasc/Brookhaven expended hundreds of hours trying to develop a product that worked: Sealevel focused on the external actuator component and the internal sensors integration, while CreatiVasc/Brookahaven worked on the internal valves, pump, and balloons.

The Court indicated that Sealevel's invoice was some evidence of its "consequential" or "incidental" damages, but this is legally incorrect. Section 36-2-715 of the South Carolina code defines "incidental damages" as:

> Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

Sealevel put no evidence of incidental damages into the record, and there was no charge to the jury regarding such damages.

("Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy.").

[22] *United Merchants & Mfrs. v. S.C. Elec. & Gas Co.*, 113 F. Supp. 257, 261 (W.D.S.C.), *aff'd*, 208 F.2d 685 (4th Cir. 1953) (citation omitted) (emphasis added).

Similarly, section 36-2-715 defines "consequential damages" as:

> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
> (b) injury to person or property proximately resulting from any breach of warranty.

There is no evidence of injury to person or property in the record before the Court. Subsection (a) of the definition above has been explained by South Carolina courts as follows: "Consequential damages occasioned by the breach of a contract may be recovered where such damages may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made."[23] The only consequential damages contemplated by the parties were lost profits, as Tom O'Hanlan candidly admitted:

> Q: But you'd agree with me that [Pl.'s Ex. 4] [doesn't] contain any provisions that require CreatiVasc or any – any entity . . . standing in CreatiVasc's shoes to pay Sealevel for its engineering time.
>
> A: I would agree with that as stated, but the contract does provide for the exclusive rights to manufacture the product. So that's how a lot of companies make their money is **you forego the front-end cost in exchange for the manufacturing rights in anticipation that it's going to be a high volume, a profitable venture.**

(Depo. of Sealevel Systems, Inc., p. 51, ll. 11-23).[24]

Accordingly, Sealevel's damages claim under the Supply Agreement fails as a matter of law, and the Court should have directed a verdict in favor of the Defendants.

D. Plaintiff's tortious interference with a contract claim against DiaxaMed lacks evidentiary support.

Plaintiff's claim for tortious interference with contract against DiaxaMed fails for multiple reasons, all of which render the claim legally unsustainable. To succeed in a tortious interference

---

[23] *Hutson v. Continental Assurance Company*, 269 S.C. 322, 332, 237 S.E.2d 375, 380 (1977), *overruled on other grounds*, *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993).

[24] Tom O'Hanlan was impeached on the stand with this testimony.

claim, a plaintiff must establish: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages.[25] "[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties."[26]

In December 2016, Brian McMurray formed DiaxaMed for the purpose of purchasing the assets and intellectual property of Brookhaven Vascular, Inc. (CreatiVasc's successor-in-interest). (McMurray Depo. 31:3-13, 32:9-25; Pl.'s Ex. 14). However, DiaxaMed did not take an assignment or otherwise assume Brookhaven Vascular's responsibilities under the Supply Agreement between CreatiVasc/Brookhaven and Sealevel. The Supply Agreement remained with Brookhaven Vascular, Inc., which acknowledged at trial that the Agreement had never been terminated.

Upon acquiring CreatiVasc's assets, DiaxaMed immediately shifted its focus to refining the Gen 1 version of the Hemoaccess Valve System—*a design that predated Sealevel's involvement* and relied on a needle and subcutaneous port to activate the balloon valves rather than a remote actuator. (McMurray Depo. 31:3-13, 34:9-17, 34:23-35:15, 51:1-16).

The evidence at trial was uncontradicted: DiaxaMed is not currently using and has never used or attempted to use any technology developed or designed by Sealevel in any of its work on the Hemoaccess Valve System. (McMurray Depo. 34:23 – 35:4). This is because DiaxaMed does not have and has never had any interest in using a magnetic wand or handheld actuator, or any other remote activation device similar to Sealevel's technology, in its development of the

---

25 *Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC*, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012) (quoting *Camp v. Springs Mort. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993)).

26 *Id.* (alteration in original) (quoting *Threlkeld v. Christoph*, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984)).

Hemoaccess Valve System. (McMurray Depo. 34:23 – 35:4, 49:5-17, 50:22 – 51:16).

A claim for tortious interference presupposes the existence of a valid, enforceable contract. [27] "The elements of a cause of action for tortious interference with a contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages."[28] Courts have emphasized, "[a]n essential element to the cause of action for tortious interference with contractual relations requires the intentional procurement of the contract's breach. Where there is no breach of the contract, there can be no recovery."[29]

Here, the Supply Agreement remains intact but unenforceable, has never been breached, and Sealevel has suffered no damages Absent evidence of the existence of an enforceable contract or its breach, Sealevel's tortious interference with a contract claim fails as a matter of law. Moreover, as South Carolina courts have recognized, "[t]he nexus between the two causes of action [breach of contract and tortious interference with contract] is the breach of the contract, for . . . breach of the contract is an element of both causes of action. This is the element from which the injured party's actual damages flow on both the contract and tort claims."[30] Because no enforceable contract was breached, Sealevel's tortious interference claim is legally unsustainable, even before analyzing the specific elements of the tort.

However, even if one looks past that fundamental infirmity, Sealevel's claim still fails due to the absence of any evidence supporting the third and fourth elements: intentional procurement of a breach and lack of justification.

---

[27] *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993)

[28] *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993).

[29] *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007).

[30] *Collins Music Co. v. Smith,* 332 S.C. 145, 147, 503 S.E.2d 481, 481 (Ct. App. 1998) (quoting *Ross v. Holton,* 640 S.W.2d 166, 173 (Mo. Ct. App. 1982)).

In *Sea Island Food Grp., LLC v. Yaschik Dev. Co., Inc.*, 433 S.C. 278, 857 S.E.2d 902, (Ct. App. 2021), the Court of Appeals cited favorably federal authorities examining the third and fourth elements of the tort.[31] The Fourth Circuit has noted that "[w]hat constitutes improper means [of interference] may be somewhat difficult to distill as a rule of law . . . ."[32] Importantly, "[i]nterference with a contract is justified when it is motivated by legitimate business purposes."[33] In fact, "there can be no finding of intentional interference with . . . contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party."[34] Examples of improper methods include slander, sabotage, violence, fraud, and misrepresentation or deceit.[35]

Here, the only evidence introduced at trial was that DiaxaMed merely purchased certain assets from Brookhaven Vascular after Brookhaven had exhausted its operating capital and that DiaxaMed did not take an assignment of Brookhaven Vascular's rights under the Supply Agreement. (McMurray Depo. 49:5-17; Pl.'s Ex. 14). Purchasing assets in an arm's-length transaction is a legitimate business purpose, and this conduct alone cannot sustain a cause of action for tortious interference with a contract. There is absolutely no evidence of improper means, wrongful conduct, or an intent to induce a breach of the Supply Agreement.

Therefore, Sealevel's claim for tortious interference with contract fails for multiple independent reason: (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

[31] 433 S.C. 278, 287, 857 S.E.2d 902, 906.

[32] *Waldrep Bros. Beauty Supply v. Wynn Beauty Supply Co.*, 992 F.2d 59, 63 (4th Cir. 1993).

[33] *Gailliard v. Fleet Mortg. Corp.*, 880 F. Supp. 1085, 1089 (D.S.C. 1995).

[34] *Eldeco*, at 482, 642 S.E.2d at 732 (quoting *Southern Contracting, Inc. v. H.C. Brown Constr. Co.*, 317 S.C. 95, 102, 450 S.E.2d 602, 606 (Ct. App. 1994)).

[35] *See Waldrep Bros. Beauty Supply*, 992 F.2d at 63–64.

conduct—purchasing assets—is a legitimate business activity that does not constitute wrongful interference. Accordingly, the Court should enter a judgment in favor of DiaxaMed.

II. DEFENDANTS ARE ENTITLED TO A NEW TRIAL UNDER THE THIRTEENTH JUROR DOCTRINE.

In the alternative, Defendants seek a new trial under the thirteenth juror doctrine. "The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts."[36] "The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror 'hangs' the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome."[37]

A new trial is appropriate where the evidence does not justify the verdict and "justice has not prevailed."[38] "The trial judge, sitting as the thirteenth juror[, is] charged with the duty of seeing that justice is done [and] has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case."[39] In making such a determination, the Court is not required to weigh the evidence in the light most favorable to the opposing party.[40]

The evidence in the record establishes that CreatiVasc and Sealevel both assumed certain risks when they entered into the Supply Agreement. First, they assumed the risk that the device they committed to develop together would not work as they envisioned. Second, they assumed the risk that the device would never receive approval from the Food and Drug Administration to

[36] *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) (citation omitted).
[37] *Id.*
[38] *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 722 (Ct. App. 1996) (citation omitted).
[39] *Id.* at 403, 477 S.E.2d at 722 (citation omitted).
[40] *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003).

be implanted in a human body. Third, they assumed the risk that they would run out of funding before they were able to fully develop the product.

The evidence in the record showed unequivocally that the risks the parties assumed all came to fruition. But the evidence did not establish Sealevel's claims against either Creativasc/Brookhaven or DiaxaMed. And it certainly did not provide the appropriate basis for an award of actual, much less punitive, damages against anyone. The result in this case can only be attributed to jury confusion, or passion, caprice, prejudice, or some motive that falls outside of the evidentiary record. A new trial is warranted.

III. DEFENDANTS ARE ENTITLED TO A NEW TRIAL ABSOLUTE.

In the alternative, Defendants seek a new trial absolute pursuant to Rule 59, SCRCP. "A new trial may be granted . . . on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State."[41] A new trial absolute is appropriate "if the verdict is inconsistent and reflects jury[] confusion."[42]

Alternatively, a trial court "may grant a new trial absolute on the ground that the verdict is excessive or inadequate."[43] "When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice."[44]

---

[41] Rule 59(a), SCRCP.

[42] *Vinson*, 324 S.C. at 404, 477 S.E.2d at 723 (citing *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995)).

[43] *Brinkley v. S.C. Dep't of Corr.,* 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009) (further citations omitted).

[44] *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 26, 602 S.E.2d 772, 781 (2004).

“A new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the ‘result of caprice, passion, prejudice, partiality, corruption, or other improper motives.’”[45] The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion.[46]

The Court should order a new trial absolute because the jury’s verdict is objectively excessive, unsupported by the evidence, and the clear result of undue prejudice or passion. It should first be noted that the punitive damages award violates the statutory limits set forth in S.C. Code Ann. § 15-32-530(A) (Supp. 2024), which provides that, absent the exceptions in subsections (B) and (C), “an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars.” As none of the exceptions in subsections (B) and (C) apply, the punitive damages award must, at a minimum, be reduced to three times the actual damages award.[47]

Moreover, the jury’s final note before rendering its verdict demonstrates that its decision-making process was improperly influenced by extraneous considerations. The jury inquired whether it could award Sealevel attorney’s fees and other costs, none of which were part of the record. Upon being instructed that it could only base its verdict on the evidence presented, the jury nevertheless returned an actual damages award against DiaxaMed that lacks any evidentiary foundation and then imposed a punitive damages award that appears to have been motivated by

---

[45] *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000) (citations omitted); *see also Welch v. Epstein,* 342 S.C. at 302, 536 S.E.2d at 420.

[46] *Wright v. Craft,* 372 S.C. 1, 35-36, 640 S.E.2d 486, 504-05 (Ct. App. 2006).

[47] Assuming the Court is inclined to agree with Defendants’ analysis of the actual damages award, the cap on punitive damages should be $964,620.00. Otherwise, the cap should be $1,200,000.00.

animus rather than a reasoned evaluation of the facts.

Sealevel's counsel further inflamed the jury by appealing to emotion in closing argument, referring to DiaxaMed as a "corporate raider" seeking to exploit CreatiVasc/Brookhaven's financial distress. Counsel also referred to the ATEX Customer Supply Agreement and documents associated with Steve Johnson's hiring and departure from DiaxaMed (Pl.'s Exs. 15, 16, 18), none of which bore relevance to the issues in the case and all of which were admitted over Defendants' objections. In reality, the evidence showed only that DiaxaMed sought to continue the research and development that CreatiVasc/Brookhaven had been performing at the time of the asset purchase. Despite significant financial investment, DiaxaMed has yet to produce a viable product.

"In order to receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights."[48] "A conscious failure to exercise due care constitutes willfulness."[49] "The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton."[50] Here, however, no such inference is supported by the record. The absence of evidence demonstrating reckless, willful, or wanton conduct on DiaxaMed's part mandates a new trial.

IV. DIAXAMED IS ENTITLED TO A NEW TRIAL *NISI REMITTITUR*.

In the alternative, DiaxaMed requests a new trial *nisi remittitur*. "The trial judge alone has the power to grant a new trial *nisi*," whether absolute or *nisi remittitur* (or *additur*), "when [the

[48] *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000) (citing S.C. Code Ann. § 15-33-135 (Supp. 1999); *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996).

[49] *Id.* (citations omitted).

[50] *Id.* (citations omitted).

court] finds the amount of the verdict to be merely inadequate or excessive."[51] Such a ruling does not require a finding that the verdict was motivated by considerations of passion, caprice or prejudice. Instead, the trial judge must evaluate whether the verdict is excessive in light of the evidence presented.

A motion for new trial *nisi remittitur* asks the trial court to reduce the verdict because the verdict is merely excessive.[52] Moreover, the Court has discretion to reduce the jury's punitive damages award through an order of *nisi remittitur* as to punitive damages.[53] In *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991), the South Carolina Supreme Court articulated the framework for reviewing punitive damages, instructing trial courts to consider:

> (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) . . . "other factors" deemed appropriate.[54]

"Upon completing its review, dedicated to the postulate that no award be grossly disproportionate to the severity of the offense, the trial court shall set forth its findings on the record."[55]

Sealevel failed to prove any damages beyond those claimed as a direct consequence of the alleged breach of contract. The relationship between damages in a breach of contract claim and those recoverable in a tortious interference with a contract claim is subtle. As explained in *Collins Music Co., Inc. v. Smith*, 332 S.C. 145, 503 S.E.2d 481 (1998), while these causes of action are

---

[51] *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993) (citation omitted).

[52] *James v. Horace Mann Ins. Co.,* 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006).

[53] *See Gamble v. Stevenson*, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) ("[A]though there is no precise formula for measuring a punitive damages award, if the trial judge 'is convinced that the amount awarded is overliberal, he has the authority and corresponding *duty* to reduce the verdict by order *nisi*.'" (quoting *Hicks v. Herring*, 246 S.C. 429, 436, 144 S.E.2d 151, 154 (1965))).

[54] *Id.* at 111-12, 406 S.E.2d at 354.

[55] *Id.* at 112, 406 S.E.2d at 354.

distinct, they share a common element—breach of contract—from which actual damages flow in both claims.[56] However, the measure of damages differs:

> Under the contract claim the injured party can recover actual damages for the direct and natural consequences of the breach, or for damages that were within the contemplation of the contracting parties. The damages recoverable for intentional interference are not measured by contract rules. The injured party can recover from the tortfeasor: the pecuniary loss of the benefits of the contract; consequential losses for which the interference is the legal cause; and, emotional distress or actual harm to reputation if they are reasonably to be expected to result from the interference. Thus, the actual damages under the contract claim and tort claim will be coextensive only with respect to the lost benefits of the contract which were a direct and natural consequence of the breach, or within the contemplation of the contracting parties . . . .[57]

Nevertheless, a plaintiff may not receive a double recovery for overlapping damages under both claims.[58]

As in *Collins*, Sealevel did not prove any damages beyond those allegedly resulting from the alleged breach of contract. Therefore, the jury's actual damages award against DiaxaMed should be amended and consolidated with the award against CreatiVasc/Brookhaven rather than standing as a separate award in addition to the damages awarded under the contract claim. There was no evidentiary basis for an award of $400,000 against DiaxaMed. If the tortious interference claim is allowed to stand, Diaxamed and CreatiVasc/Brookhaven should be held jointly and severally liable for $321,540.00 rather than facing duplicative damages.

The factors in this case also overwhelmingly support reducing or eliminating the punitive damages award through an order of *nisi remittitur*. First, the punitive damages award violates the statutory limits imposed by S.C. Code Ann. § 15-32-530(A) (Supp. 2024). None of the exceptions in subsections (B) and (C) of the statute apply, meaning that the punitive damages award must be

---

[56] 332 S.C. 145, 147-48, 503 S.E.2d 481, 482 (citation omitted).
[57] *Id.* (citation omitted).
[58] Id. (citation omitted).

reduced to no more than three times the actual damages award.[59]

However, that issue is secondary to the more fundamental problem: the record contains no evidence—let alone clear and convincing evidence—demonstrating that DiaxaMed acted willfully, wantonly, or recklessly in this case. Without such evidence, punitive damages are not legally justified. Accordingly, the punitive damages award should be struck from any judgment against DiaxaMed, or the Court should order a new trial *nisi remittitur*.

V. PLAINTIFF'S PROMISSORY ESTOPPEL CLAIM SHOULD BE DISMISSED.

Lastly, the Court should dismiss Sealevel's promissory estoppel claim against Defendants.[60] As the Court will recall, it held Sealevel's promissory estoppel claim in abeyance. The parties agree that promissory estoppel is an equitable claim, which is decided by the Court rather than the jury. Because the evidence presented at trial does not support the elements of promissory estoppel under South Carolina law, this claim should be dismissed.

In South Carolina, a party asserting promissory estoppel must establish the following elements: "(1) an unambiguous promise by the promisor; (2) reasonable reliance on the promise by the promisee; (3) reliance by the promisee was expected by and foreseeable to the promisor; and (4) injury caused to the promisee by his reasonable reliance."[61] "The doctrine is designed for the rare instance when equity's aid is necessary to prevent the rank injustice that would ensue if a party could avoid being held to a clear promise he made on which the other party foreseeably and

[59] Assuming the Court is inclined to agree with Defendants' analysis of the actual damages award, the cap on punitive damages should be $964,620.00. Otherwise, the cap should be $1,200,000.00.

[60] Plaintiff alleged this cause of action against all Defendants, but it would make no sense for it to apply to DiaxaMed, which admittedly had no interaction with Sealevel whatsoever.

[61] *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 379–80, 769 S.E.2d 237, 241 (2015) (citation omitted).

reasonably relied to his detriment."[62]

"Although promissory estoppel is a flexible doctrine that aims to achieve equitable results, it, like all creatures of equity, has limitations."[63] "To this end, and particularly because promissory estoppel applies without a contract, the promise to be enforced must be unambiguous with clearly articulated, definite terms, while the sustained injury must result from an inconsistent disposition by the promisor."[64] "Therefore, the presence of either an ambiguous promise or an injury not arising out of the inconsistent disposition precludes promissory estoppel's application, though perceived inequities may exist."[65]

Sealevel's promissory estoppel claim fails because the evidence does not satisfy the required elements. First, Sealevel has not identified any specific, definite, and unambiguous promise made by CreatiVasc upon which it allegedly relied. The mere existence of discussions or negotiations does not constitute a legally enforceable promise under promissory estoppel.

Second, even assuming Sealevel subjectively relied on any representations by CreatiVasc, such reliance was not reasonable. The parties were engaged in commercial dealings where contractual terms were subject to negotiation, and Sealevel, a sophisticated business entity, had the opportunity to seek contractual protections rather than rely on alleged verbal assurances or undecided terms to be determined later.

Third, there is no evidence that CreatiVasc made any representations with the expectation that Sealevel would act in reliance on them to its detriment. To the extent that Sealevel made business decisions that resulted in financial consequences, such decisions were based on its own

---

[62] *Cruz v. City of Columbia*, 443 S.C. 201, 205, 904 S.E.2d 451, 453 (2024)

[63] *Barnes v. Johnson*, 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct. App. 2013), *abrogated on other grounds by Cruz*, 443 S.C. 201, 904 S.E.2d 451.

[64] *Id.* at 470, 742 S.E.2d at 11.

[65] *Id.* at 470, 742 S.E.2d at 11-12.

business judgment rather than any binding commitment by CreatiVasc.

Lastly, Sealevel has not demonstrated that it suffered a specific injury as a direct result of its reliance on a promise by CreatiVasc. Any losses it claims to have incurred stem from its own independent decisions to assume business risks rather than from an enforceable promise giving rise to promissory estoppel. Because Sealevel has failed to establish the necessary elements of promissory estoppel, this equitable claim should be dismissed. The doctrine cannot be used to circumvent contractual requirements or impose obligations where none exist. Accordingly, the Court should dismiss Sealevel's claim of promissory estoppel.

CONCLUSION

For the foregoing reasons, Defendants are entitled to judgment notwithstanding the verdict pursuant to Rule 50(b), SCRCP. In the alternative, Defendants are entitled to a new trial under the thirteenth juror doctrine, a new trial under Rule 59(a), SCRCP, or, at a minimum, a new trial *nisi remittitur*. Additionally, Sealevel's promissory estoppel claim should be dismissed.

ADAMS AND REESE LLP

s/*Kirby D. Shealy III*
Kirby D. Shealy III (S.C. Bar # 11556)
1221 Main Street, Suite 1200
Columbia, SC 29201
Telephone: (803) 254-4190
Facsimile: (803) 779-4749
kirby.shealy@arlaw.com

Attorney for Defendants

February 24, 2025.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	13TH JUDICIAL CIRCUIT
Sealevel Systems, Inc.,	)	
Plaintiff,	)	Case No.: 2022-CP-23-01310
vs.	)	
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., ,	)	**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' POST-TRIAL MOTIONS (FILED FEB. 24, 2025)**
Defendants.	)	

Plaintiff Sealevel Systems, Inc. ("Plaintiff") herein respectfully files its opposition to the Post-Trial Motions of Defendants CreatiVasc Medical, Inc. ("Creativasc"), Diaxamed, LLC ("Diaxamed"), successor in interest to Brookhaven Vascular, Inc. ("Brookhaven Vascular"), successor in interest to Brookhaven Merger Corp. ("Brookhaven Merger") successor in interest to CreatiVasc Medical, Inc. (hereafter collectively "Defendants"), filed Feb. 24, 2025.

For the reasons set forth herein, Defendants' Motion should be denied in its entirety.

STATEMENT OF THE CASE

Plaintiff Sealevel Systems, Inc. ("Plaintiff") and Defendant Creativasc Medical, Inc. entered into a Customer Supply Agreement on Oct. 28, 2014 ("CSA") (Pltf Tr. Ex. 4, 5 and 7). The CSA addressed further improvements and continued development of the Hemoaccess Valve System®, to provide patients with dialysis treatments. On Feb. 5, 2015, the Brookhaven Defendants took over Creativasc, in a transaction valued at $23,957,996.00. (Pltf Tr. Ex. 29). The Creativasc CEO, Mr. Johnson, and other employees remained employed. Documents of

Merger executed on Feb. 5, 2015, and filed with the S.C. Secretary of State stated 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 CSA. (*Id.*). Thirteen days later, on Feb. 18, 2015, ATEX Technologies entered into its Supply Agreement with Creativasc. (Pltf Tr. Ex. 5).

On Nov. 4, 2015, Creativasc hosted a Technology Summit in Greenville, SC, attended by ATEX and Sealevel representatives. (Pltf Tr. Exs. 8 and 9). Defendant Diaxamed and ATEX are each owned by Brian McMurray. When Brookhaven merged into / took over Creativasc in Feb. 2015, McMurray became a Brookhaven board advisor. From 2014, and throughout 2015 and 2016, Sealevel's engineers contributed a minimum of 2,386 hours to the project. (Pltf Tr. Ex. 26). In Dec. 2016, McMurray formed Diaxamed to take over Creativasc and Brookhaven. (Pltf Tr. Exs. 8 and 9). Diaxamed structured the acquisition such to take all assets and liabilities of Creativasc, except the CSA, for which it claimed it had no knowledge. (Pltf Tr. Ex. 14).

In 2017, representatives of the former Creativasc went dark on Sealevel. Frustrated, Sealevel inquired continuously about the status of the CSA. (Pltf Tr. Ex. 26). Unknown to Sealevel and not disclosed by the Creativasc CEO, Mr. Johnson, McMurray terminated him on March 30, 2017, and reminded him of his "continuing obligations," (i.e., non-disparagement) and "restrictions on [his] post-employment activities." (Pltf Tr. Ex. 16). Representatives of Defendants remained silent and / or evasive as to what had happened to Creativasc, asserting in June 2017 no knowledge of the CSA, and even asked to be provided with a copy of the same. (Pltf Tr. Ex. 21). At trial, Defendants acknowledged the CSA and admitted it had never been terminated, but later argued it was unenforceable.

Upon taking over Creativasc, on Jan. 6, 2017, Diaxamed required the Creativasc CEO to sign its Asset Protection Agreement, which included a non-disparagement[1] provision. (Pltf Tr. Ex. 16). At trial, in closing arguments, Defendants alleged their attorneys' clever structuring of the buyout of Creativasc by Diaxamed created a "heads-we-win, tails-you-lose" situation and further that since the transaction was "legal," they were not subject to liability to Sealevel. Defendants denied knowing the CSA would inevitably be breached by Diaxamed's shutting down of Creativasc. (Pltf Tr. Ex. 17).

In his email to Sealevel dated Jan. 12, 2017 (Ex. 17), Creativasc's former CEO, Mr. Johnson was not aware of any plans of Diaxamed to drop the ongoing development relationship with Sealevel under the CSA. Despite the email communications and other efforts within Creativasc dating back to 2015 (Pltf Tr. Exs. 8 and 9), as well as the 68-page merger document filed with the S.C. Secretary of State (Pltf Tr. Ex. 29), and testimony of Steve Johnson, John Feltman and Brian McMurray of their familiarity with Sealevel and / or Tom O'Hanlan, McMurray and others also testified they had little to no knowledge of the existence of Sealevel or the CSA.

[1] Plaintiffs did not even receive a copy of this non-disparagement agreement / provision in discovery prior to Mr. Johnson's deposition. This was because he was in fear that answering deposition questions, for example about his non-privileged communications, would somehow violate the non-disparagement provision. Thus, Diaxamed got exactly what it wanted, namely to shush and scare its former employees in to not disclosing facts relevant to the case, even when under oath for a deposition! Johnson testified he was prohibited from disparaging: "John Feltman, Brian McMurray, I would assume anybody that's on the board of what was Brookhaven." (Johnson Depo., Page 113, lines 9-13). Sealevel acknowledges the preceding deposition testimony is not in the record in this case, but is relevant to show Diaxamed's efforts to shush employees and not communicate with Sealevel. What is in the record related to this line of facts is that Johnson never told Sealevel that Diaxamed was dropping Sealevel, or that the CSA was the only asset of Creativasc not included in the Dec. 30, 2016 Contribution and Assignment Agreements, Plaintiff's Trial Exs. 15 and 16.

During the conference on the record on jury instructions, Diaxamed took the position it had not assumed any obligations to Sealevel, and therefore, could not be liable for breach of contract to Sealevel. Accordingly, the case went to the jury on Plaintiff's claims for breach of contract against the Creativasc and Brookhaven entities, and intentional interference with contract by Diaxamed. The jury awarded (i) $321,540.00 in breach of contract damages versus Defendants Creativasc Medical and Brookhaven Vascular, (ii) $400,000.00 in damages against Diaxamed for intentional interference with contract, and (iii) $2,500,000.00 in punitive damages against Diaxamed.

STANDARD OF REVIEW

A motion for **judgment notwithstanding the verdict ("JNOV")** stems from the earlier directed verdict motion, which counsel for Defendants made at both the close of the Plaintiff's case and the close of all testimony. *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 634, 529 S.E.2d 758, 761 at fn.3 (Ct. App. 2000). This Court can set the verdict aside and enter judgment "in accordance with [Defendant's] motion to for a directed verdict…" *Id.* (quoting Rule 50(b), SCRCP).

When considering a **new trial absolute**, this Court has discretion to determine if the damages awarded were appropriate. *Encore Tech Grp., LLC v. Keone Trask & Clear Touch Interactive, Inc.*, 436 S.C. 289, 304, 871 S.E.2d 608, 616-17 (Ct. App. 2021) (stating, "[w]e defer to the jury's determination of damages, and we review the decision to grant or deny a new trial by asking whether the circuit court abused its discretion."). "The circuit court may grant a new trial based on damages 'only when the verdict is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.'" *Id.* (quoting *Burke v. AnMed Health*, 393 S.C.

48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011) (quoting *Becker v. Wal-Mart Stores, Inc.*, 529 S.E.2d at 761)).

The primary differentiating factor in these various new trial doctrines is that the Court's discretion under the **13th Juror Doctrine** does not require the evidence to be viewed in the light most favorable to the non-moving party. "The trial court's discretion to grant or deny a new trial as the thirteenth juror is very broad. 'As has often been said, the trial judge is the thirteenth juror, possessing the veto power to the Nth degree …'" *Burke v. AnMed Health*, 710 S.E.2d at 88 (quoting *Worrell v. S.C. Power Co.*, 186 S.C. 306, 313-14, 195 S.E. 638, 641 (1938)); *see also* *Nestler v. Fields*, 426 S.C. 34, 41, 824 S.E.2d 461, 465 (Ct. App. 2019) (stating, "[f]or the same reasons, we affirm the trial court's denial of Nestler's motion for a new trial under the thirteenth juror doctrine.").

"[A] motion for JNOV under Rule 50(b), SCRCP is a renewal of a directed verdict motion. *Wright v. Craft*, 640 S.E.2d 486, 496, 372 S.C. 1, 20 (Ct. App. 2006) (quoting *Glover v. N.C. Mut. Life Ins. Co.*, 295 S.C. 251, 256, 368 S.E.2d 68, 72 (Ct. App. 1988)). "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000); *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). "The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision." *Welch*, 342 S.C. 279, 300 (quoting *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); and *Hunter v. Staples*, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999). "In ruling on motions for directed verdict and JNOV, 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 party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 445 S.E.2d 439, 440, 314 S.C. 427, 429-430 (1994) (quoting *Vacation Time of Hilton Head Inc. v. Lighthouse Realty, Inc.*, 286 S.C. 261, 332 S.E.2d 781 (Ct. App. 1985)).

"In essence, [the Court] must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." *Harvey v. Strickland*, 566 S.E.2d 529, 532, 350 S.C. 303, 309 (2002) (quoting *Bultman v. Barber*, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981)). "If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." *Id.* (quoting *Quesinberry v. Rouppasong*, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998)). "However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997) (citing *Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997)). "If more than one reasonable inference can be drawn from the evidence, the court must submit the case to the jury." *Id.* (quoting *Bragg v. Hi-Ranger, Inc*. 319 S.C. 531, 534, 462 S.E.2d 321, 323 (Ct. App. 1995)). "A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation." *Id.*

ARGUMENT

Defendants' Motion sets forth arguments in five different parts, as follows:

(I) Defendants are Entitled to Judgment Notwithstanding the Verdict, because:

a. The CSA is unenforceable, at pp. 2-7;

b. no evidence the CSA was breached, at pp. 7-9;

c. no evidence of damages, at pp. 9-11; and

d. no evidence of tortious interference by Diaxamed, at pp. 12-16;

(II) Defendants are Entitled to a New Trial under 13th Juror Doctrine, at pp. 16-17;

(III) Defendants are Entitled to a New Trial Absolute, at pp. 17-19;

(IV) Defendants are Entitled to a New Trial *Nisi Remittitur*, at pp. 19-22; and

(V) Plaintiff's Promissory Estoppel Claim Should be Dismissed.

(Id.).

I. Defendants' JNOV Arguments A-D

Defendants' Motion at pp. 2 to 7 argues the subject **contract (i.e, Customer Supply Agreement, Pltf. Trial Ex. 1) was unenforceable**. (*Id.* at I(A), at pp. 2-7). In support of this position, Defendants on page 5 at footnote 9, rely upon *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) (citing *Aperm of S.C. v. Roof*, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986)), for the proposition that, "for a contract to be binding, material terms cannot be left for future agreement." The facts of *Stevens & Wilkinson*, bear little to no resemblance to the facts of this case, which involved a contract for the development and exclusive rights to sell a medical device / product. (Pltf. Tr. Ex. 4, at ¶ 1(i)). In *Stevens & Wilkinson*, our Supreme Court set forth the facts of the case, in part, as follows:

> The MOU documented "the understandings reached with respect to the financing, development and operation of the Hotel." It contemplated multiple future agreements to fully define the duties of the parties—the Development Management Agreement, the Design/Build Agreement, the Qualified Management Agreement, and the HQ Hotel Room Block Commitment, a joint use agreement for parking, and a bond financing agreement.

Id. at 698 (underline emphasis added).

In contrast, the specifications for the Product Sealevel and Creativasc were collaborating to develop were set forth in patent applications filed with the U.S. Patent and Trademark Office, as early as June 6, 2006 by Dr. David L. Cull (Pltf. Tr. Ex. 1), and in subsequent applications filed on April 25, 2014 (Provisional Patent Application No. 61/984,550) and April 24, 2015

(Patent Application No. 14/695,241). Sealevel's Thomas B. O'Hanlan was a named inventor in the '241 Patent Application referenced above, filed April 24, 2015. In summary, the details of the Product were already specifically delineated, whereas, the details of the hotel to be built in Columbia, South Carolina under *Stevenson* were non-existent, as the project contemplated in that case was at the mere concept stage.

At the point in time when the Parties to the CSA would be buying and selling from each other under Sections 1(i) and (ii), those transactions[2] would be subject to application of the principles of the Uniform Commercial Code, as embodied in Title 36 of the S.C. Code of law. *See e.g.,* S.C. Code Ann. § 36-2-306(2)(b) (stating, "A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale").

Further by way of example, S.C. Code Ann. § 36-2-305, entitled, Open Price Term, specifically provides that "[t]he parties if they so intend can conclude a contract for sale even though the price is not settled." *See e.g., Adams v. G.J. Creel & Sons*, 320 S.C. 274, 279, 465 S.E.2d 84, 86 (1995) (applying and interpreting Section 305 with respect to wholesale gasoline sales contract, stating, "[Section 305] provides that when parties have an open price contract, the price charged by the seller must be reasonable and fixed in good faith."); *see also Gantt v. Morgan*, 199 S.C. 138, 141, 18 S.E.2d 672, 673 (1942) (noting, "when the contract is silent as to the price to be paid, the law invokes the standard of reasonableness, and the fair value of the services is recoverable.").

---

[2] *See e.g., Princess Cruises v. GE*, 143 F.3d 828, 830 (4th Cir. 1998) (applying the "predominant purpose" test and holding, "when the predominant purpose of a maritime or land-based contract is the rendering of services rather than the furnishing of goods, the U.C.C. is inapplicable, and courts must draw on common-law doctrines when interpreting the contract.").

As specifically set forth in South Carolina's version of the UCC, the Commercial Code does not provide exclusive remedies available to a party that may eventually be a Buyer or a Seller under the Code. See e.g., Flavor-Inn v. NCNB Nat'l Bank, 309 S.C. 508, 510, 424 S.E.2d 534, 536 (Ct. App. 1992) (stating, "Section 36-1-103 provides: 'Unless displaced[3] by the particular provisions of this act, the principles of law and equity . . . shall supplement its provisions.'"); see also S.C. Code Ann. § 36-2-703 (Comment 1 to Rule, stating, "[t]his Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case."), and Contour Indus. v. U.S. Bancorp, 2008 U.S. Dist. LEXIS 52308, *5-6, 66 U.C.C. Rep. Serv. 2d (Callaghan) 175 (E.D. Tenn 2008) (rejecting Defendant's argument "that plaintiff's request for punitive damages is preempted by the UCC," and further stating, "courts have held that punitive damages are recoverable under the UCC's statutory provision for conversion.").

In Defendants' Motion at page 11, it is argued and presented that S.C. Code Ann. § 36-2-715 represents the exclusive remedies available to Sealevel under the CSA. In addition, Defendants' Motion omits the title of Section 715, which is "Buyer's incidental and consequential damages." Id. Not only are the remedies under the UCC not exclusive as set forth herein, but Defendants' contention that Section 715 sets forth the sole and exclusive remedies available to Sealevel is grossly misleading. Still further, Defendants' Motion ignores the fact that the CSA is a combination of a contract for services and a contract for the sale of goods.

[3] The current version of S.C. Code Ann. § 36-1-103 (effective Oct. 1, 2014) includes this statement in subsection (b) as follows: "Unless displaced by the particular provisions of this title, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

Creativasc remained silent on any objections as to the lack of price term in the CSA while Sealevel was dedicating its highly skilled engineers and staff to the design of the "Product" as referenced and described in Section 1 of the CSA, as follows:

> Sealevel agrees to design, manufacture, sell and deliver to Customer hardware and software (the "Product") used in the System's handheld actuator and implanted balloon pressure monitoring and reporting devices in accordance with the specifications set forth in Exhibit A, which is attached hereto and incorporated herein by reference (such specifications, the "Specifications"). …

(Pltf. Tr. Ex. 4, at ¶ 1).

The same Specifications referenced above were not included in the original CSA, however, evidence and testimony at trial established Creativasc and Sealevel were working from a lengthy and detailed set of specifications. (Pltf. Tr. Exs. 11 and 12). Exhibits 11 and 12 are examples of the good-faith exhibited by Sealevel throughout the relationship with Creativasc *et al*. For example, in Ex. 12, Sealevel's Head of Engineering, Tony Martin, responds to an email inquiry from Lindsey Sanders [Calcutt] on the same day she sends her request, Feb. 16, 2016, providing detailed responses on all nine (9) points raised in her inquiry. (*Id.*).

As to Defendants' position that the **CSA was not breached** (*Id.* at I(B), at pp. 7-9), there is ample evidence in the record to show not just a beach, but that such breach was the inevitable result of the actions of Defendants. In addition, the jury rejected this argument.

As to Defendants' argument there was **no evidence of damages**, (*Id.* at I(C), at pp. 9-11), presumably their position is also and would be Sealevel could never be entitled to damages for breach of the CSA by these Defendants. Defendants' Motion declares, "The only evidence Sealevel presented at trial regarding damages was a single invoice for $321,540.00, purportedly representing engineering services rendered as of June 13, 2017." (*Id.* at 9). This is inaccurate and misleading. The evidence consisted of the extensive testimony or Tom O'Hanlan and others showing the large amount of work performed by Sealevel pursuant to the CSA, including that Sealevel had provided a working prototype. *See e.g.,* Pltf. Trial Exhibits 4, 10-12, 17, 21 and 26.[4] Once again, the jury also rejected this argument.

Defendants' Motion fails to address the limitation on damages recoverable by Creativasc as against Sealevel set forth conspicuously in the CSA at Section 16, as follows:

> **Limitation of Liability**. SEALEVEL'S AGGREGATE LIABILITY TO CUSTOMER SHALL NOT EXCEED THE AGGREGATE SUM OF ALL AMOUNTS PAID BY CUSTOMER TO SEALEVEL UNDER THIS AGREEMENT. IN NO CIRCUMSTANCE SHALL SEALEVEL BE LIABLE FOR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, EVEN IF SEALEVEL HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. CUSTOMER ACKNOWLEDGES THAT THIS SECTION IS A MATERIAL INDUCEMENT FOR SEALEVEL TO ENTER INTO AND PERFORM ITS OBLIGATIONS UNDER THIS AGREEMENT. THIS PROVISION SHALL SURVIVE THE EXPIRATION OR TERMINATION OF THIS AGREEMENT.

Id. at pp. 6-7 (bold, ALLCAPS and underlining in original).

In contrast, there is no such "Limitation of Liability" provision in the CSA in favor of Creativasc. (*Id.*). At trial, Defendants argued to the jury as if the Section 16 Limitation of Liability provision applied in favor of Creativasc. However, since no such provision is in the CSA, the Court and the Parties must conclude that the Parties did not intend to limit Sealevel's rights to damages for breach of contract by Creativasc or its successors.

"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." *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996). "The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach." *Id.* (citing *Drews Co. v.*

[4] Exhibit 26 is the letter and invoice Sealevel sent Defenadants on June 26, 2017. At trial, Defendants made no effort to contest or challenge the monetary amounts or hours as set forth in this invoice.

Ledwith-Wolfe Assoc., 296 S.C. 207, 371 S.E.2d 532 (1988)). "[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." Id. "Where the wrongdoer creates the situation that makes proof of the exact amount of damages difficult, he must realize that in such cases 'juries are allowed to act upon probable and inferential as well as direct and positive proof.'" Powers v. Calvert Fire Ins. Co., 216 S.C. 309, 321-322, 57 S.E.2d 638, 644 (1950) (citing Wood v. Pender-Doxey Grocery Co., 151 Va. 706, 144 S.E. 635, 638 (1928).

In Powers, the "difficult[y]" the Court references involved an insurance company that once promised to pay for a new vehicle, but later recanted and effectively disavowed the parties' contract. Id. In Minter, the "difficult[y]" the Court referenced involved one party refusing to follow through on its contractual obligations. Id. at 70 (stating, "[t]he exact parameters of the deal are impossible to ascertain because GOCT failed to offer the Minters the opportunity to enter into the transaction, a right guaranteed to the Minters in their original Agreement.").

The net of Defendant's position on damages is under no circumstances could Creativasc have been obligated to pay any damages to Sealevel, until such time as it chose not to honor the exclusive rights provision in Section 1 of the CSA. In effect, Defendants are asking this Court to give them a *get out of jail free card* on damages, despite there being no limitation whatsoever in the CSA for the benefit of Creativasc. Put another way, Defendants want to limit Sealevel's recoverable breach of contract damages to only "lost profits."

On pages 9-10 above, Sealevel has already addressed Defendants' arguments attempting to limit its remedies to "incidental" or "consequential," damages under Commercial Code Section 36-2-715. Further to the point that the CSA is a mixed contract for services and product sales, the Buyer (*i.e.,* Creativasc") would not yet have a claim against the Seller for breach of any Seller's warranties under S.C. Code Ann. § 36-2-314 or 315. This is because there was no product yet to be sold, and also because Creativasc abandoned and breached the CSA (Section 24) when it participated in the Dec. 30, 2016 transaction transferring the Hemoaccess Device to Diaxamed, as set forth herein.

As to Defendants' position that there was **no evidence of tortious interference by Diaxamed** (*Id.* at I(D), at pp. 12-14), evidence in the record shows not just a breach, but a bad-faith breach of contract by Defendants, precipitated by the actions of Diaxamed. It was well within the jury's province to conclude that Diaxamed used the Asset Protection Agreement and its non-disparagement provision to control Steve Johnson and have him not tell Sealevel anything about the sale of Creativasc / Brookhaven's assets to Diaxamed, or that Diaxamed just wished to go in a different direction. The record includes other evidence of this intent to ruin the CSA by Diaxamed, including but not limited to the Defendants' evasive responses to Ben O'Hanlan's letter dated June 26, 2017. *See* Pltf. Trial Exhibits 21 and 26.

Diaxamed in taking the actions it did with respect to the CSA and Sealevel, preserved for itself the opportunity to take the entirety of the Hemoaccess Valve System®, while preserving also for itself the right to develop a wand similar to the device already developed by Sealevel, while cutting Sealevel and its exclusive rights out of the deal altogether. Steve Johnsno also testified about Diaxamed taking all of his computers and flash drives, which contained all of the Sealevel's contributions to the CSA. This is a breach of the CSA at Section 14, entitled Confidential Information. By Diaxamed's own terms, it did not assume or accept the CSA (Pltf. Trial Exs. 14 and 15), but it did take all of Sealevel's know-how and information provided by Sealevel to Creativasc during the cooperative period of the CSA from 2014 to 2016. The jury saw through all of this, as was its right and obligation to do so in analyzing the evidence and following the Court's jury instructions. The jury also rejected this argument.

II. New Trial per 13th Juror Doctrine

As to Defendants argument they are entitled to a **new trial under 13th juror doctrine** (*Id.* at II, at pp. 16-17), Defendants argue Sealevel assumed the risks: (i) "that the device they committed to develop together would not work as they envisioned," and (ii) "that the device would never receive approval from the FDA." (*Id.*). However, those facts are not in the record in this case and those hypothetical facts had nothing to do with why the CSA was breached. Defendants also argue Sealevel: (iii) "assumed the risk they would run out of funding before they were able to fully develop the product." (*Id.* at 17). Again, this is not a fact in evidence, nor is it a fact reasonably inferred from the evidence. The evidence shows Creativasc / Brookhaven's Hemoaccess Valve System® was acquired in its entirety excepting the CSA. *See e.g.,* U.S. Patent and Trademark Office Trademark Registration Nos. 3,720,250 and 4,944,136[5] for Hemoaccess Valve System® (each assigned to Diaxamed on Feb. 1, 2017).

At trial, Defendant Diaxamed could point to no documents to corroborate its assertion that it was simply going in another direction and did not wish to work with Sealevel under the CSA. As was argued to the jury in closing arguments, all of these facts were well known to Diaxamed and its counsel, and they chose to "roll with it." Therefore, it was actually Diaxamed who *assumed the risk* of being sued by Sealevel.

This case was the subject of a summary judgment motion, which was denied on Nov. 30, 2023. Defendants presented their Motions for Directed Verdict, which were denied at the close of the Plaintiff's case and again at the conclusion of all testimony. The record in this case

[5] At https://tmsearch.uspto.gov/search/search-information, enter "Hemoaccess Valve System."

includes witness testimony from Sealevel's witnesses that the jury obviously deemed credible, as well as seventeen (17) Exhibits from the Plaintiff, eight (8) Exhibits from the Defendants, and several follow up inquiries from the jury, including requesting to hear the deposition testimonies read into the record of John D. Feltman (Brookhaven Defendants) and Brian McMurray (owner of Diaxamed and ATEX Technologies). As set forth herein with reference to the 17 Trial Exhibits of the Plaintiff and 8 Trial Exhibits of the Defendants (*See* Table of Exhibits at end of this Response, below signature block), the jury had plenty of relevant evidence in the jury room from which to evaluate the facts of this case.

"Upon review, a trial judge's order granting or denying a new trial [under the 13th Juror Doctrine] will be upheld unless the order is 'wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.'" *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478-479, 567 S.E.2d 851, 854 (2002) (citing *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265, 267 (1990) (citing *S.C. State Highway Dep't v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976))). The trial Court's "review is limited to consideration of whether evidence exists to support the trial court's order."

Because of the strength and scope of the evidence in the record, even viewing the evidence *independently* (as opposed to in the "light most favorable" to the Plaintiff) and within its "discretion"[6] as the Court is required to, Defendants' motion fails to set forth grounds for a new trial under the13th juror doctrine.

III. New Trial Absolute

As to Defendants' argument they are entitled to a **new trial absolute** (*Id.* at III, at pp. 17-19), Defendant's Motion fails to establish any of the necessary grounds. The verdict shows no

---

[6] "Therefore, the sole issue on appeal is whether the trial judge abused his discretion in granting Hunt's motion for a new trial." Folkens v. Hunt, 300 S.C. 251, 253, 387 S.E.2d 265, 266 (1990).

sign of "jury confusion," or a "grossly excessive" or "inadequate verdict." In addition, the liquidated amount awarded on the Breach of Contract claim of $321,540.00, was based on Sealevel's [unchallenged] Invoice dated June 13, 2017. (Pltf Tr. Ex. 26). Sealevel is entitled to pre-judgment interest at 8.75% on this amount under S.C. Code Ann. § 34-21-20(a). The time from the invoice to the verdict is 2,800 days, and the *per diem* amount due on $321,540.00 at 8.75% is $77.08,[7] providing an additional amount due of $215,828.22. Accordingly, the amount awarded for purposes of review and comparison to punitive damages factors or any other review of punitive damages should be considered $537,368.22 (not even including the $400,000.00 in actual damages awarded as against Diaxamed). *See e.g., Vickery v. Evans*, 266 P.3d 390, 391 (Colo. 2011) (noting "the amount of the actual damages awarded, to which reasonable exemplary damages are statutorily limited, refers … to the jury's assessment of total compensatory damages [plus] statutorily mandated prejudgment interest.").

In *BMW of N. Am. v. Gore*, 517 U.S. 559, 574-575 (1996), the Supreme Court stated:

> Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the $ 2 million award against BMW is grossly excessive: [1] the degree of reprehensibility of the nondisclosure; [2] the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and [3] the difference between this remedy and the civil penalties authorized or imposed in comparable cases. We discuss these considerations in turn.

Id. (underline emphasis added).

Accordingly, the Court is to look to not just the actual damages awarded to Sealevel as against Creativasc and / or Diaxamed, but the "harm or potential harm" caused by the actions of Diaxamed. *Id.*

---

[7] Calculations: (i) per diem: $321,540.00 * 8.75 / 100 / 365 = $77.08; (ii) prejudgment interest: 2,800 * $77.08 = $215,828.22; and (iii) principal + interest: $321.540.00 + $215,828.22 = $537,368.22.

In Section III of Defendants' Motion, it is argued that the limitations on Non-Economic Damages in S.C. Code Ann. 15-32-530 somehow support Defendants' argument for a New Trial Absolute.

As discussed below, exceptions to the cap exist and are applicable. Accordingly, the Court should deny Defendants' Motion to the extent it request a reduction of the punitive damages award under Section 15-32-530, which provides in relevant part:

> (A) Except as provided in subsections (B) and (C), an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars.
>
> (B) The limitation provided in subsection (A) may not be disclosed to the jury. If the jury returns a verdict for punitive damages in excess of the maximum amount specified in subsection (A), the trial court should first determine whether:
>
> (1) the wrongful conduct proven under this section was motivated primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known or approved by the managing agent, director, officer, or the person responsible for making policy decisions on behalf of the defendant; or
>
> (2) ~~the defendant's actions could subject the defendant to conviction of a felony … proximate cause of the plaintiff's damages~~.[8]
>
> If the trial court determines that either item (1) or (2) apply, then punitive damages must not exceed the greater of four times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of two million dollars and, if necessary, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed by this subsection. If the trial court determines that neither item (1) or (2) apply, then the award of punitive damages shall be subject to the maximum amount provided by subsection (A) and the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed by subsection (A).
>
> (C) However, when the trial court determines one of the following apply, there shall be no cap on punitive damages:

[8] As shown by the ~~strikethrough~~ text, Sealevel acknowledges there are no criminal charges for felony criminal charges in the record in this case to support a finding of an exception to the cap under either Section 530(B)(2), (C)(2) or (C)(3).

(1) at the time of injury the defendant had an intent to harm and determines that the defendant's conduct did in fact harm the claimant; or

(2) ~~the defendant has pled guilty …proximate cause of plaintiff's damages;~~ or

(3) ~~the defendant acted or failed to act while under the influence of alcohol, drugs, … is substantially impaired. S.C. Code Ann. § 15-32-530(A)–(C).~~

S.C. Code Ann. § 15-32-530.

Defendants declare that the exceptions to punitive caps in subsections (B) or (C) are not applicable to this case, yet no analysis of the exceptions is provided in Defendants' Motion. However, there is ample evidence Diaxamed was motivated by financial gain and / or that it intended to harm Sealevel in the way in which it interfered with the CSA. Exceptions to the cap on punitive damages apply as set forth below.

Under Section 530(B)(1), the 3x-cap on noneconomic damages is increased to a 4x-cap if the Court finds Diaxamed was "motivated primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct,[9] together with the high likelihood of injury resulting from the conduct, was known or approved by [the company]." *Id.* Here, one need only look to the jury's finding of punitive damages and the fact that the sole purpose of the two transactions involving Creativasc that occurred after execution of the CSA on October 28, 2014 (Pltf. Tr. Exs. 14, 15 and 29) were for the primary purpose of financial gain to the investors.

[9] This underlined portion of the Code cannot be read as requiring that punitive damages exceptions only apply in cases involving personal injury. Instead, the "high likelihood of injury" is the pertinent inquiry in the context of wrongful business torts, such as intentional interference with contract. Here, the likelihood of injury to Sealevel by its being dumped by Diaxamed in its acquisition of, arguably 97.5 % of Creativasc, was 100 %. By way of example, Sealevel's only contact, Mr. Johnson was fired and shushed by Diaxamed's threats of enforcing the non-disparagement clause against him.

Under Section 530(C)(1), "there shall be no cap on punitive damages, [if] at the time of injury the defendant had an intent to harm and [the Court] determines that the defendant's conduct did in fact harm the claimant." *Id.* This jury determined Diaxamed knew about Sealevel and the CSA and chose to leave them both on the side of the road, *or in the middle of the road to become roadkill*. The fact of Sealevel's interest in the CSA becoming dead was inevitable given Diaxamed's structuring of its Contribution and Assignment Agreements (Pltf. Trial Exs. 14 and 15) to leave Sealevel to die on the vine, with no one to even tell them who, what, when or why this had happened. The record shows Creativasc nor any of its successors took action to give notice of termination of the CSA.

Diaxamed's dropping of Sealevel also breached Section 24 of the CSA (Pltf. Trial Ex. 4), which provides:

> **Assignment**. Neither Party shall assign this Agreement or any of its rights hereunder, nor shall Customer subcontract any substantial portion of this Agreement, without the prior written consent of the other Party; provided, however, that any Party may, without such consent, assign this Agreement in connection with the transfer or sale of all or substantially all of its business, or in the event of its merger, consolidation, change in control or other similar transaction. Any permitted assignee shall assume all obligations of its assignor under this Agreement. Any purported assignment or transfer in violation of this Section shall be void.

Id. (underline emphasis added).

In this instance, Creativasc assigned / transferred "all or substantially all of its business," therefore, "prior written consent," of Sealevel was not required (nor was it ever requested). *Id.* In addition, had Diaxamed chosen to abide by the contractual obligations of Creativasc, it would have been required to "assume all obligations of its assignor under this Agreement." *Id.*

Pltf's. Exhibit 4 (the CSA) was in the record for the jury to review. The jury could see that this Section 24 Assignment provision was either ignored or danced around by Diaxamed. Testimony at trial showed Diaxamed accepted assignment of every other asset of Creativasc, except the CSA. Diaxamed took over all trademarks and patent applications, all employees, all computers and files, and even the same office space Creativasc occupied over at the Patewood facility in Greenville, South Carolina. This is the type of intentional conduct punitive damages were designed to deter and ultimately, prevent from happening. Once it had all the facts, this jury found the conduct of Diaxamed reprehensible and punished it accordingly. The jury concluded Diaxamed's conduct was intentional and led to the inevitable demise of Sealevel's vested interest in the CSA, in contravention of the CSA's Assignment provisions.

Punitive damages are not given in every case. They are based on the misconduct of a defendant and awarded for extreme, reckless, or intentional behavior to punish wrongdoers and prevent future wrongs. *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) ("The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future."). By looking at factors like intentional misconduct and the nature of the defendant's actions, courts can make fair decisions, which promote justice and accountability. Limiting punitive damages under the circumstances of this case based upon Defendants' arguments conflicts with the rationale for awarding punitive damages.

Pursuant to subsection (C)(1), the Court should find that there is no applicable cap on punitive damages because "at the time of injury the defendant had an intent to harm" and "the defendant's conduct did in fact harm the claimant." S.C. Code Ann. § 15-32-530. The South Carolina Court of Appeals has held "that an intent to harm will be inferred as a matter of law when a person sexually assaults, harasses, or otherwise engages in sexual misconduct towards an adult." State Farm Fire & Cas. Co. v. Barrett, 530 S.E.2d 132, 136 (S.C. Ct. App. 2000). Here, while the actions at issue do not rival anything as despicable as sexual assault, the consequences were known. In fact the consequences were so well known and foreseeable that the Parties specifically drafted into the CSA Section 24 to prevent one party from simply dropping the other without "prior written consent." Id. However, no hurdle short of a court order was not going to stop McMurray and his new company, Diaxamed, from taking what they wanted and leaving the rest to die.

In another case involving the South Carolina Torts Claim Act, the South Carolina Supreme Court held that:

> The concept of "intent to harm" is analogous to the concept of "malicious intent," which courts have previously interjected into the analyses of claims for intentional interference with contractual relations and intentional interference with prospective contractual relations. However, consideration of these concepts in this context is often an error, due in large part to the historical use of the term "malicious" to describe the idea that the intent must generally be improper in some way. Therefore, as modern courts have addressed these causes of action, the distorted notion of "malicious intent" has been removed, and the elements of these torts have been clarified as specifically requiring the intent to interfere for an improper purpose rather than a motive generally grounded in some sort of spite or ill-will towards the plaintiff. *See* 2 Dan B. Dobbs, *The Law of Torts* § 446 (2001 & Supp.2006); *and* Prosser and Keeton, *The Law of Torts* §§ 129–130 (5th ed.1984).

Eldeco, Inc. v. Charleston Cnty. Sch. Distr., 372 S.C. 470, 481 n.5, 642 S.E.2d 726, 732 n.5 (2007) (underline emphasis added).

In addressing whether conduct was reckless so as to warrant punitive damages, in Solley v. Navy Fed. Credit Union, the Court of Appeals concentrated on defendants' conduct at the time it committed the tort and the probability of a resulting injury. There, the defendant bank had allowed plaintiff's husband to take out a mortgage on the couple's jointly owned property without her consent and she did not discover the misconduct until a year and half later.

> Recklessness implies the doing of a negligent act knowingly'; it is a 'conscious failure to exercise due care.' " Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (quoting Yaun v. Baldridge, 243 S.C. 414, 419, 134 S.E.2d 248, 251 (1964)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." *Id.* "'It is this present consciousness of wrongdoing that justifies the assessment of punitive damages against the tort-feasor …'" Cody P. v. Bank of Am., N.A., 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct.App.2011) (quoting Rogers v. Florence Printing Co., 233 S.C. 567, 578, 106 S.E.2d 258, 263 (1958)). "**In other words, 'at the time of his act or omission to act the tort-feasor [must] be conscious, or chargeable with consciousness, of his wrongdoing.'**" Id. (quoting Rogers, 233 S.C. at 578, 106 S.E.2d at 264) (alteration by court).

397 S.C. 192, 723 S.E.2d 597 (S.C. Ct. App. 2012) (emphasis added). Likewise, here, the jury found Diaxamed knew about the CSA and took steps to avoid it and cause its inevitable breach, such that the consequences were not only known to Diaxamed's officers, but desired.

Finally, while Plaintiff does not believe that any of the punitive caps apply based on the applicability of the exception set out in subsection (C)(1), if the Court somehow determines that a statutory cap on punitive damages under subsection (B) is applicable, the punitive award cap should be multiplied and calculated based on the total amount of the award at the time of trial, which as set forth herein is $537,368.22 (including prejudgment interest). S.C. Code Ann. §§'s 15-32-530(B)(1) and 34-21-20. Under Section (B), a punitive damages award limited to 4x-cap would be in an amount of $2,149,472.88.

IV. New Trial *Nisi Remittitur*

As to Defendants argument they are entitled to a **new trial *nisi remittitur*** (*Id.* at IV, at pp. 19-22), Sealevel's arguments and facts in support as set forth above address this ground and show it should not be granted either.

V. Promissory Estoppel

As to Defendants argument that the **Promissory Estoppel claim should be dismissed** (*Id.* at V, at pp. 22-24), the Court has not issued any decision on this claim, and therefore, it is not ripe for discussion or briefing until such time as an order or decision is issued.

CONCLUSION

For the reasons set forth herein, the Court should deny Defendants' Post-Trial Motions because the evidence establishes any reasonable jury would have reached these verdicts, and further that when viewed in the light most favorable to Plaintiffs, no reasonable jury would not have rendered similar verdicts.

WESLEY D. FEW, LLC

/s/Wesley D. Few
Wesley D. Few, SC Bar No.15565
Post Office Box 9398
Greenville, South Carolina 29604
(864) 527-5906
wes@wesleyfew.com

ATTORNEYS FOR PLAINTFF

Greenville, South Carolina
May 21, 2025

Table of Trial Exhibits

Plaintiff's Trial Exhibits:

Ex. 1 – June 6, 2003, Patent App. No. 10/456,697, Arteriovenous Access Valve System and Process, by inventor David L. Cull, M.D.;

Ex. 2 – September 26, 2014, emails between Steve Johnson and Tom O'Hanlan;

Ex. 4 – Oct. 28, 2014, Customer Supply Agreement ("CSA") Sealevel and Creativasc;

Ex. 5 – Feb. 18, 2015, Supply Agreement ("CSA_2") b/w Atex and Creativasc Medical, Inc.;

Ex. 6 – Mar. 4, 2015, email between Tom O'Hanlan and Steve Johnson;

Ex. 8 – Oct. 28, 2015, email from Steve Johnson re Supplier Meeting next week;

Ex. 9 – Nov. 5, 2015, email from Steve Johnson re Technology Summit;

Ex. 10 – Feb. 4, 2016, email Martin (Sealevel) to Lindsey Sanders (Calcutt) re: Specifications;

Ex. 11 – Feb. 15, 2016, Requirement Specs HVS handheld by (Calcutt);

Ex. 12 – Feb. 16, 2016, email Sanders (Calcutt) to Martin et al re: Project Requirements;

Ex. 13 – Mar. 9, 2016, Second Amendment to the CSA;

Ex. 14 – Dec. 30, 2016, Contribution Agreement, Brookhaven, Diaxamed & Atex Technologies

Ex. 15 – Dec. 30, 2016, Assignment & Assumption, Feb. 18, 2015 CSA_2 (Exhibit 5 above);

Ex. 16 – Jan 6, 2017, Non-disparagement provision (only) of Asset Protection Agreement;

Ex. 17 – Jan. 12, 2017, email Johnson to Sealevel re: "changes over the last several weeks";

Ex. 21 – June 28, 2017, LTR to Sealevel from General Counsel to Brookhaven Medical;

Ex. 26 – June 26, 2017, LTR from Sealevel with Invoice for $321,540.00; and

Ex. 29 – Feb. 5, 2015, Articles of Merger, Brookhaven Merger, filed w S.C. Sec. of State.

Defendants' Trial Exhibits:

Ex. 1 – Email, Sept. 11, 2015, re: Hemoaccess Valve System Actuator Status;

Ex. 2 – Email, Sept. 16, 2015, re: Wand;

Ex. 3 – Email, Sept. 18, 2015, re: Creativasc;

Ex. 4 – Email, Oct. 26, 2015, re: Creativasc Meeting in Greenville;

Ex. 6 – Email, Nov. 9, 2015, re: Dead Handheld;

Ex. 7 – Email, Feb. 3, 2016, re: Catching Up Since St. Barts!;

Ex. 8 – Email, Feb. 9, 2016, Wild Thought, Johnson to O'Hanlan;

Ex. 9 – Email, Aug. 28, 2016, re: Creativasc, Dr. Cull to O'Hanlan;

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	13TH JUDICIAL CIRCUIT
Sealevel Systems, Inc.,	)	
Plaintiff,	)	Case No.: 2022-CP-23-01310
vs.	)	
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., ,	)	**PLAINTIFF'S RULE 59 MOTION TO RECONSIDER ORDER GRANTING JNOV (FILED JUNE 24, 2025)**
Defendants.	)	

Plaintiff Sealevel Systems, Inc. ("Plaintiff") herein respectfully files its Motion to Reconsider under Rule 59, SCRCP, this Court's order granting JNOV, dated June 24, 2025.

STANDARD

Rule 59, SCRCP, allows parties to move for "'reconsideration' of issues and arguments," and a "motion under Rule 59(e) long has been viewed as 'motion for reconsideration' despite the absence of those words from the rule." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). Courts should "freely allow[] a motion for reconsideration" because it provides the Court with "'the opportunity promptly to correct their own alleged errors.'" *Id.* at 22, 602 S.E.2d at 779 (quoting *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 837 (7th Cir. 1999)).

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, 497

(Ct. App. 2007). "In deciding whether to grant or deny a directed verdict motion, the court is concerned only with the existence or nonexistence of evidence." Id. at 491, 649 S.E.2d at 498 (citing *Pond Place Partners v. Poole*, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002)). "In ruling on a motion for a directed verdict, 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 party opposing the motion. The trial court must deny such a motion when the evidence yields more than one inference or its inference is in doubt. If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied." *Id.*, at 489, 649 S.E.2d at 497 (internal citations omitted). "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." *Small v. Springs Industries, Inc.*, 292 S.C. 481, 483, 357 S.E.2d 452, 454 (1986).

ARGUMENT

This Court got it right in the first instance, when it denied Defendants' motions for directed verdict at trial and submitted the factual issues of the existence of the contract, the question of its breach, the question of tortious interference, and the question of damages to the jury to decide. As to the existence of the contract, Defendants admitted that in their Answer to the Complaint, filed Oct. 12, 2018, specifically at Paragraphs 1,[i] 27,[ii] 31 and 41.[iii]

Defendants' 2nd, 4th, 5th and 6th Defenses also affirm the Supply Agreement between the parties. Specifically, Defendants' Answer raised eight defenses, as follows:

(i) denials and admissions (*Id.* at ¶¶'s 1-42, and at pp. 1-7),
(ii) **arbitration, presumably based on Para. 15 of the Supply Agreement**,
(iii) failure to state a claim under Rule 12(b)(6),
(iv) **Sealevel "committed a prior material breach" of the Supply Agreement**,
(v) waiver of rights "under the agreement,"

(vi) estoppel of rights "under the agreement,"
(vii) punitive damages are unconstitutional, and
(viii) reserving rights to plead additional defenses.

Id. at pp. 8-9.

Respectfully, for all the reasons previously raised to this Court, as well as for those set forth herein, and particularly because this three (3) day jury trial featured significant evidence supporting the existence of a valid and enforceable contract, its breach and resulting damages, this Court erred by setting aside the factual determinations of the jury and itself deciding that no enforceable agreement or contract existed between the parties.[1]

I. The Uniform Commercial Code-Sales expressly permits enforcement of a contract for a sale of goods "[e]ven though one or more terms are left open . . . if the parties have intended to make a contract . . . ." S.C. Code § 36-2-204(3).

The Order erroneously overlooks that the Supply Agreement (as defined in the Order), in addition to being a contract for services, is an enforceable executory contract for the sale of goods under South Carolina's Uniform Commercial Code-Sales.[2] The Order analyzes the Supply Agreement only as "a contract for services," Id. at 5, when, by its plain terms, it is predominantly a contract for the development and sale of goods. Because the central purpose of the Supply Agreement is the sale of goods, the Uniform Commercial Code's provisions on contract formation apply.

[1] Plaintiff incorporates by reference herein its previous arguments in opposition to Defendants' motions for directed verdict and post-trial motions, including all oral arguments made at trial, its memorandum in opposition to Defendants' post-trial motions, and its arguments at the post-trial motions hearing.

[2] Respectfully, the Order is internally inconsistent. It acknowledges application of the Commercial Code in its discussion on damages (although the Order finds that these provisions are an exclusive remedy when the Code provides they are not exclusive), yet ignores the Code's provisions on contract formation.

The Commercial Code expressly provides contracts for the sale of goods can leave terms open for future agreement, as the parties to this case did. S.C. Code Ann. § 36-2-204 states:

> (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.

Id. (emphasis added).

Respectfully, the Court errs as a matter of law in finding the parties' admitted Supply Agreement unenforceable on the basis it leaves open precisely the sort of terms that the Uniform Commercial Code anticipates might be left open. *See, e.g.,* S.C. Code Ann. § 36-2-305 (allowing parties to intentionally enter into a contract without a set price term); *see also* S.C. Code Ann. § 36-2-311 (allowing parties to intentionally enter into a contract with unsettled particulars regarding performance); *but c.f.* Order, p. 5 (stating, "[t]he Agreement lacked essential terms, including a fixed price of the Product, a minimum purchase obligation for CreatiVasc, or concrete delivery deadlines."). As a matter of law, including the Commercial Code, the Supply Agreement is enforceable and executory; at a minimum, factual questions existed as to the contract's existence, scope, breach and damages.

"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." *Small v. Springs Industries, Inc.*, 292 S.C. 481, 357 S.E.2d 452 (1986). This Court should reconsider its Order and reinstate the jury's verdict.

II. There was existing, conflicting evidence on breach and damages which evidence properly compelled submission to the jury.

Factual questions about the Supply Agreement's terms and scope, its breach by Defendants, and the remedy for its breach, all belonged to the jury and were not to be decided as a matter of law by the court as a JNOV—particularly after the Court had previously *denied* directed verdict (and summary judgment) because of conflicting facts. The JNOV decision on breach and damages—finding that there was "no evidence" of either—is in stark contrast with the jury's consideration of the evidence and testimony, and the jury's finding that there was indeed a breach by Defendants, the harm from which the jury valued in in the hundreds of thousands of dollars.

Similarly, disputed questions of the parties' intent, credibility, good faith, bad faith, and extent of damages are also jury matters. *DNR v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-303 (2001) (finding determination of parties' intent a question of fact); *Youmans v. Youmans*, 128 S.C. 31, 36, 121 S.E. 674, 676 (1924) (finding whether a party acted in good faith is a question of fact, even when Special Referee made findings of fact). "The well-established rule in this state is that if there is ***any 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, 298-299, 721 S.E.2d 430, 434-435 (stating, "the trial court did not err in finding some statements in Makawi's second affidavit credible despite having found that the first affidavit was not."); and *Austin v. Stokes-Craven Holding*

Corp., 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) (stating, "[w]hile 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 breach and damages questions are particularly factual because, as previously argued by Plaintiff, Defendants' breach included breach of the implied covenant of good faith a fair dealing (and commensurate damages flowing from that breach). These questions, requiring evaluation of credibility and intent, are uniquely in the realm of juries. *See* *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 147 S.E.2d 481, 484 (1966) (noting, "[T]here exists in every contract an implied covenant of good faith and fair dealing … It has been said that implied promises always exist where the covenant on one side involves some corresponding obligation on the other; where, by the relationships of the parties and the subject matter of the contract, a duty is owing by one not expressly bound by the contract to the other party in reference to the subject thereof.'") (cleaned up); *see* *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.*, 542 S.E.2d 743, 344 S.C. 129 (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 …"). The Order further errs by ignoring and discounting multiple provisions of the Supply Agreement for which there was certainly evidence of breach and bad faith, including the provisions on termination, confidential information, and assignment. The questions of breach and/or bad faith as to each of those provisions were properly questions of fact for the jury.

Accordingly, this Court was correct to permit this case, with its myriad disputed facts and conflicting evidence, to go to the jury in the first instance. Respectfully, the Order granting JNOV invades the province of the jury on the factual questions going to the existence and scope of the contract, breach, bad faith, and damages, among other disputed issues. This Court should reinstate the jury's decision, which evaluated disputed facts to find a valid and enforceable agreement, its breach, interference with the same, and resulting damages.

CONCLUSION

For the above reasons, as well as those previously raised and ruled upon by this Court, Plaintiff respectfully requests that its Motion to Reconsider be granted and that the Jury's Verdict be reinstated.

[signature on next page]

WESLEY D. FEW, LLC

/s/Wesley D. Few________
Wesley D. Few, SC Bar No.15565
Post Office Box 9398
Greenville, South Carolina 29604
(864) 527-5906 | wes@wesleyfew.com

FORD WALLACE THOMSON LLC

Ainsley F. Tillman, S.C. Bar No. 70551
Robert E. Byrd, S.C. Bar No. 106284
715 King Street
Charleston, South Carolina 29403
(843) 277-2011
Ainsley.Tillman@FordWallace.com
Robert.Byrd@FordWallace.com

ATTORNEYS FOR PLAINTFF

Greenville, South Carolina
July 7, 2025

---

[i] Stating in ¶ 2 of their Answer to ¶ 1 of the Complaint, inter alia, "Defendants admit that Defendant CreatiVasc Medical, Inc. and Sealevel Systems, Inc. entered into a Customer Supply Agreement dated October 28, 2014 and that the parties to the Customer Supply Agreement amended such agreement on or around April 10, 2015 and on or around March 9, 2016." *Id.*

[ii] Stating in ¶ 23 of their Answer to ¶ 27 of the Complaint, "Defendants admit the allegations contained in Paragraphs [27, 28, and 29] of Plaintiff's Complaint" *Id.* Para. 27 of the Complaint alleged, "On October 28, 2014, CreatiVasc and Sealevel executed the Supply Agreement. This Supply Agreement was executed on behalf of CreatiVasc by Defendant James S. ("Steve") Johnson (hereafter "Johnson"), as CEO of CreatiVasc." *Id.*

[iii] Stating in ¶¶'s 31 and 34 of their Answer to ¶¶'s 38 and 41 of the Complaint, inter alia, "Defendants admit that the Customer Supply Agreement was a valid and binding contract at the time the parties entered into such agreement." *Id.*

RECEIVED
Aug 15 2025
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 Honorable Perry H. Gravely,
Circuit Court Judge

Case No. 2022-CP-23-01310

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.

NOTICE OF APPEAL

Appellant Sealevel Systems, Inc., hereby gives notice of appeal of the following orders entered by the Honorable Perry H. Gravely, identified as follows: (i) Order Granting Defendants' Motion for Judgment Notwithstanding the Verdict (filed June 24, 2025); and (ii) Order Denying Motion to Reconsider (filed July 18, 2025).

The undersigned counsel certifies that this appeal is timely filed within 30 days of receipt of notice of the latter order(s) and / or judgments identified above.

Appellant requested and has received the hearing transcript from the May 23, 2025 hearing on the post-trial motions identified above at (i). There was no hearing related to the order identified above at (ii). Additionally, Appellant has requested the trial transcript from the trial during the week of February 13th, 2025, but has not yet received the trial transcript. Accordingly, the undersigned will advise the Court upon receipt of the transcript from the trial that relates to the orders identified above.

Respectfully submitted,

WESLEY D. FEW, LLC

/s/Wesley D. Few
Wesley D. Few, S.C. Bar No. 15565
Post Office Box 9398
Greenville, South Carolina 29604
(864) 527-5906 | wes@wesleyfew.com

and

FORD WALLACE THOMSON, LLC

s/ Ainsley Fisher Tillman
Ainsley F. Tillman, S.C. Bar No. 70551
Ainsley.Tillman@FordWallace.com
Robert E. Byrd, S.C. Bar No. 106284
Robert.Byrd@FordWallace.com
715 King Street
Charleston, South Carolina 29403
(843) 277-2011

Attorneys For Appellant

Charleston, South Carolina
August 15, 2025

<u>Other Parties and Counsel of Record:</u>

Adams and Reese LLP
Kirby D. Shealy III (S.C. Bar # 11556)
1221 Main Street, Suite 1200
Columbia, SC 29201
Telephone: (803) 254-4190
Facsimile: (803) 779-4749
kirby.shealy@arlaw.com

Counsel to Respondents 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.

Butler Snow LLP
Robert E. Sumner, IV (S.C. Bar # 71728)
Anna W. Mobley (S.C. Bar # 106387)
25 Calhoun Street, Suite 250
Charleston, South Carolina 29401
Telephone: (843) 277-3700
Facsimile: (843) 277-3701
robert.sumner@butlersnow.com
anna.mobley@butlersnow.com

Counsel to Respondent Diaxamed, LLC

STATE OF SOUTH CAROLINA) IN THE CIRCUIT COURT 13
COUNTY OF GREENVILLE) DOCKET No. 2022-CP-23-01310

SEALEVEL SYSTEMS INC.,
Plaintiff,
versus

CREATIVASC MEDICAL INC., ET AL.,
Defendants.

H E A R I N G
BEFORE THE HONORABLE PERRY H. GRAVELY

DATE: February 11-13, 2025.
TIME: ***
LOCATION: South Carolina Circuit Court 13
TRANSCRIBED BY: Mary Ragsdale

LEGAL EAGLE
Post Office Box 5682
Greenville, South Carolina 29606
864-467-1373
depos@legaleagleinc.com

APPEARANCES:

WESLEY D. FEW, ESQUIRE
WESLEY D. FEW, LLC
P.O. Box 9398
Greenville, South Carolina 29604
Attorney for the Plaintiff,

KIRBY DARR SHEALY, ESQUIRE
ADAMS AND REESE, LLP
1221 Main Street, Suite 1200
Columbia, South Carolina 29201
Attorney for the Defendants.

INDEX

EXAMINATIONS

EXHIBITS

DEFENDANT'S:

Exhibit 1	Email Thread	226
Exhibit 2	Email, 9/16/15	226(ID), 227
Exhibit 3	Email, 9/18/15	227(ID), 228
Exhibit 4	Email, 10/26/15	230
Exhibit 6	Email, 11/9/15	232
Exhibit 7	Email, 2/3/16	233
Exhibit 8	Email, 2/9/16	235
Exhibit 9	Email, 8/28/16	237
Exhibit 10	Email, 1/13/17	237(ID)

COURT'S:

Exhibit 1	Jury Note 1	88
Exhibit 3	Jury Note 3	321
Exhibit 5	Jury Note 5	497

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

PROCEEDINGS - FEBRUARY 11, 2025.

THE COURT: I'm resident judge for here in Greenville County. I'm sure you all had a few things to talk about when you all got home last night. Well, we're going to be -- this is going to be as -- about as different as you can be. You all had a criminal matter yesterday, so you all went from that high profile, lots of stuff going on, to a much different case.

This is a breach of a contract -- this is two businesses -- this is a civil matter, which is a lawsuit between two businesses and related individuals over the development of a medical equipment and a breach of a contract -- or a possible breach of a contract relating to that development of that medical equipment and determinations of rights and damages of the parties involved.

So as about -- as extreme different than what you all had to -- were asked questions about yesterday. It's a very important case -- you know, all kidding aside, a very important case to all the parties involved in this matter.

Now, there's two purposes for the questions that I'm going to ask you. Yesterday, you all went through when you all got qualified -- there were certain questions to make sure you're qualified. The whole purpose of the questions that I'm asking you now are twofold. One is so that the attorneys can get a little more information about you, so when they -- the juror -- when they exercise their strikes, they have a little bit better of an idea of who you are, and the other thing is to make sure you can be fair and impartial to the trial of the case, okay?

And the selection process is a little differently -- and I know some of you actually were involved in the questions for the -- the big case, and you all were probably over there all day, and some of you may not have actually gone in there, but this -- the selection process is a little differently, and it'll be -- I mean, we should have you out of here -- this part in about 30 minutes, and then we will -- then some of you will have to go -- there's one more case that we need to be struck this morning, and it's -- it's a criminal matter, but it's a simpler matter than what we're dealing with -- which you all had to deal with yesterday.

But the selection process in a civil suit is a little differently. Once I have everyone after I finish the questions, then the attorneys will strike off of a -- a list on paper -- it's not where you have to stand up each time, so that was -- this is a little different process between a civil case and a criminal case. I just explained all that to you so you'll know a little bit about what's going on before I start asking you some questions.

All right. So -- again, this is a civil case, it involves primarily two businesses and related individuals to those businesses, and you may hear the -- the term "Plaintiff," the Plaintiff is the person who initiated the lawsuit or the -- the -- the business that filed the lawsuit, the Defendants are the people that were -- were sued, and then they in turn sometimes have the ability to file claims back, so that's kind of a -- a business dispute is what you hear about.

So the caption of the case is Sealevel Systems Inc., is the Plaintiff, versus CreatiVasc Medical Inc. Is that pronounced -- is that right? CreatiVasc Medical Inc., Diaxamed LLC, which is an accessory and interest to Brookhaven Vascular Inc., successor in interest to Brookhaven Merger Corp., which is successor in interest to CreatiVasc Medical Inc. Individuals, John D. Feldman and James -- also known as Steve Johnson, okay? So those are all the parties involved. First of all, I always ask a general question that is: Does anybody have any information knowing anything about this lawsuit? If so, please stand.

All right. Okay. So, first of all, I'll ask: Is there anybody -- anybody or member of their immediate family, an employee, have any close social or business relationship or -- or personal relationship with any of the owners, and I go of: Sealevel Systems Inc., CreatiVasc Medical Inc., Diaxamed LLC, Brookhaven Vascular Inc., Brookhaven Merger Corp, or CreatiVasc Medical Inc., or any connection whatsoever to any of those businesses? If so, please stand.

All right. Now the parties involved in the case where our -- Defendant John Feldman -- Mr. Feldman or --

MR. SHEALY: Mr. Feldman is not here.

THE COURT: Okay, sorry.

MR. SHEALY: He's -- he will -- he's unable to be here, your Honor, he had back surgery.

THE COURT: Okay. I'm sorry, yeah. It's Steve Johnson? All right. Thank you. Is anybody connected by blood or marriage, have any close personal, business, or social relationship with either John Feldman or James Steve Johnson? If so, please stand. All right. At this time, I'm going to ask that the attorneys introduce themselves and their law firms.

MR. FEW: Thank you, your Honor. May it please the Court? I'm Wes Few, and I represent the Plaintiff, Sealevel Systems, and this is Sealevel's representative, Tom O'Hanlan, who's the owner of that company.

MR. SHEALY: Okay. May it please the Court, your Honor? Ladies and gentlemen, my name's Kirby Shealy, I'm with the law firm of Adams and Reese in Columbia. Steve Johnson is here with me, along with Bob Thatcher of CreatiVasc Medical, also representing John Feldman who is not available for medical reasons (inaudible) also representing Brookhaven Vascular and Merger Corp.

THE COURT: All right. Now, as to the attorneys, is anybody connected by blood or marriage, having close personal, business, or social relationship with either of the attorneys or members of their law firm? If so, please stand. Okay, no response.

Has anybody ever been involved with these attorneys? Have they represented you or have they been on any matter where there will be other side -- or involved in anything that you were -- you were involved in, whether they -- with these attorneys representing any parties? If so, please stand. Okay. And no response.

Now, I'm going to list you some -- a couple of -- not a couple, but a handful of witnesses, and we're not -- this doesn't mean that, like, "My gosh, we're going to have a two-week trial here, we're going to call these witnesses?" These are all the potential witnesses that could be called, and I will say along that line, from talking with the attorneys we -- this case could take -- you know, we are expecting this case to conclude by Thursday, but as of -- just you -- you -- you should also -- just keep in the back of your mind that we could go into Friday.

So, that -- that's kind of for planning purposes, that's what you need to plan for, but this is not like the other one that will be going into next week.

So here are the witnesses that could be involved: Tom

O'Hanlan -- and if you are here, you could stand. All right, thank you. And when I call your name, if -- if any of you all -- you all could please stand. Ben O'Hanlan, Tony Martin, Jeff Hunter, Charlie Phelps, Derek Pukelik, Jeremy T., Earl Foster, John Feldman, Steve Johnson, Jason Jennings, Nicole Andrew, Getty Hayden, an attorney, Jordan Jacobs, Frank Patterson, David Cole -- Dr. David Cole, Barbara Ulig, Melanie Jen, Chad Clark, Lindsey also known as Sanders Calcutt, Bob Scribner.

MR. SHEALY: That should be Lindsey, I'm sorry.

THE COURT: Okay. Lindsey. All right. Lindsey Sanders Calcutt, Bob Scribner, Robert Beck, an attorney, Ben Zander, Andrew Clark, Mark Moraia (ph), and Savannah Forster, okay? For those names, is anybody connected by blood or marriage, have any close personal, business, or social relationship with any of those individuals? If so, please stand. All right. Again, no response.

Has any member of the jury panel ever been involved in a lawsuit, either as a plaintiff or a defendant -- and then I might -- I'll have a follow-up question on that -- after that. So has anybody ever been involved in a lawsuit, either as a plaintiff or a defendant? If so, please stand. All right. We'll start with you, what's your name and number?

JUROR NUMBER 130: Matthew Miller, 130, defendant in a real estate case.

THE COURT: Okay. And could you be fair and impartial to the trial of this case?

JUROR NUMBER 130: Yes.

THE COURT: All right. Thank you. Yes, your name back here?

JUROR NUMBER 229: Zach Corcoran, 229, plaintiff, divorce.

THE COURT: Okay. And could you still be fair and impartial to the trial of this case?

JUROR NUMBER 229: Yes, sir.

THE COURT: All right. Thank you. Yes, ma'am.

JUROR NUMBER 173: Melissa Scott, 173, in (inaudible) back in 2001.

THE COURT: All right. Could you still be fair and impartial to the trial of this case?

JUROR NUMBER 173: Yes, sir.

THE COURT: All right. Thank you. All right. Has any member of the jury panel, a member of their immediate family owned stock in, work for, had any business relationship with any of the -- the businesses involved: Sealevel Systems Inc., CreatiVasc Medical Inc., Diaxamed LLC, or Brookhaven Vascular Inc.? If so, please stand.

Without telling me any opinion -- your opinion or what you've heard, is there any member of the jury panel that had any negative experience with Sealevel Inc., CreatVasc Medical

Inc., Diaxamed LLC, or Brookhaven Vascular, or has a negative opinion of their products or services? If so, please stand. All right. And no response.

Does any member of the jury panel or member of your immediate family have any special training, knowledge, or work experience in any of the following fields: Medical device development, law or the courts, biomedical or mechanical engineering, or intellectual property protection?

So there's four categories: Medical device development, law in the courts, biomedical or mechanical engineering, and intellectual property protection.

So we're going to start over here this time. All right. Your name and number?

JUROR NUMBER 225: 225. I'm Olivia Campbell. My brother has a doctorate degree in mechanical engineering.

THE COURT: Okay. But do -- do you have any experience in any of that?

JUROR NUMBER 225: No.

THE COURT: Okay. Could you still be fair and impartial to the trial of the case?

JUROR NUMBER 225: Yes.

THE COURT: All right. Thank you. Ma'am, name and number?

JUROR NUMBER 146: Sorry. Megan Phillips, 146. I have a cousin who is a lawyer, I have an uncle who is working in a

-- a -- a case with having his name on some different things that he's made -- I can't remember exactly, it's not medical, and then I've worked with medical device companies for things like (inaudible).

THE COURT: Okay. All right. And as far as just immediate family, just so -- I mean -- you know, spouses or children or parents kind of?

JUROR NUMBER 146: Okay.

THE COURT: But anyway, could you still be fair and impartial to the trial of the case?

JUROR NUMBER 146: Yes.

THE COURT: All right. Thank you. Yes, your name and number?

JUROR NUMBER 285: 285. Walter Roche. My father-in-law's in biomechanical -- a biomedical engineer.

THE COURT: Okay. Where's he located?

JUROR NUMBER 285: Columbia, at Lexington Hospital.

THE COURT: Okay. Could you still be fair and impartial to the trial of this case?

MR. ROCHE: Yes.

THE COURT: All right. Thank you. Ma'am?

JUROR NUMBER 157: Erica Reyes, 157, both of my parents were attorneys, and I'm an organizational consultant, so I've worked with a lot of medical and pharmaceutical companies on different products and different items that they have.

THE COURT: When you say "organizational," what -- what can -- what's your --?

JUROR NUMBER 157: Organizational consultants. So I've worked with pharmaceutical companies like Baxter, Bayer --

THE COURT: Okay.

JUROR NUMBER 157: Right. Yeah.

THE COURT: All right. You -- you think you could still be fair and impartial to the trial of this case?

JUROR NUMBER 157: Yes, sir.

THE COURT: All right. Thank you. Gentleman in the blue shirt?

JUROR NUMBER 118: 118. Daniel Mahoney. I'm a mechanical engineer by trade.

THE COURT: Okay. And could you still be fair and impartial to the trial of this case?

JUROR NUMBER 118: Yes, sir.

THE COURT: All right. Thank you. Gentleman in the back?

JUROR NUMBER 229: 229. Zach Corcoran (ph), I'm a lawyer.

THE COURT: All right. And could you still be fair and impartial to the trial of this case?

JUROR NUMBER 229: Yes, sir.

THE COURT: All right, thank you. Yes?

JUROR NUMBER 130: I'm Matthew Miller, 130, had one semester of law school, and my father is a retired physician and school professor who frequently served as expert witness in various medical cases.

THE COURT: All right. And could you be fair and impartial to the trial of this case?

JUROR NUMBER 130: Yes.

THE COURT: All right. Thank you. Ma'am?

JUROR NUMBER 106: Julian Lane, 106, I have a master's degree in mechanical engineering, my mom is a lawyer and my partner is a pharmacist.

THE COURT: Okay. Can you -- could you be fair and impartial to the trial of this case?

JUROR NUMBER 106: Yes, sir.

THE COURT: All right. Thank you. Yes, ma'am.

JUROR NUMBER 123: Tracy Macmeny, 123, I'm a registered nurse for over 30 years. So I'm unaware of specifics, but just throwing that out there in the different places that I've worked.

THE COURT: Okay.

JUROR NUMBER 123: May have been using products, maybe not -- but just --

THE COURT: All right -- all right. Could you still be fair and impartial to the trial of this case?

JUROR NUMBER 123: Yes.

THE COURT: All right. Thank you. Has any member of the jury panel ever been involved in any capacity in a lawsuit against a business person or other entity, seeking monetary compensation for damages or injury to themselves or their family, property, or business? If so, please stand.

This may be kind of similar to the previous question. So are you involved in a lawsuit, were -- you were seeking money for damages? If so, please stand. All right. And again, your name?

JUROR NUMBER 229: Zach Corcoran, 229, I represented my dad, dispute with attorney.

THE COURT: Okay. All right. Okay. Can you still be fair and impartial to the trial of this case?

JUROR NUMBER 229: Yes.

THE COURT: All right. Ma'am?

JUROR NUMBER 173: 173. Melissa Scott, and then (inaudible) in 2011.

THE COURT: Okay. And you could still be fair and impartial to the trial of this case?

JUROR NUMBER 173: Yes, sir.

THE COURT: All right. Yes -- yes, ma'am?

JUROR NUMBER 122: I'm Crystal Mycail (ph), 122, and it was an accident, it's been a long time, I can't remember the day.

THE COURT: And could you still be fair and impartial to the trial of this case?

JUROR NUMBER 122: Yes.

THE COURT: All right. Thank you. Yes?

JUROR NUMBER 146: Sorry. 146. Megan Phillips, my father was hit by a truck recently, and so there was a -- a case.

THE COURT: Okay. Could you still be fair and impartial to the trial of this case?

JUROR NUMBER 146: Yes.

THE COURT: All right. Thank you. Does any member of the jury panel hold any beliefs or opinions whether political, social, religious, or otherwise, which may affect your ability as a juror to be fair and impartial, and to base your decision only -- and could you base your decision only on the evidence presented in court during the trial of this case? So if there's anybody aware of any reason why they don't believe that they could be fair and impartial to the trial of this case based on their political, social, religious beliefs? If so, please stand. All right. And no response.

Has any member of the jury panel formed or expressed any opinion about any issue or matter involved in this case? If so, please stand. All right. And no response.

Has any member of the jury panel read any newspaper articles, or seen any postings on social media, or any information whatsoever about this case, or any issues involving this case? If so, please stand. All right. And no response.

Is any member of the jury panel aware of any bias or prejudice which they would have against the Plaintiff or the Defendant in this matter? If so, please stand. Okay.

And then, finally: Is any member of the jury panel aware of any reason whatsoever that they cannot serve on this jury and they cannot be fair and impartial to both sides? If so, please stand. Okay. And no response.

Any additional questions from the Plaintiff?

MR. FEW: Nothing from the Plaintiff, your Honor.

THE COURT: Any additional from the Defendant?

MR. SHEALY: No, your Honor.

THE COURT: You all need a few minutes, or --?

MR. SHEALY: Defense is ready.

MR. FEW: We're ready as well.

THE COURT: All right. You'll be striking from the first 20 and -- in the dump by the way, ladies and gentlemen, you'll be hearing some numbers that are stricken, this -- these are not your numbers out there, they're -- they're the way they're numbered on this piece of paper, so sometimes that causes confusion. All right. Ms. Cooper?

MS. COOPER: Using the numbers on the left, will strike 1 through 20 first. Plaintiff goes first.

THE COURT: And by -- and for -- by the way, we will have two alternates. Okay?

MR. FEW: Plaintiff strikes Juror Number 3.

THE CLERK: Plaintiff strikes 3.

MR. SHEALY: Defendant strikes 11.

THE CLERK: Defendant strikes 11.

MR. FEW: Plaintiff strikes 19.

THE CLERK: Plaintiff strikes 19.

MR. SHEALY: Defendant strikes 14.

THE CLERK: Defendant strikes 14.

MR. FEW: Plaintiff strikes 16.

THE CLERK: Plaintiff strikes 16.

MR. SHEALY: Defendant strikes 20.

THE CLERK: Defendant strikes 20.

MR. FEW: Plaintiff strikes Number 7.

THE CLERK: Plaintiff strikes 7.

MR. SHEALY: Defendant strikes 4.

THE CLERK: Defendant strikes 4. Then we'll get our first alternate from 21, 22, or 23.

MR. FEW: We have a strike on that.

THE CLERK: One.

MR. FEW: Plaintiff strikes 24.

THE CLERK: 21, 22, 23 to begin.

MR. FEW: Oh, I'm sorry.

THE CLERK: It's okay.

MR. FEW: 23.

THE CLERK: Plaintiff strikes 23.
MR. SHEALY: Defendant strikes 21.
THE CLERK: Defendant strikes 21. Now using the Numbers: 24, 25, and 26. Plaintiff strikes first.
MR. FEW: 24.
THE CLERK: Plaintiff strikes 24.
MR. SHEALY: Defendant strikes 25.
THE CLERK: Defendant strikes 25. Gentlemen, I'll call these back to you: Plaintiff strikes 3, 7, 16, 19, 23, and 24. The Defendant strikes 4, 11, 14, 20, 21, and 25.
MR. SHEALY: That's correct.
MR. FEW: Okay.
THE CLERK: Ladies and gentlemen, when I call your name, please bring your things, and have a seat in our jury box: Jan O'Connell, Kiana Houston McNair, John Fuller, Olivia Campbell, Melissa Scott, Timothy Bishop, Megan Cook, Daniel Mahoney, John Venting, Juliana Elane, Joshua Litner, Emily Costello. Our first alternate is Robert Weber. Second alternate is Tracy --
JUROR NUMBER 123: Tracy Macmeny.
THE CLERK: Thank you.
JUROR NUMBER 123: It's okay, and thank you.
THE COURT: All right. Any exceptions from the selection process of the jury, from the Plaintiff?
MR. FEW: Nothing from Plaintiff, your Honor.

THE COURT: Any from the Defendant?

MR. FEW: Nothing from the Defendant, your Honor.

THE COURT: All right. Ladies and gentlemen, let me talk to this crowd first, then I'll talk to you all. You all have been selected for the trial of this case, we're going to take a short break, there's some things I have to go over with the attorneys in maybe 10 minutes -- no more than 15 minutes, we'll bring you out and we'll start with the trial of the case.

That's very important -- couple of rules, but the one rule that I will tell you right now is: Do not discuss the case. I know that there -- you really don't have any information at this point, but at no point is it proper to discuss the case until you've gotten all of the evidence and the law which you have to apply to it. So at this time, if you'll follow the bailiff back to your jury room, and we'll bring you back out in just a few minutes, we can start the trial of the case.

(Jury exits room.)

THE COURT: And for the rest of you -- you all going to be experts on jury selection after the next few days. At this point, you'll be going back downstairs, there's another case to be drawn, and it's a criminal case, you'll go back to that different system that you kind of went through yesterday, so -- but it won't be -- it won't be here all day for that. So thank you very much and good luck.

(Gallery exits.)

THE COURT: All right. Have you all marked all the exhibits, or any you all put in, and you all ready to go pretty much?

MR. FEW: Yes, your Honor. And I -- I can hand you guys a -- a copy of the 22 (inaudible).

THE COURT: Okay.

MR. SHEALY: Your Honor, I did want to put a couple things on the record that we talked about --

THE COURT: Okay. Yes.

MR. SHEALY: -- in the chambers. Your Honor -- and Mr. Few can correct me, but I believe we have a stipulation that there is no dispute as between the parties about the ownership of any intellectual property that sort of forms -- the predicate for this lawsuit.

MR. FEW: Yeah, I believe that's correct.

THE COURT: Okay. You believe that's correct or you agree with it that that's correct?

MR. FEW: I agree with -- I agree with what we said back in chambers, which was --

THE COURT: Well -- I mean, what -- well, he just put on the record, do you agree with that?

MR. FEW: That there's no dispute, it depends on how it's -- how it's -- it's worded.

THE COURT: Well -- I mean, he just worded it.

MR. FEW: He said there's no dispute as to the intellectual property.

THE COURT: And then, do you agree with that?

MR. FEW: I agree that paragraph six sets forth who owns what of the agreement.

MR. SHEALY: As I understand it, we have no disagreement as to the ownership of -- of intellectual property.

MR. FEW: That's not something I plan on putting on a jury form or anything.

THE COURT: We're just asking that -- he's asking if that's a stipulation, if that -- do you agree with that?

MR. FEW: I agree with it as long as nothing's said to the contrary your Honor, I mean, it's -- it's not just as simple as saying who owns the --

THE COURT: I mean, I just -- in chambers, he mentioned that he had a -- I thought you all had a stipulation, I'm just trying to get whatever you all stipulate -- you all want to talk a minute -- I mean, you all putting a stipulation on record, I'm not mediating your discussion here. I'm like -- if he puts a stipulation, in you agree with it, then that's what we put on the record, this -- I mean, I -- that's what I thought we were doing. So you all discussed and figure out what your stipulation -- you don't have a stipulation, we don't have to put anything on the record, easy as that --

MR. FEW: I don't see --

THE COURT: -- it's your call.

MR. FEW: -- I don't see a need for that stipulation, frankly.

THE COURT: All right. Then, there's no stipulation.

MR. SHEALY: All right. Your Honor, then I -- we move in limine that there be no introduction of any evidence pertaining to any products being developed by Diaxamed that are outside of the -- the -- the -- the product, that is the subject of this lawsuit -- on the ground set there's irrelevant, and that -- that may get into some proprietary trade secret kinds of things, because there are other products that Diaxamed in -- in -- has in development.

THE COURT: And I believe you said you didn't really have any information about that?

MR. FEW: I don't have any confidential information. The witness testified the other day that they were working on something else that had something to do with Europe. So -- so -- and -- and to my knowledge, they don't -- there is no product that is commercially available from any of these companies.

THE COURT: I'm not sure, that's why this motion is asking.

MR. FEW: When the testimony came out about the product

-- some other product being in -- in Europe -- I mean, that's so generic, I don't know how it possibly gets into any type of -- I mean, we can just stipulate to that -- that there's -- this testimony from a witness that Diaxamed is working on some other product.

THE COURT: Well -- I mean, he's making a motion in limine about any product, and I'll -- I'll grant him -- I mean, it's like -- you know, there'd be maybe some reference to working on -- maybe no specific information about any other product in Diaxamed, unless you tell me something.

MR. FEW: I -- I'm not aware of any other product, your Honor, but I think it's --

THE COURT: I mean -- I guess, it's not today, you're not going to -- are you going to be eliciting any testimony or presenting any evidence contrary to that?

MR. FEW: I don't have any intention to, but if a witness mentions, it -- it -- it -- the company is an -- is a going concern, and I think that's an important issue for the jury to understand that the company's not been shut down and that they may be working on other things. I don't see how that prejudices anything or confuses anything.

THE COURT: All right. I'm going to have him restate his motion so that you have a -- you can figure out what he's talking about.

MR. SHEALY: Your Honor, I have a motion in limine, that to exclude any evidence regarding other products that are under development or in development by the Defendant, Diaxamed.

MR. FEW: All right.

THE COURT: I mean, I'm going to grant that unless you come up with something during the trial that you need to change that, we can address it at that time.

MR. FEW: Well, your Honor, just to be clear, I don't even -- the -- the grounds that Opposing Counsel stated was that something was confidential, and I'm not aware of anything confidential. When the witness testified the other day in her deposition there was another product in Europe, there was no effort made to mark that testimony confidential, so I don't know what's possibly confidential about some company may be working on another product.

THE COURT: And, I'm not sure that's what his motion is directed at, is it?

MR. SHEALY: I mean, it really isn't.

THE COURT: No. I don't -- I'm not involved in this case, I don't know if there's other information out there, he's just trying to make sure that no confidential information that you may be in possession of regarding his clients is not presented -- you know, in the public record.

MR. FEW: Your Honor, I'll just say if there really was grounds for such a motion, then Opposing Counsel would be saying: "We have product X or Y or Z, and I don't want it mentioned," and there is no such knowledge of anything. So I -- I don't really understand the need for the motion in limine, because there is no other product other than the fact that this company may do other things which may come out, and I don't see how that could possibly be prejudicial to the trial.

THE COURT: I think we're on two different wavelengths, but I'm granting your motion, and if there -- if there comes an issue, that Mr. Few, that you need to -- to raise, then we can address it at that time.

MR. FEW: Your Honor, may I inquire that -- that when the witness was deposed the other day that she mentioned there -- there's another product that -- that she didn't even really know much of it, she doesn't work there anymore.

THE COURT: As long as you don't get information about that product, then we're fine.

MR. FEW: But she -- if she can say they're working on some other product in Europe because if not, I need to counsel her not to talk about it.

THE COURT: That's not a problem, is it?

MR. SHEALY: I don't think so, I mean...

THE COURT: Yeah.

MR. FEW: Very well, we agree.

THE COURT: All right. It took a long time to get to that agreement. All right. Anything else?

MR. SHEALY: Nothing from the Defense, your Honor.

THE COURT: All right. Any from the Plaintiff?

MR. FEW: Nothing from the Plaintiff, your Honor. I've got this 22, I can hand up to you (inaudible).

THE COURT: Well -- I mean, is -- is that one that he's --?

MR. FEW: This is one we're adding so that you can put in that book.

THE COURT: Okay. Do you -- have you marked it?

THE CLERK: I have not marked any Plaintiff's Exhibits.

MR. FEW: No, it's -- it's a -- you have a binder that we get?

THE COURT: I -- I'm not the court reporter.

MR. FEW: Right. Well, no, I'm not giving it to her, I -- I've got -- I'm going to introduce those as we get through to the witnesses, this is just for you to put in --

THE COURT: Okay.

MR. FEW: -- your binder.

THE COURT: So have you marked anything?

MR. FEW: No, sir. But they're tabs in there so you can put it behind 22.

THE COURT: Have you all marked anything with the court reporter?

MR. SHEALY: The court reporter's marked all Defense

Exhibits.

THE COURT: All right. Have yours -- are yours marked?

MR. FEW: No, your Honor, not yet, I have them right here.

THE COURT: All right. We're going to take a short break, and then you can have them marked. That doesn't mean they're in, they're just -- they're marked so they don't have to be -- we have to stop each time to try to introduce them.

MR. FEW: Very well. Thank you, your Honor.

THE COURT: Yeah, five minutes.

(Off the record.)

(On the record.)

MR. FEW: As I understood it, your Honor, Defendant's objected to Numbers 1, 3, 5, 7, 13 to 16, and 18 to 21.

THE COURT: So what point -- I just want to know which one you all have stipulated to.

MR. FEW: That would be (inaudible), so everything else is -- is okay to go in.

MR. SHEALY: That -- that -- that is correct, your Honor.

THE COURT: Okay. Tell me what those are. Plaintiff's?

MR. FEW: Your Honor, we would -- Defendants would stipulate that the Plaintiff's Exhibits 2, 4, 6, 8, 9, 10, 11, and 12, and 17, can come into evidence.

THE COURT: All right. No objection to those. How about Defense's Exhibits?

MR. SHEALY: Your Honor, I just got those last night, and my recollection is that --

THE COURT: And that's fine, I mean...

MR. SHEALY: -- there's a few of them that -- I don't have any basic, overall, major objection to any of them, but I think some of them may need to be authenticated, so we'll just --

THE COURT: Well, the question is: Do you have any -- that you don't have objection to? That was my question.

MR. SHEALY: No, I just object to all of them at this point.

THE COURT: All right. Okay. All right. Is the Plaintiff ready for the jury?

MR. FEW: Yes, your Honor.

THE COURT: Defense ready?

MR. SHEALY: Yes, your Honor.

THE COURT: All right. Bring the jury in. All right. Bring the jury in.

THE BAILIFF: Judge, the jury is present.

THE COURT: All right. Bring them in.

(Jury enters room.)

THE COURT: All right. Ladies and gentlemen, we are now getting ready to start the trial of this case. And first of all, I'm going to turn it over to our assistant clerk of the court for administering the oath of the case, Ms. Cooper.

THE CLERK: Ladies and gentlemen, please stand for the oath in the case, and you raise your right hand, and your response will be, "I will." You shall well and truly try Case Number 2022-CP-23-1310: Sealevel Systems Inc. versus 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., John D. Feldman, and James S -- Steve Johnson, and (inaudible) true verdict according to the law and the evidence, so help you God?

THE JURORS: I will.

(Jury sworn.)

THE CLERK: Thank you. Please be seated.

THE COURT: All right. I'm going to give you some preliminary information, then I'm going to turn it over to the lawyers. First of all, I always like to start off each trial just to kind of introduce you to other people in the courtroom, just so you don't have to wonder who they are and what they're doing.

First of all, we have a court reporter that's sitting here, and she takes down all of the testimony and everything that's stated so we can have a record. Our clerk of court, Ms. Cooper, is involved in administering the oath to witnesses and keeping up with the records and general of the matter like that.

Seated to my right is my -- I -- I call "my assistant judge," he's a law clerk, a law school graduate to assist me any type of research or anything, like, that is needed in the case.

The most important people for your purposes are the bailiffs. These ladies on the -- the red coats, and you all got the cream of the crop this week with these two. So -- and I'm on the record of saying that. No, they really are. They're fantastic, and they will look after you, if you have any questions or need anything, please check with them. If there's anything that I need to get involved with, they'll let me know.

So -- anyway, what is your role and what is my role? We have two totally different roles in the trial of this case. My role is to preside over the trial, rule on objections that may be placed throughout the trial, and tell you what the law of the case is, okay? And throughout the trial, there may be objections by Counsel, and the purpose of that is not to try to keep anything from you, that is just our process to make sure that all of the rules of evidence have properly been followed when evidence is presented to you as the jury.

Now, your role is to determine what the facts of the case are, and you're to determine that by the evidence that's presented, documents -- there may be testimony, there may be documents, there may be stipulation, anything like that, you'll give the weight and value which you feel is appropriate and you'll determine what the facts are. And what I mean by that is, at the conclusion of the trial, I will charge you a law after you've heard all of the testimony, and then you will have a verdict form. And that verdict form will be a piece of paper, and it will ask various questions, and you -- the jury, will answer any these -- answer the questions that are presented to you on this verdict form, and that's how you indicate what your decision is on the (inaudible).

I'm going to ask that you not take notes, I think that the documents and so forth should be sufficient for you to review during your deliberation. And as I said, I think the case -- we hope that the -- again, sometimes you don't ever know when you start a case how long it will be, so that's why I'm kind of planning today, tomorrow, and Thursday, but don't -- don't rule out Friday in case we should go into Friday.

Trial -- usually what I try to do is start at 9:30 in the mornings, we try to take a break as close to 12:30 as we can for lunch, and you'll be on your own for lunch, and we'll -- I'll give you an hour and a half for lunch, and -- it kind of depends on where we are with witnesses and the -- in the particular case, sometimes it's like, "Well, we don't really want to start another witness now, so we may leave for lunch a little bit earlier."

Sometimes I have other matters unrelated to this case that -- sometimes I get really ambitious with my schedule, so I may have to take breaks to handle some of that stuff. We try to close end of the day as close to 5:00 as possible, sometimes it may be a little bit earlier. If we have to go over 5:00 -- and I'm just saying just sometimes just a little over 5:00, I will let you know and say "Hey, did anybody here make any arrangements?" But our goal is to finish before 5:00, so that you can be headed on, except when you're in your deliberations, that may be changing a little bit.

Now, if anybody needs to take a break when -- when -- like -- if we hadn't gotten to there yet, indicate, let us know, let the bailiffs know. I mean, we've realized -- this is very important to the parties, but we also realize this is an inconvenience to you, and we want to try to make you as comfortable as possible.

Now -- and it -- and there's a couple of rules that I will tell you every time you break, because these rules are important. And that is: Not to discuss the case among yourselves, and definitely not members -- you know, from your family or friends, when you go home at night, it's very -- I know that's difficult, but it's very important that you don't discuss the case because once you start discussing the case, you're starting to make up your mind, and you're also having kind of outside influence if you discuss it with people outside the jury. So don't discuss the case. Talk about anything else in the world, but not this case.

Second is: It's very important that you not do any type of research, and I know that's tough too with Google, that you don't Google everything -- you know, it's not proper to Google the parties involved in this matter, the lawyers, the law, any issues in this case. Everything that you need to make your decision, you will get in this courtroom under our rules, and that's why it's important not to get any outside influence or any outside information.

The third thing is: I'm not aware of any media coverage, I think they're all involved in that other matter, but if there is any plea, disregard that, including any -- any social media.

Now, the -- in a case like this, the burden of proof -- whatever party has a burden of proof for their particular claims is by what we call "the preponderance of the evidence," or "more likely than not." That's the standard that the -- the Plaintiff have proven their case must prove that it -- their claim is more likely than not.

And that's much different -- I don't know if anybody's ever been involved in a criminal matter or maybe you have been on a jury in a criminal matter, or maybe you've seen it on TV, and that's -- you hear this phrase: "Beyond a reasonable doubt," that's a much higher standard, and that's what's involved in a criminal case, which does not apply here. It's by "preponderance of the evidence," or "more likely than not." And I will give you more information at the conclusion when I charge you on the law. The things that -- you know, every piece of evidence, every testimony, you're to give it the weight and value which you feel is appropriate. As far as -- you know, witnesses, you're to determine credibility of witnesses or believability of witnesses. And I realize this is -- this may be a very technical case with some documents and stuff, but it's very important that you pay very close attention, because it's a very important matter for both -- both sides here.

The procedures for the trial are that: We will start with opening statements, this is not evidence, this is the lawyer's summary of what the case is about. Then we will have witnesses, and then once -- and the production of evidence, and once we've concluded with all the evidence that's going to be presented, then we will have closing arguments by the attorneys, and then I'll charge you with the law, which will be the last thing before you go to your jury room and begin your deliberation.

When you take the first break, I'm going to ask that you select a foreperson, and that can be of the original 12, and that the -- the foreperson is merely the person to communicate with the Court, if needed, and kind of lead the discussion due to deliberation. So that's -- that's the -- so anybody can -- you know, that you all selected, however you all feel is appropriate.

And the foreperson would be sitting in the first seat here, they have a special seat, and the alternates have a special seat. Other than that, you all can sit -- everybody can sit wherever you want to.

All right. With that being said, those are all my kind of opening remarks, and I will now turn it over to the attorneys for opening statement. Mr. Few?

MR. FEW: Thank you, your Honor. May it please the Court?

Good morning, ladies and gentlemen. Thank you all for being here. My name is Wes Few, and I'm Counsel to the Plaintiff.

The Plaintiff is a corporation in this instance, a company called Sealevel Systems Incorporated. It's located over in Pickens County in Liberty, and it's owned by Tom O'Hanlan and his wife. And this is his son, Ben, that used to work for the company. He's going to testify as our opening witness here in a few minutes and tell you a little bit about how the matter ended, and then I would have

Dr. Cole here to kind of tell you how the whole thing began.

I don't think you need to be too worried about the intellectual property, or the -- the -- the technical, or the confusing aspects that someone may think exist in this case. This is a case about a contract. Parties were introduced, they said "Hey, let's do this together." They executed an agreement, which is going to be Exhibit 4. You'll see the Exhibit 4, it'll go back into evidence, you'll be able to read it and see what it says, and the parties have obligations in there, and one of the obligations in there is to terminate the contract, and that's never been done.

It's a -- it's a 2014 contract -- October 28, 2014, it's never been terminated. I'll let the Defendants explain that to you. You're going to hear some conflicting testimony from the Defendants about the facts of this case. Some of them are going to say "We had an agreement." Some of them are going to say "We didn't have an agreement." But the -- the gist of this contract is about -- this lawsuit is about a contract, just like is made every day, okay? But this -- all contracts are different, okay? So our claims are pretty simple, we're asking for a declaratory judgment from this court, that the contract exists, and that my client has rights in that contract.

Now, to prevail on that, that's not asking for an award of damages or anything. And you -- you all will be the ones that will be able to decide if there was a contract that existed, that most likely will be a factual finding that the Court will make, and you as a jury will make that finding.

Our second claim is related to Claim Number One, but it's alleging a breach of a contract, and we want damages as related to it. And you're going to hear about the amount of time that my clients put into this effort, a lot of time. Hundreds of thousands of dollars of man-hours in time, dropping what they had going on, jumping in with two feet, and doing everything that they possibly could to design what would be a handheld device that would go to the arm or the leg where this dialysis device was going to be an implantable, okay?

Probably getting confusing right there, I think we can keep it at a high level. There's an implantable that CreatiVasc was developing. They were also trying to do the handheld, but they weren't having any luck doing it, that's why they reached out to people and were introduced to Tom O'Hanlan and Sealevel. And you'll see that they were pleased to find that that type of expertise was right here in Greenville, Pickens County. Tom got involved in the execution of the contract, his folks sent it over, they signed it, and they started moving (inaudible).

Now, another thing that is inherent in every contract is, "If you are a party to a contract, that you have to act in good faith," and you don't need me to tell you what good faith is -- good faith, but I wouldn't. Good faith is being honest, good faith is being truthful, good faith is -- is -- is communicating with people about the substance of the contract, and it's not ignoring it. It's not telling that there was no contract after they know that you've been involved and have their employees coming over to your facility and just opening up your doors and doing everything that you possibly could to design the handheld.

So Sealevel's responsibility -- and the contract speaks to this, but was to design the handheld. They also -- Tom has an incredible mind, okay? You're going to see that when he testifies. He's an engineer, he's been designing solutions to things that -- I have an engineer in (inaudible), but I never dreamed that I could do some of the things that he's done. His company's been very successful, they employ dozens of people, they've been in business for many -- many years, they're still going, they're very successful, and he's going to tell you that they -- they could have gotten this done if there had been an ongoing communication.

And as to how the whole thing fell apart, that's something that you're going to get to determine. You're going to determine that based on the testimony of the other folks that the Defendants -- who were going to have to explain the emails that they sent or the emails that they didn't send, were the positions that they took, and it's -- so let me go back to our claims: Declaratory judgment that the contract exists and that we have rights in it. A breach of a contract alleging damages, which will be the amount of time that they put into it.

Also related to that breach of a contract, there's a confidentiality provision in the agreement, and we believe that the evidence will show that they took everything that Tom did, and that Sealevel did over a period of -- from October of 2014 until really early 2017, is when -- I guess their strategy was just to pretend that no contract existed, and that Tom didn't exist, and that all the work that he had done didn't exist, but that's not what Mr. Johnson's going to testify to. He's going to tell you that after he was terminated, they kept his computer and they had all of our information, and they never gave it back, just what he can communicate with us after 2017.

You're going to hear evidence that there was investments that were made in the technologies. It started as one entity, it goes to another entity, it has to do -- they call them like rounds of financing, okay? I'm going to explain that in just a second, okay? We also have a claim for intentional contract, okay? Which means we -- we need to prove that the contract existed, that it was valid, that the

Defendants knew about it, and that they took steps to cause a breach of that contract, okay? And we're entitled to damages remedies that the judge will tell you about based on that claim as well. And then, we have two other claims that could be considered to be pled in the alternative, okay? And that's something that the law allows us to do, and they're known as equitable claims.

And essentially, if -- if you were to find that there was no contract, you would -- you could conclude that if there had been a promise that was made by a party, and that Plaintiff relied on that promise and provided services in relation to that promise, and then they say there's no contract, you can still collect for the value that you provided to them.

Classic example of that would be somebody comes and knocks on your door and says "Hey" -- you know, "You need a new roof," probably happens -- I'm sure that's happened to some of you all. "You need a new roof," and you go, "Okay." And you say you're going to get a -- you're going to do a roof, and you just forget to execute a contract, and they come and put the roof on, and then the homeowner says "Well, I don't have a contract with you, and I don't owe you anything."

And the roofer says "Well" -- you know, "We agreed on $22,000," or whatever. That roofer would have a claim for his actions that he took and relies upon that promise, even in the absence of a contract, okay? So that's -- that's our -- our equitable claims that we call "quantum meruit and promissory estoppel." Based on a promise and based on the value that my client provided that was not returned to us.

Okay. So Dr. Cole, who's sitting right here, he's a vascular surgeon here in Greenville. He's retired now, he was at Charisma, I believe for many -- many years, he has a great -- very active mind, and he came up with this idea to -- to help with dialysis, okay? So that's another thing, just a high level, the invention related to facilitating patients getting dialysis. They wanted to make it easier, quicker, just -- that -- that was the whole idea.

He came up with the invention -- I believe, around the 2003 time period, and he took some efforts on his part to raise a little bit of money and get it going, but he's a vascular surgeon. And to -- to start a company, it takes start-up capital and it takes people that know how to get medical devices approved and -- and all those things and design.

And there were some design issues with this product, because it -- it -- it had to do a lot of things, but mostly were mechanical and electrical -- electricals, and circuits is -- is Sealevel's expertise.

Eventually, Dr. Cole came in contact with Mr. Johnson

-- sitting right here, and the company -- a company was formed called "CreatiVasc." CreatiVasc Medical -- that's why their name is one of the parties. CreatiVasc Medical is the party that contracted with Sealevel in October of 2014. Okay? In -- or around early 2015, these Brookhaven companies came in and they invested money. Essentially, they took it over. They -- they -- they bought it -- they can explain to you all the differences of it, but Brookhaven came in, and that's why Brookhaven is named in the lawsuit.

And -- and -- when Brookhaven came in and invested, a gentleman out of Raleigh named "Brian McMurray," who owns a company called "ATEX," also got a contract with CreatiVasc to -- that was a supply agreement, okay? That's another thing that's important to understand, the contract was to supply the parts. So based upon Sealevel's willingness to design the handheld, and -- and do all that work in product development, once it got up and going, Sealevel was going to be able to have the exclusive right to sell the handheld as a part of the device, okay? Well, ATEX also had a supply agreement where we believe -- they believed that they have the exclusive rights to the whole thing, okay? That's going to be something that you can sort out how and why that all came about.

Then on December 30, 2016, ATEX, the company owned by Mr. McMurray out of North Carolina, forms "Diaxamed." That's why you see the name Diaxamed. It's a newly-formed company to take all of the assets of CreatiVasc, okay? By my way of understanding, it's all the same thing, okay? It's just different corporate entities that were involved. And you'll have to decide: Did those corporate entities take responsibility for the Sealevel contract? Whereas they say "Look, it didn't exist. Go away, don't bother us. We don't want to deal with you anymore."

So from that point forward -- shortly thereafter Mr. Johnson was terminated, he was made to sign some agreements. One of which included a non-disparagement clause. And a non-disparagement clause, I would tell you is something that people use when they don't want someone to tell other people what they've experienced. So he was made to sign those agreements, would've been real simple to Sealevel what -- what was going on and why we weren't talking to you anymore, but no -- no one ever did it -- no one ever did it. So that -- that's -- that's the gist of our case.

I thought it would be important to -- to put the people kind of in the timeline. So you had Dr. Cole and he had a company that he'll tell you the name of it doesn't really matter, it's something Vascular, then there was CreatiVasc, and CreatiVasc consisted of Steve Johnson, who was the president and CEO, and then they contracted with Sealevel to have a supply agreement, and they had other vendors they were working with.

And then, Brookhaven came in, but John Feldman -- who's a fellow who had a medical issue and couldn't be here, he was the guy affiliated with Brookhaven. He was not really a hands-on operational kind of guy, okay? But he was involved.

The -- Steve Johnson was there with CreatiVasc, he was there with Brookhaven, and he was there for about three months with Diaxamed. Lindsey Calcutt, who was a PhD from Clemson, who we plan on bringing in to testify, she -- I believe, will testify that she worked for CreatiVasc, and then she also worked for it while it was part of Brookhaven. I think when she came in, Brookhaven was already involved, and then she stayed on with Diaxamed for a while.

So the commonalities of the different entities, CreatiVasc, Steve Johnson is involved in all three of them, and -- and I believe Lindsey Calcutt was involved in all those as well, but that'll -- that'll be made clear. And so, the question is -- and what we maintain is that you can't take -- you can't become the owner of everything that was CreatiVasc and not take the obligations and the responsibilities that CreatiVasc had, but there -- as I can tell, that's the position that's at stake.

And so, I want to be real respectful of your time. We put a lot of time and effort into getting ready for these trials. There will be times when you will think to yourself, "Should have been more time than Mr. Few," because you're fumbling and bumbling over there. But I always try to -- try a case on, like, 20 or fewer Exhibits, and right now we -- we have 22, they may not all get put into evidence, but that's what we've marked, we may add a few, just know that when something goes into evidence, you get to take it back to the jury room. And the judge will make all the decisions on what comes into evidence and what doesn't come into evidence.

But also the testimony that you hear from the witness stand is evidence as well. So I've made an effort to streamline the way we prove this case. Always something interesting happens that I didn't foresee as we move forward in a trial, and so we may adjust and add in -- you know, and -- and make an effort to put in some additional evidence.

There's a lot of emails that went back and forth between these parties. My client has produced well over a thousand pages of documents, and -- and -- so that's a lot of the information that the Defendants have kept and never given back to us. So they -- they've kept all of our research, we don't know what they've done with it, we don't know if they loaded it into some AI program, and we just -- we just don't know because they wouldn't tell us.

So that's our case. There's a contract, I don't think it's all that complicated. We're really not arguing over who owns which piece of intellectual property. We had a contract that we allege was breached, we believe that evidence will show that it was breached in bad faith, that it was breached -- it was breached intentionally, and that we're entitled to have our rights declared under that contract, and that we're entitled to the types of damages that the judge will charge you, that we are able to get under the applicable law. So, thank you very much.

THE COURT: Mr. Shealy?

MR. SHEALY: Thank you, your Honor. May it please the Court?

Ladies and gentlemen, my name's Kirby Shealy, introduced to you earlier. I'm from Columbia, I represent all the Defendants. And -- you all were made aware -- or probably you were aware when you walked into the courthouse Monday that of -- of a big murder trial, there's a bad guy somewhere in that case. I'm here to tell you that in this case, there aren't any bad guys.

Everybody that was involved in this project is smart, they are entrepreneurial, they are creative, and they were excited about trying to put together a -- a medical product that if it had worked, would've been revolutionary, would've really improved people's lives, people that have to go for dialysis every week to have their -- basically have the blood scrubbed of the -- the toxins that build up if -- in your blood, if your kidneys aren't working appropriately.

But the product didn't -- didn't work. I mean, it ran into problems. And that's what ultimately is the genesis of this, is the product didn't work, it's never been developed, and the -- this project which started with great promise just didn't work out, and -- and so that's -- that's what we're ultimately here about, is a failed start-up.

Start-up companies often start up with a lot of enthusiasm, it takes money to get a company off the ground, you'll hear -- you know that CreatiVasc was that start-up, some money was raised and -- you know, time was spent trying to develop the product, money was spent trying to develop the product. Began to run out of money, then they reached out to somebody else to inject more money, and that's when an entity called "Brookhaven Vascular" was formed, and John Feldman that Mr. Few mentioned, injected more money into the enterprise. Burned through that money and time passed, and still the product is not where it needs to be to be approved by the FDA, and -- and -- and marketable.

Eventually a company called "Diaxamed" purchased some of the -- not all of, but some of the assets of CreatiVasc, and Diaxamed still exists today, still operating.

Mr. Thatcher -- Bob Thatcher is over here, on the far end is the CEO of Diaxamed. But the evidence will show that there's never been a product developed. There -- the -- the aspect of the product that Sealevel was working on, Diaxamed decided

-- you know, "We've seen that it just isn't working, and we're not -- we've got problems with the -- the other aspect of the product that don't have anything to do with what Sealevel is working with, and we're going to focus our efforts there."

You're going to see a -- a mock-up of this thing there. Mr. Few mentioned that there's an implantable device, and I'm not going to pretend to explain how it works, but people will explain it to you, but you'll see a mock-up of it. Something that gets implanted in the human body, and the original conception of this was using needles. The device could be activated and help alleviate a -- a -- a problem that patients experience when they do dialysis all the time. Blood clots develop, and it's -- it's a risk to people. And this -- the idea of this product was that it would mitigate or make less the risk of these blood clots developing.

So that was the original conception that Dr. Cole invented. And then, down the line of the folks who CreatiVasc said "Wouldn't it be really great if we could have these dialysis patients that have to face needles every week, have to face just a couple less every week, and have the device -- the pumps that -- that run the device activated by an external-handheld thing that would connect over the -- through the skin without puncturing the skin, and run the pumps that way?" And that's the part of this that Sealevel was working on. Which the evidence is going to show that there were problems, as there are with anything like this. This is -- I mean, if this thing had worked and gone to mark -- this has been revolutionary, this has been fantastic, but there are problems with things like this that are developed to be put into the human body. They have to work -- they have to work reliably every time or bad things can happen when you're introducing foreign bodies into the -- into the human body.

So ultimately, it just didn't work, and the -- and the project ran out of money. And, so -- that's where we are. I'm going to pledge to you that I'm going to do everything I can to keep the focus as narrow as possible on what the issues really are in this case, and they have to do with that -- this -- the agreement that the CreatiVasc ask entered into -- with Sealevel.

And my pledge to you is that you keep your eye on the ball -- I mean, I -- you -- my -- my request of you is that you keep your eye on the ball is -- you know, did -- when CreatiVasc entered into that agreement so did it obligate CreatiVasc to buy anything from -- from Sealevel? The -- the -- the whole thing, if you -- once you see it, is premised on this notion of like, "If we get to market, we'll buy all of the handheld -- the external things from you," but we never get to market, so we didn't breach anything.

They never sustained any damages. They took this on -- on that basis -- on the basis of, "Look, if you agree to let us be the -- the sole supplier of this thing, we'll take all the risks up front." Everybody took risks. Sealevel took risks, CreatiVasc took risks, everybody spent money, lost money trying to put this together. Nobody -- there's no -- there's -- there's nobody secretly marketing this to the world. We'd all know about it. Frankly, it would be such a interesting revolution -- but if there would be no evidence of such a thing, because it just hadn't happened. And -- so that's what -- that's why at the end of this case, we're going to come to you and ask for a verdict for the Defendant, because there really has never been a breach of this agreement.

The -- Diaxamed didn't -- didn't buy or -- or assume this obligation under this agreement when it bought the assets of Brookhaven, which was the successor to -- to CreatiVasc. So it -- it -- just -- that -- Mr. Few made allusions to that. It's not bound under the -- the -- the agreement. The agreement still exists, it -- it certainly still exists, but nobody has breached it. 10 years plus now -- over 10 years later, nobody has breached anything because no product's been developed. So for those reasons, at the end, we'll be asking you for a verdict for the Defendant.

Thank you very much for your service. Both parties --

all of the parties appreciate your being here and recognize what a sacrifice it is to serve on the jury, but we'll do our level best to keep that work time as -- in that box as limited as possible. Thank you.

THE COURT: All right. Mr. Few, call your first witness.

MR. FEW: Thank you, your Honor. May it please the Court? Plaintiff calls Ben O'Hanlan.

THE COURT: All right. Mr. O'Hanlan you'll come forward and be sworn.

THE CLERK: Place your left hand on the Bible, raise your right hand.

BEN O'HANLAN,

being duly sworn, testified as follows:

THE CLERK: State your name for the record.

THE WITNESS: Ben O'Hanlan.

THE CLERK: Thank you. Please be seated.

DIRECT EXAMINATION

BY MR. FEW:

Q. Good morning, Ben.

A. Good morning.

Q. Jury probably figured out from the same last name that you're related to this fellow; is that right?

A. Yes, sir.

Q. And -- and how are you related to him?

A. Most people will say he is my brother, but he's, in fact, my dad.

Q. Yeah.

A. When they see us.

Q. And -- I -- I want to try to be brief with your testimony, but I do want the jury to understand, what was your involvement, if any, with Sealevel systems back in the 2014 to 2017 time period?

A. I was president of the company from 2012 until 2019 -- actually beginning of 2020.

Q. And as president of the company, did you have any familiarity with this customer supply agreement that we've been talking about?

A. Sure, yeah. It was standard practice for us, and it's one of the first things that get in place when we engage with a customer on a new custom opportunity.

Q. And what do you recall about how it ended?

A. How it ended?

Q. Yeah.

A. They -- well, there was -- as everybody's discussed, there was two components to the solution. There was a component that we were responsible for, which was the handheld, and then there was a component that was implanted. We're a computer company, we've never done implanted anything, so our responsibility was for the electronics and the motor, and the mechanics outside. And so, we -- we accomplished the requirements as far as our product goes. The solution itself, as an overall, solution could not be developed because of the implant, so the customer just went dark on us, we got no communication, and so eventually we had to send invoices to which we finally got a response.

MR. FEW: Your Honor, may I approach the witness?

BY MR. FEW:

Q. Mr. O'Hanlan, I'm going to hand you a copy of what's been marked as Exhibit 21. Take a look at that and tell me if you recognize that document.

A. Yes, sir, I do. There's several things that I remember from this document that make it easy to remember.

Q. Okay. First off, is it -- tell the jury what that document is.

A. This is a response to us finally sending an invoice after not having any communication, and this is from Brookhaven Medical's General Counsel, and it says "With regards to the invoice, please be advised that Brookhaven acquired all the outstanding shares of CreatiVasc. While Brookhaven is a parent company of the wholly-held subsidiary that acquired CreatiVasc, Brookhaven did not and has not assumed any outstanding liabilities of the CreatiVasc entity that existed immediately prior to the merger. Moreover, CreatiVasc also denies any liability for the items set forth on the invoice. It does not have a copy of any purported" -- that's one of the things that struck me. "Purported supply agreement supporting the invoice, if -- if in fact one exists, please send a copy to me." After discussions with Steve Johnson, that's also a parent to Sealevel was unable to produce a working device, that's also what struck me about this letter. I believe Steve Johnson's words were he left for joy when it worked. And so, "Accordingly, please consider this correspondent is complete denial, any liability of either Brookhaven or CreativVasc for your invoice."

Q. Okay. And the letter is addressed to you; is that right?

A. Yes, sir.

Q. And what's the date on it?

A. That is June 28, 2017.

MR. FEW: Your Honor, at this time, I would move Exhibit 21 into evidence.

(Plaintiff's Exhibit Number 21 admitted into evidence.)

THE COURT: Any objection?

MR. SHEALY: No objection, your Honor.

THE COURT: All right. It's in without objection.

MR. FEW: Thank you.

BY MR. FEW:

Q. Mr. O'Hanlon, do you recall receiving any other correspondence or communications in writing other than this

Exhibit 21? It just got put into evidence.

A. Not to my knowledge.

Q. And what is your recollection of the amount of time and effort that Sealevel put into this project?

A. It's been a long time. I think most of the work was done around 2015-ish time frame, so that's roughly 10 years ago. What I do recall is that whatever amount we invoiced was a very conservative number in terms of we, in fact, spent a lot more hours than what we'd actually put on the invoices.

Q. And there was mention in the opening statements about Brookhaven putting money, did Sealevel ever get paid for the work that they did?

A. It's -- I don't recall, I wouldn't want to misstate it. I mean, I -- that's an easy answer to -- to get, but I don't recall. I don't remember there being any payment that I could say for certain.

MR. FEW: Thank you. That's all the questions I have. Please answer any questions that Mr. Shealy might have for you.

THE COURT: Cross-examination?

MR. SHEALY: Just briefly, your Honor.

CROSS-EXAMINATION

BY MR. SHEALY:

Q. Mr. O'Hanlan, the agreement that Sealevel entered into with CreatiVasc, that was the customer supply agreement that you heard Mr. Few talk about in his -- in his opening?

A. Yeah.

Q. And that you also acknowledged, right?

A. I did. Yes.

Q. And are you familiar with that document?

A. Yeah. Intimately, yes.

Q. Okay. And you'd agree with me that that agreement -- in that agreement, CreatiVasc never agreed to pay Sealevel for the time it spent developing the product, correct?

A. Well, that would've been an exhibit.

Q. That would've been an exhibit --

A. To the agreement invoices and such, yes. And it does define invoices in the agreement.

Q. Well, it defines invoices for -- if -- if -- there is a -- if there's going to be a delivery of the device, Sealevel is going to invoice according to a...

A. And we did deliver the device. And, in fact, Steve left for joy when we delivered the device.

Q. So -- but it doesn't say that -- that Sealevel is going to be allowed to send invoices to CreatiVasc for the time that it's spent in research and development, does it?

A. It speaks to how invoices are occurred, yes.

Q. It speaks to how invoices are -- are occurred?

A. Yes.

Q. Is that what you're saying?
A. Yes.
MR. SHEALY: Okay. Your Honor, Plaintiff marked -- before we get started, Exhibit 4, which we stipulated would be admitted into evidence. May I approach with a copy of Plaintiff's Exhibit 4?
(Plaintiff's Exhibit Number 4 marked for identification.)
THE COURT: Plaintiff's Exhibit 4, yes.
BY MR. SHEALY:
Q. Mr. O'Hanlan, I'm showing you Plaintiff's Exhibit 4.
A. Uh-huh.
Q. Do you recognize that document?
A. Yeah. That's is supply agreement.
Q. All right. And it's several pages in length, correct?
A. Correct.
Q. All right. Who signed Plaintiff's Exhibit 4 on behalf of Sealevel?
A. Me.
Q. Okay. And -- so that -- it bears your signature on page 10?
A. Yes.
Q. All right. And the -- as I understand it, the scope of what Sealevel was to do is set forth in the first

paragraph, is that correct?

A. The one labeled "scope," yes.

Q. Yes. All right. And it says "Sealevel agrees to design, manufacture, sell, and deliver to customer hardware and software," -- that are defined as the product.

A. Uh-huh.

Q. "Used in the systems handheld actuator and implanted balloon pressure monitoring and reporting devices in accordance with the specifications set forth in Exhibit A."

A. Correct.

Q. Right? Okay. So -- and let's just turn to Exhibit A to the agreement. You see exhibit A?

A. Yes, sir.

Q. Okay. And it's blank, isn't it?

A. Yeah. It's not uncommon to fill in an exhibit with a product specification later after the agreement is executed. Steve Johnson's signature is also on that document.

MR. SHEALY: Okay. Your Honor, may -- could you admonish the witness to just answer the question?

THE COURT: Please answer the question.

THE WITNESS: Got it.

MR. SHEALY: Okay.

BY MR. SHEALY:

Q. Now, the -- the agreement goes on to talk about purchase orders and price.
A. Uh-huh.
Q. Right?
A. Uh-huh.
Q. And it says that the -- the parties will agree on a price of the -- of the device later, right? Is that correct?
A. Yes.
Q. Okay. And it says that purchase orders for the device will be in the form of Exhibit B, correct?
A. Uh-huh. Also blank at the time I signed it.
Q. Yeah, also just completely blank? All right. And then, the terms of payment is paragraph four, correct?
A. Uh-huh.
Q. "On or after shipment of product --
A. Uh-huh.
Q. -- to consumer -- to customer under a purchase order --
A. Yeah.
Q. -- Sealevel shall issue an invoice in the form of Exhibit C," right?
A. Also, both probably.
Q. Well, let's look. All right. Exhibit C, you would agree is also blank?

A. It's not on the contract.

Q. Okay.

A. It's not on the contract. You don't have all those details.

Q. All right. You executed the agreement. What you're doing is you're defining what the working relationship is going to be.

A. Sure.

Q. And then, you fill in those details as the project progresses.

A. Sure.

Q. All right. And so, looking at Exhibit 4, show me where in Exhibit 4 it says that Sealevel can invoice CreatiVasc for the time spent on research and development.

A. "On or after a shipment of product customer under a purchase order, Sealevel shall invoice -- so it shall invoice in the form of Exhibit C to the customer. Payment shall be due 30 days from the date of shipment or the date of invoice, whichever is later."

Q. Right. So that's what we just looked at, and that has to do with invoicing for delivery of the product, right?

A. We did, yes.

Q. But it doesn't say you can invoice us for all the time that you spent, and the engineer's rate for designing the product, does it?

A. Well, we would've been happy to discuss all of those things, but our customer went silent on us. And so, we -- after delivering the product, we then delivered an invoice.
MR. SHEALY: Your Honor -- again, I'd ask for the Court to admonish the...
THE COURT: Answer the question.
THE WITNESS: What's the question?
THE COURT: You can't explain it.
THE WITNESS: What's that?
BY MR. FEW:
Q. The -- the -- the question I asked --
A. Uh-huh.
Q. -- is, where does it say that you can invoice the customer for research and development time?
A. Research and development time goes into the product.
Q. The -- but it doesn't say you can invoice for research and development time?
A. It says that when we deliver the product, then we can invoice.
Q. You can invoice for the product?
A. For the product.
Q. Right.
A. And the product includes our costs, which includes

the research and development.

Q. So -- and Sealevel was to be the exclusive provider of the product, right?

A. Would you like to read the scope one?

Q. I mean, isn't that your recollection?

A. Yes -- yes.

Q. You were intimately --

A. Yes.

Q. -- familiar with it, right?

A. Yes.

Q. So the product -- that was what -- that was what was in it for Sealevel, is it wanted to be the exclusive provider of this revolutionary product when it went to market, right?

A. Correct.

MR. SHEALY: Okay. No further questions, your Honor.

THE COURT: Re-direct?

MR. FEW: No re-direct, your Honor.

THE COURT: All right. You may step down. All right. Call your next witness.

MR. FEW: Thank you, your Honor. May it please the Court? Plaintiff calls Dr. David Cole.

THE COURT: All right. Dr. Cole, come around and be sworn.

THE CLERK: Place your left hand on the Bible, and raise your right.

DR. DAVID COLE,

being duly sworn, testified as follows:

THE CLERK: Thank you. Please state your name.

THE WITNESS: Dr. David Cole.

DIRECT EXAMINATION

BY MR. FEW:

Q. Good morning, Dr. Cole.

A. Good morning.

Q. How are you today?

A. Good.

Q. You and I met -- I think we met today for the first time in person; is that right?

A. Correct.

Q. And you spoke on the phone last week, and you were kind enough to kind of tell me the story about this device, or the effort to develop this device; is that right?

A. Yes.

Q. And so, I -- I really just want to kind of lead you through some questions to let you explain to the jury how it came about and -- and I want to get a little bit of your background involved in that. Before we do that, so we know that you're a medical doctor, where did you go to medical school?

A. I went to Baylor College of Medicine in Houston, Texas.

Q. And you -- we talk about my sons being in medicine, I'm -- I'm new to all this. But you do a residency after medical school, right?

A. Correct.

Q. And what -- where did you do a residency and what specialty was it?

A. I -- I did a residency in general surgery, which was five years, in the Air Force. After completing the five-year residency, I did two years of vascular fellowship at Eastern Virginia Medical School. And then, upon completion of -- of that fellowship, I -- I spent five years as a vascular surgeon in the Air Force before moving to Greenville in 1997, to start a -- a vascular surgery -- to join a vascular surgery practice with the Greenville Health System.

Q. Now -- and that -- is that what's today Prisma?

A. It is, that's correct.

Q. And are you still working full time or part time as a vascular surgeon?

A. No -- no. I am completely retired. I've been retired for two years in March.

Q. And what was the approximate time period that you started conceiving or thinking of -- of the device that -- that was -- you -- you filed for a patent on it, correct?

A. Correct.

Q. And you received a patent at some point, right?

A. Correct.

Q. So tell -- tell us about -- I guess, just kind of start with your -- you've obviously coming in with 12 years of surgery and vascular surgery experience before you even get to Greenville in 1997, and I guess just tell the jury, like, what were the kind of things that you saw in your practice that -- that caused you to have the spark to want to come up with this device?

A. One of the -- when I came to Greenville, I was a -- a general vascular surgeon doing everything. There were more vascular surgeons in Greenville at the time than maybe we had business for, and I saw a need that was unfilled in -- in doing an operations in -- an operation called "vascular access surgery." It's a -- a -- it's a -- it's a category of surgeon of operations, maybe 12 or 15 operations, they're -- that are performed on patients so they can be connected to a dialysis machine.

South Carolina has a huge number of patients with -- that have kidney failure. These patients need to be dialyzed three days a week for the rest of their lives. And these shunts that we implant, either in their arm or on their thighs allow them to be connected to that machine, and if that shunt does not work, they die. They will eventually --

they'll die usually within just a few days or weeks.

And so, these -- these -- these operations are their lifeline, and these operations -- the set of operations is one of the highest -- is associated with one of the highest complications of any operation performed on any human being.

If you implant a -- a hundred of these -- these shunts on -- on January 1st, by December 31st, 75 percent of them will have failed at least once. We're constantly doing operations on these trying to -- trying to decrease the devastating complications. And there -- there's seven complications associated with these -- with these shunts. And those -- those seven -- six of those seven complications are due to the continuous blood flow running through this shunt, and it's like having your car in your garage running 24 hours a day.

I happened to be -- I happened to be seeing a patient in -- in the office, and I thought, "What if we were able to -- to shut this -- this -- this flow in this -- in this -- in this access off, they only needed nine hours a week rather than having to run 164 hours a week? What -- what we -- maybe we could set up a system that we -- that we could turn it on and turn it off."

And at the time, that was a -- that was a fairly radical idea, but I needed -- we needed to develop a valve system that would allow us to turn the flow off and turn it

-- and turn it back on and get -- get it running again. And so, I had the idea, probably, in 1999. Couple of years I researched different valves and different industries, and -- and -- and not being an engineer myself I -- I came up with an idea called the vascular -- it was called "the hemo-access valve system" to where we would take -- if you can imagine just a ring that putting a graft, the tube would blood flows, slipping the ring into the tube having a -- having a balloon on one side of that ring, if you could blow up that balloon and it can compress the graft, it -- it -- the -- the graft would be -- the flow in the graft would be shut off. I'm sure you'll see models of this device.

But after I had come up with a very basic valve system, I filed for a patent which was issued a couple of years later. I did some basic research on animals and basic lab research that I could do in -- in the -- in the health system, to try to develop proof of concept. Once I had developed the proof of concept, I established a -- I was -- I was willing at that point to invest my own money in the company, and I -- I invested about a hundred thousand dollars, and I -- and I started a -- a -- a company called a "Vascular Innovations."

And then, for about two or three years after that, I struggled, because I -- I did -- I was a full-time vascular surgeon taking care of patients, and I did not have the expertise to develop and run a company. I was able -- during that period of time, due to the -- due to the significance of the device, it was recognized by physicians, by business people in the community, I was able to present to them the -- the concept and was able to raise from them about $400,000. Those were -- those were investors that I worked with at -- at Greenville Health System, and those are the people that -- that -- that took a risk on me on day one. And so, from that point on, I had great deference to their -- their success.

MR. FEW: And let me -- your Honor, may I approach? I'm going to show him a copy of Exhibit 1.

BY MR. FEW:

Q. Dr. Cole, I'm going to hand you a copy of what's been marked as Exhibit 1, if you'll just take a look at that.

MR. SHEALY: Your Honor, may we approach?

BY MR. FEW:

Q. Tell me if you recognize it.

THE COURT: You want to approach?

(Bench conference.)

BY MR. FEW:

Q. Dr. Cole, did you recognize the document that was handed to you as Exhibit 1?

A. Yes, sir. It was the pack that was -- that was issued for the device.

Q. And do -- if -- do -- do you see any of the drawings that you think might be helpful for a -- a layperson such as most of the rest of us in the courtroom, apart from you --

A. Yeah, I think --

Q. -- to understand and...?

A. I think that the Exhibit 2A would probably be one that would be -- it would help -- 2A and -- and probably the very -- the -- the first -- the first one.

Q. 2A?

A. 2A, and then I guess the one on the front -- on the -- on the front page.

Q. Which I believe it's about -- it's just the same thing, one of them, maybe an isometric or whatever they call it.

MR. FEW: Well, can you -- your Honor, is it okay for him to hold that up and show it?

THE COURT: Yeah. Do you -- are you introducing it?

MR. FEW: I -- I mean, I -- I -- I think -- I think we're entitled to have it put into evidence based on the testimony, it's in the record at this point in time, so I would just move it in so that we (inaudible) in.

MR. SHEALY: We just object on base of relevance.

THE COURT: Right. I believe in light of -- what the testimony is, I'm -- I'm going to allow it, again over the objection, so -- yes. So it's the -- Exhibit 1 is in without

-- I mean, substantive objection.

(Plaintiff's Exhibit Number 1 admitted into evidence.)

BY MR. FEW:

Q. And Dr. Cole, you're the only inventor that's listed on that patent application; is that right?

A. Correct.

Q. And it was given a name of an "Arteriovenous Access Valve System and Process"?

A. Yes, sir.

Q. And it shows that it was filed on June the 6th of 2003?

A. Yeah. Yes, sir.

Q. And this is actually the -- this is the patent that was issued, I believe --

THE COURT: I thought you're using for illustrations. I mean, let's...

MR. FEW: Yeah. I -- I was just clarifying the ownership.

BY MR. FEW:

Q. So, Dr. Cole, without -- we don't want to make the case about the patent, but if you would hold up whichever one of those figures, and maybe explain to the jury what -- what the device involves, and they'll have this back in the jury room, so they...

A. Okay. This tubular structure here and this tubular structure here represent an artery and a vein. The operations that we do to create these shunts, is we take a plastic tube about the size of my index finger. And one end of that tube, we hook to the side of the -- of the -- of the artery, we tunnel that tube underneath the skin, and we connect the other side to the side of the vein. That's -- that's the operate -- that's the operation that we do currently. The thought...

Q. Can I interrupt?

A. Okay.

Q. Is there a term for that?

A. It's called "an Arteriovenous graft -- Arteriovenous graft."

Q. And what -- and forgive me, what's a fistula?

A. A fistula is where -- where the artery and the vein are connected directly to one another, and that is not in -- that is not the category of operation that would be applicable for the hemo-access valve system. This is only applicable to the AV grafts, and that's one of the more common operations that we do.

Q. Is a fistula the old way to do it?

A. No, they're both -- both -- they're both ways of -- of doing it. It's just that there -- there are certain patients that are better -- better suited for fistulas than grafts.

Q. Yeah.

A. And so, once this -- once these tubes are connected, blood -- blood is continuously flowing through this graft from the artery into the vein. And that's -- that's -- and then when the patient goes to the dialysis unit three times a week for four hours a day -- three to four hours a day, the nurses take large needles -- very large needles. I mean, larger needles than you've ever -- you've seen. They stick it through the skin into this tube on one hand -- on both sides.

They draw blood out through one tube, run it through the dialysis machine, and put it back into this -- into this tube. And the -- and -- and this is a -- this -- this artificial system creates havoc on the patient -- on the patient's arm. It -- it -- it -- and -- and -- and -- and it causes all sorts of -- of complications, but like I said, six of seven of those complications are -- are due to this flow that's going on continuously. And so, what -- what -- what this invention shows is a ring that is placed around the tube near the arterial anastomosis, and the -- and the venous anastomosis.

Inside that tube is a balloon and there is a little plastic tube that goes from the balloon to a port, and that's also implanted underneath the skin. And in order to -- in order to -- for this to work, the nurse has to take a small needle -- a third needle, and insert it through the skin into this port, inject saline into it, and that results in shutting off the flow in this part -- in this -- in the -- at one end. The same thing is done at the other end, and then we use the -- the dialysis needles to flush the blood that's in there. And that's -- that's the process to -- to close off the -- the -- the graft when it's not being used for dialysis. And then, to open it back up, they put the needle back in and suck out the -- suck out the same -- the same line, and that opens up the graft.

THE COURT: And I'm going to have to -- you need to limit your answer (inaudible) to questions asked.

MR. FEW: Okay. Yeah, that's fine. I -- I just wanted to touch briefly on -- on the patent.

THE COURT: I don't want to be rude to you, but I just let this -- keep the case moving.

BY MR. FEW:

Q. So, Dr. Cole, you got us up to the point where I think you had put your own money in, and then you had got some money from some investors that said that was, like, a total of a half a million, I believe. And then, at some point in time, you ran into Steve Johnson and CreatiVasc was formed; is that right?

A. That's correct.

Q. And were you -- what was your involvement at that point in time?

A. At that point in time, I was -- I was happy to turn over the -- the -- the company -- management of the company, president of the company to Steve. He had -- he had experience in this, and I was -- from that point on, I was the -- the chief science officer or the chief technical officer. I would be responsible for anything for the device itself, that's implantation, it's research, anything that's related to its function in patients.

Q. Did you -- did you continue to work on the development? I mean, you didn't, like, just hand it off and -- and -- and they ran for touchdown, I mean, you -- you -- you were still involved?

A. I was absolutely involved. I was -- I've been -- I've been -- I was involved -- despite being a full-time vascular surgeon, I was -- I was -- I was actively involved in this development of this device for CreatiVasc for -- until it -- until the company was dissolved, and...

Q. So roughly what year do you think it was that you started work that CreatiVasc was formed?

A. I -- I think it was somewhere around -- maybe 2004 -- probably 2005, would be my guess.

Q. And then, you -- at some point in time, did -- did you know Mr. O'Hanlan?

A. I do.

Q. Did you know him independently of -- of the -- of CreatiVasc?

A. We -- we -- yeah, I did. I -- he -- his -- his -- he was in the paper -- the newspaper. I read an article about him and realized after it was just a -- a -- a profile of him in -- in Liberty, and I realized after reading it probably in the mid-2007, 2008, somewhere around there, I realized reading it that -- that his dad, who lived in Waynesboro, Virginia -- his dad was a surgeon, his dad had operated on me, he was a good friend of my dad's.

So I reached out to him in a -- in an email telling him that -- that -- that, and that my dad thought highly of his dad, and -- and that was the -- that was the only -- he responded, but that was the only interaction that he and I had until I went out to Sealevel with Steve to discuss the development of this -- of this device -- of this device several years later.

Q. Let me make sure -- I think, that I understand this correctly. That communication that you made to him after seeing the article, that didn't have anything to do with you asking him to get involved with CreatiVasc, did it?

A. No -- no.

Q. No? Okay. At some point in time -- to your knowledge, did Tom O'Hanlan and Sealevel get involved with CreatiVasc?

A. Yes -- yes.

Q. What do you recall about that?

A. It was at a time that -- that we realized that -- that -- that we needed to advance the technology to make it more usable -- user-friendly. Patients having the -- having the expectation that -- that a dialysis nurse would've to stick four needles in a patient for each dialysis session, and having patients be -- you know, to -- to be -- accept four -- four needles -- you know, regardless of how -- of how -- how successful it was in reducing complications, you also have to have it -- have to be accepted by patients and by the people using it.

And what we had was -- was -- was too onerous and therefore -- and we recognized that, I believe somewhere around 2012, 2013, somewhere around there. My -- my -- my memory of that -- that period is somewhat -- somewhat blurry, but that's when I -- that's when Steve took me to Sealevel, and that's when I -- I believe that was the first time that I was -- that I was introduced to -- to Mr. O'Hanlan.

Q. And -- and -- and -- and was that the -- is it fair to say that the handheld would be somewhat of a replacement for those four needles?

A. It would be a replacement for the needles, yes.

Q. Did you have anything to do with any contractual relations between CreatiVasc and Sealevel?

A. No.

Q. Were you aware of the terms of any of their agreements?

A. No.

Q. I recall that you -- this was -- this was important to you, how?

A. It was -- it was very important to me that this -- the success of this -- I take care of patients. They're devastated by this -- this -- the development of this device -- you know, I devoted my -- my -- my 20 years to -- to -- caring for these patients. And -- and I was also deeply connected to the people that first in -- first invested in the company. And these are -- these were friends of mine, colleagues, and -- and so when anybody would ever call me to -- to test out -- to -- to look at the device to have new ideas, I would -- I would -- I'd drop what I was doing to go -- to go -- try to figure it out.

Q. Thank you. And then, there's been you -- you've been here for the opening statements, I guess. Brookhaven Medical, Brookhaven Vascular, do you know what those are?

A. I do.

Q. Tell the jury what you understand about how those entities became involved, and what their involvement was.

A. Near the -- we -- our -- our company -- we had a clinical trial back in -- in -- in -- in -- around 2010 to somewhere around there, where we implanted five of these devices in patients. It was approved by the FDA, and all of those failed. And so, we needed to go back and we needed to do more research, try to find out the technical -- the reasons why it wasn't working.

Around this time, we felt like we had the engineering challenges met, but we were running out of money, and at this time, the FDA -- a member of the FDA recommended that I apply for a -- for a -- for a grant through the FDA, where they would fast-track the hemo-access valve system. And we didn't really have any money left, and I -- and I -- and I told her that I don't -- I -- I think we -- you know, we can't benefit from FDA fast track, and she talked me into going ahead and applying, because the FDA recognized this -- this significance of this -- of this device.

She -- we ended up doing that and we were awarded that grant, and it became suddenly a -- companies around the country -- there were a number of people that were then willing -- we were on the map then for -- for new infusion of -- of -- of funding, and -- and John Feldman -- because of that, we received that grant. John Feldman then came into the picture, and he invested a substantial amount of -- of money into CreatiVasc to help us continue with our development.

Q. Do you remember if that was before or after

Sealevel had become involved?

A. It was before Sealevel.

Q. Okay.

A. And -- and then -- after -- I -- I think it was -- I -- I don't -- I'm not -- I'm not exactly sure, but I believe it was -- I believe it was before, because we didn't really have the funds to consider -- you know, I'm certain it was before -- before Sealevel.

Then we continued our research, we continued to modify what we had. And sometime after -- after -- after John got involved, then I think we -- I think we connected to -- to Sealevel, and that's when there was a discussion with -- with John Feldman, about combining CreatiVasc with a company in Texas, a balloon-manufacturing company -- angioplasty balloon manufacturing company. And it was the thought that we bring these two companies together, we have one with the technology that -- any technology, new technologies, high risk (inaudible) that company with a company that is a solid -- you know, what we thought was a solid manufacturing company that -- that would be a good merger. And Mr. Feldman brought investors together, that company was bought, and -- and that -- and -- and Brookhaven was -- was -- was then -- the two companies were merged into Brookhaven.

Q. But -- do you know if Sealevel's initial contract was with Brookhaven or with CreatiVasc?

A. I don't -- I don't know -- I don't know.

Q. That's fine. Now, you stayed on as chief science officer and were actively involved until about what time?

A. After the company was dissolved and -- and sold to Diaxamed, I was no longer -- and have not been involved in the development of the device since.

Q. Did you ever meet any of the people from Diaxamed?

A. They -- they approached me several times, to -- to ask me to serve as a consultant, and -- and I declined.

Q. Did you ever meet Brian McMurray?

A. I have met -- I did meet Brian McMurray. He was -- he happened to be on -- I believe he happened to be one of the investors in CreatiVasc, maybe -- maybe before Brookhaven. I -- I don't -- I -- he was an -- he was an investor in Brookhaven, and I know that he was -- he may have been a -- one of the later investors in CreatiVasc. I don't recall that, if that's true or not. But when -- but when the company dissolved -- Brookhaven dissolved, he was the one that -- that -- he's one of the people -- one of the people that stood up to say "I want to buy it."

Q. And you've applied for more patents than the one that we've looked at; is that right?

A. Uh-huh.

Q. And you filed for -- do you know how many you've filed for?

A. Well, I worked with engineers at -- with CreatiVasc, and I think we -- we -- we -- we probably filed for 12 or 14 patents.

Q. Related to this technology?

A. Correct.

Q. Okay. And then, have you ever had occasion to work with Tom O'Hanlan other than this particular instance?

A. I have. Tom -- Tom is a -- is a very brilliant engineer, and -- and I have -- I've -- I've worked on a device -- actually, I've worked on -- I'm working on a device now, that's a -- that's a simulator for -- for -- to teach nurses how to cannulate these -- these fistulas. And we've had little -- little projects that kind of align because -- although I'm not an engineer, I like to hang out with engineers.

Q. So, did you reach out to Tom to help on that particular?

A. I did.

MR. SHEALY: Objection. Relevance.

MR. FEW: Dr. Cole, thank you for your time. Please answer any questions that Mr. Shealy may have for you.

THE COURT: Okay. Cross-examination?

MR. SHEALY: Dr. Cole, you're a great American. I have no questions for you.

THE WITNESS: Thank you.

THE COURT: You may step down. Thank you. All right. Ladies and gentlemen, we have that -- that's a good -- good break time here for -- for lunch. We're going to start back at 2:00 because I have another matter at 1:45 that should just like to take a few minutes, but it's something I have to address. So come back in at 2:00.

Now, here's what you -- I've got to give you an assignment. When you get back at 2:00, I want you all to discuss among yourselves and select a foreperson. As I said, it can be the original 12, and it's a person that leads discussion and any type of communication with the Court. And once you've done that, if you'd give that note to the bailiff, and then they'll bring it to me so l can put it on the record.

All right. Do not discuss the case. Again, I told you how important that was. Also, it's very important not to do any type of research about the case, parties, issues, anything related to this case. I also -- do not pay attention to the media coverage, I'm not aware of it. You -- the media coverage on the other stuff going on at the courthouse, I'm sure there's plenty of it.

And finally, do not -- if anybody should contact you other than somebody from the clerk's office, then let the bailiff know when you get back from lunch. I don't expect that, but I always just say that. So -- all right. You all have a good lunch and we'll see you at 2:00.

(Jury exits room.)

THE COURT: You all may seat until the jury gets out. All right. Anything else from the State -- not the State, for the Plaintiff? Zach's been too much a criminal lawyer. Anything else from the Plaintiff?

MR. FEW: Nothing from the "State," your Honor.

THE COURT: You know, I make that little comment. At the end, I always say "Anybody contacts you other than clerk's office, please advise us to know." I used to be able to say that's never happened, but I always say that. But, yeah, I had -- I had a victim contact one the jurors in a case of Parkinson (ph). I had to throw the victim in jail, and declare a mistrial. All right. See you all back at 2:00.

MR. FEW: Okay. Thank you, you Honor.

THE COURT: And like I said, we'll be up at 1:45, I've got a little criminal matter to take care of over (inaudible), but I'm doing at Webex, so...

MR. SHEALY: All right. But you all was lock it up for (inaudible)?

THE CLERK: Yes.

THE COURT: Yes. Yeah, there won't be anybody else coming in for --

(Off the record.)

(On the record.)

THE COURT: All right. Bishop, Juror Number 16, and I'm going to have the clerk mark that as Court's Exhibit 1.

(Court's Exhibit Number 1 marked for identification.)

THE COURT: All right.

MR. FEW: Your Honor, from a housekeeping standpoint, I had mentioned earlier -- and I told Kirby in the hallway what I had mentioned to you.

THE COURT: And I ruled up -- I ruled against you.

MR. FEW: Yeah, I told him that he just could cause objections and we'd speak up. So John Feldman and Brian McMurray, they have objections to our designations. It would probably work out great if at the end of the day today we could read their depositions into the record, that would probably get us through the end of the day.

I have a witness out there that's going to be really quick, and then another witness that's going to be really quick, but I don't think she's going to get here before I would need to put Tom up. And -- so hopefully that'll put us in a position where tomorrow there would only be two witnesses, I think. Hold me to that, but I -- just from a logistics standpoint, I guess what I'm saying is, it might be a good idea to go ahead and rule on those objections.

The other thing that I wanted to mention -- and this is on me, but the witness whose deposition we took two weeks ago, we specifically talked about the trial, we've emailed her, and apparently, we can't get in touch with her and I -- I don't know that we served her with a subpoena given that she was just subpoenaed earlier. So we may have to go back and designate her testimony, which I'll go home tonight and prepare to do that in the event that we can't get her here in person.

THE COURT: All right. Do I have -- I guess all the designations and -- I think you -- I think the Defendant -- you filed something in connection with your brief?

MR. FEW: We did. We filed our designations, and I think they don't have any issues with our designations, we just had issues with theirs. The -- and I -- I filed our objections last night.

Your Honor, because I'm out of town, I don't have a copy of these transcripts that have both parties' designations on them, but you've got our designations that these -- the -- the Defense designations are highlighted in the two transcripts that I'm happy to hand up to the bench.

THE COURT: All right. So you all want me to rule -- you want me to rule on these so you can produce them this afternoon?

MR. FEW: Well --

THE COURT: Are there a lot of them?

MR. FEW: He's got -- let's see.

THE COURT: I mean, I'm just wondering when I'm going to do it.

MR. FEW: Your Honor, I think from what our discussions were yesterday when we conferenced that the primary objection is relevance objection, so my guess is that once we start looking at them, the Court's going to be having the same analysis on virtually all of the objections, and the way you stated it to me was that -- I forgot (inaudible) said it.

MR. SHEALY: So your Honor, there's -- Mr. Few alluded to a separate contract between a company named ATEX and CreatiVasc in his opening statement.

THE COURT: I'm not -- let -- let me just -- I'm just trying to be logistical here. So -- I mean, I'm going to have to review these depositions, we'll have to argue, I don't see how that's going to be possible to do all that, and you be able to publish these this afternoon. I mean, we could've handled this yesterday.

MR. FEW: I don't know (inaudible) last night.

MR. SHEALY: Right. I -- your Honor, I -- I received the Plaintiff's designations yesterday and made the objections last morning.

THE COURT: All right. I mean, can -- do you have enough to go forward on this afternoon without, and then we can address it?

MR. FEW: I have -- I have a good bit. Yes, sir. I mean, I have three witnesses lined up, and --

THE COURT: I'll miss 2:00, and then we can -- let's address these afterwards. You may have to -- you may have to publish them in the morning, though.

MR. FEW: That's fine. However, I just wanted to make the best use of our time. So...

THE COURT: I know, I -- but I want to make sure we look at it carefully and give --

MR. FEW: Okay, thank you, your Honor.

THE COURT: -- appropriate evaluation of it, so let's kind of shoot for that, and since you all are moving along. All right. So anything else before we bring the jury in?

MR. FEW: Nothing from the Plaintiff.

MR. SHEALY: Nothing from the Defendant.

THE COURT: All right. And so, I have Feldman and McMurray's deposition. All right. Okay. Looking at these, I know there's some yellow highlighting in here, what is the yellow?

MR. SHEALY: The yellow is the Defense designations. Everything that I've given you is the Defense designations for both.

THE COURT: All right. And they're -- they don't have any problems with your designations?

MR. SHEALY: Correct.

THE COURT: And their designations are -- are they on here too?

MR. SHEALY: Your Honor, I was unable to put --

THE COURT: I got you. All right. And that's what they put in designation, you have object -- all right. So can you print those two things? They're -- they're -- yours were filed -- your objections were filed last night?

MR. SHEALY: Correct.

THE COURT: And your designations, were they filed as well?

MR. FEW: I just served them. I didn't file them, your Honor.

THE COURT: Okay.

MR. FEW: I have my copy that's -- one is highlighted in orange and another one's in green, if you want to look at that.

THE COURT: That -- that's -- I mean, what does orange mean and what does green mean?

MR. FEW: Let me refresh my memory. One is mine and one is Kirby's.

THE COURT: And I guess I just need to figure out the -- the objection portion.

MR. FEW: I think mine is in green, and Kirby's is in orange.

THE COURT: Well, do you have -- I may ask you this. Do you have a list of your designations that you can give?

MR. FEW: Yes, your Honor. I've given -- I -- I emailed those to the Court and to Counsel.

THE COURT: You got -- emailed us a lot, so we just tell somewhere.

MR. FEW: Yeah, that's fine. I have a (inaudible) copy.

THE COURT: You've got emailed (inaudible) file. All right. So you've emailed your designations, and he's object -- his objections are filed. So, all right. I'll give him something to do.

MR. FEW: Sure.

THE COURT: All right. So now are you ready? Plaintiff ready?

MR. FEW: Yes, sir.

THE COURT: And Defense ready? Ms. Doty -- Ms. Doty, ready? All right. Let's bring them in.

THE CLERK: Okay.

(Jury enters room.)

THE COURT: Sometimes we have technological difficulties in -- so something happened there, so -- anyway and I apologize, we're being so cold in here, it's kind of chilly, so it's (inaudible) good heavy coat tomorrow. We need to -- so, all right, now you can call your next witness.

MR. FEW: Thank you, your Honor. May it please the Court? Plaintiff calls Chad Clark.

THE COURT: All right. Mr. Clark, I believe we're ready at this time.
THE CLERK: Place your left hand on the Bible. Raise your right hand. Left hand -- hand on the Bible.

CHAD CLARK,

being duly sworn, testified as follows:

THE WITNESS: I do.
THE CLERK: State your name, please.
THE WITNESS: Chad Clark.
THE CLERK: Thank you. Please be seated.
MR. FEW: Ready?
THE COURT: Yes.
MR. FEW: Okay.

DIRECT EXAMINATION

BY MR. FEW:
Q. Mr. Clark, have you ever testified in the court before?
A. Yes, sir.
Q. And you and I talked for the first time today; is that right?
A. Correct.
Q. And I understand that you are -- have some degrees from Clemson University?
A. Yes, sir.
Q. And tell the jury what your degrees are.

A. Undergraduate in biomaterials for bioengineering, and then masters in commercialization of medical (inaudible).

Q. And did you ever have a working relationship with a company known as CreatiVasc?

A. Yes, sir.

Q. Tell the jury, like, approximately when that -- how that came about and when it started.

A. I believe it started early 2015 as an intern, interned for that fall semester, and then came on full time after that as an engineer.

Q. Sometime in the fall of 2015?

A. Yeah. Summer or summer, fall.

Q. Okay. And you continued to work in that job for how long?

A. I stayed -- well, the company changed names a few times. It eventually became Diaxamed, then I left Diaxamed in 2020.

Q. So you said it was Diaxamed when you left, was it called anything else in between?

A. Brookhaven (inaudible).

Q. So you got a paycheck from -- initially you were an employee of CreatiVasc Medical Incorporated?

A. Uh-huh.

Q. And then, you became an employee of...?

A. Brookhaven.

Q. One of the Brookhaven entities?

A. That was fairly short, not exactly sure what happened there. Again, I was just the -- the engineer but I leave Diaxamed soon after that (inaudible).

Q. Okay. And when you were -- how long were you involved when it was Diaxamed?

A. I don't recall the exact date, but I want to say two to three years.

Q. Okay. Who do you -- do you recall any of the people -- well, do you -- you know Mr. Johnson over here, right?

A. Correct.

Q. How do you know him?

A. CEO of CreatiVasc. He hired me.

Q. He hired you? And at some point in time, he was no longer working on what was once CreatiVasc; is that right?

A. Correct.

Q. Do you remember when that was?

A. That was the Diaxamed changeover.

Q. Okay. What was your understanding of what happened there?

A. Just buy out assets, I believe. The original time was to get rid of all employees, and I believe I interviewed and they liked me, so they kept me on.

Q. Who did you interview with?

A. Brian McMurray.
Q. Do you know what his position was at Diaxamed?
A. I mean, I would imagine we would've called him the CEO -- present CEO.
Q. Do you know if he owned the company?
A. I believe so.
Q. Do you recall doing -- did you do any work on -- well, let me ask you another way. When the company was CreatiVasc what were the projects that you were working on? And that would've been from like 2015 -- I think through all the end of 2016, do you remember what the projects were that you were working on?
A. I was really focused on the blood contact and components of the device, so the -- the balloon valve...
Q. And when you say "device," is it fair to say that there was only one device that CreatiVasc was attempting to develop at that time?
A. Correct. I mean, it was one, the hemo-access valve system, the valve portion of it was just a portion, a component, if you'll.
Q. The valve portion that you're speaking of, would that be included in what would might be referred to as the "implantable portion"?
A. Correct.
Q. Okay. Did you have any knowledge of the -- the

non-implantable portion, or the handheld, or whatever it might have been called, the actuator?

A. Yeah, I laid eyes on it, but outside of that, not much.

Q. Did you have any recollection of ever working with Sealevel?

A. No sir.

Q. I'm going to show you -- I hand you an email that's been marked as Exhibit 12, and take a look at that. Tell me if you recognize it. I believe that your email address is on that email?

A. That's correct.

Q. Okay. And if we start from the bottom, it should say "Sealevel02497." And it -- it appears to be an email from Lindsey Sanders to Tony Martin at Sealevel?

A. Yep.

Q. Okay. And you're -- that's you, CClark@creativasc.com?

A. That's correct.

Q. And there's also "SJohnson" right above you, that would be Steve Johnson, right?

A. Uh-huh.

Q. And pattersonfv@gmail.com, who's that?

A. He was considered kind of a director of engineering.

Q. For CreatiVasc?
A. Correct.
Q. And then, there's Tom O'Hanlon, do you see that email to him?
A. I do.
Q. Okay. Did you ever recall meeting Tom O'Hanlon?
A. I do not.
Q. And the subject of this email, it says "CreatiVasc project requirements and quote request," and it's dated February 16, 2016; is that right?
A. That's correct.
Q. And then, she says "Hi Tony, attached our project requirements for the CreatiVasc handheld. Below are key changes from past productions of the HVS handheld." Do you see that?
A. I do.
Q. And then, the next page, she lists the changes. "Number one, no charging base change to charging Jack." Do you see that?
A. I do.
Q. "Number two, no external user readouts." Do you see that?
A. I do.
Q. "Number three, no pressure sensors." Do see that? Do you recall what involvement the pressure sensor had in the

device that was being developed?

A. I do not.

Q. Do you know if the pressure sensors would've been on the implantable portion or the actuator handheld portion?

A. From engineering thought process, I would believe it had to be in the implantable to actually make sense, yeah.

Q. And then, it says "We do not want this component to delay a working handheld." That's Subitem 3.1; is that right?

A. Correct.

Q. And then, they say "CreatiVasc will lead the pressure sensor search, CreatiVasc will look to Sealevel for input." Do you see that?

A. Correct.

Q. And there's a four and five. What's NFC? Do you know what that was?

A. I believe that's "Near-Field Communication."

Q. That's something -- that's a -- like a bluetooth, a wireless type way to communicate?

A. Correct.

Q. Do you know who came up with the Near-Field Communication concept?

A. If you're going to have an implantable that is not externally connected through wires, you're going to have to have some load of communication.

Q. And then, the email goes on and says "We would like to receive a quote for production of six HVS handheld prototypes." Do you see that?

A. I do.

Q. "In the next couple of weeks, CreatiVasc will get you a few working pumps for testing the handheld at Sealevel. Are you available for a call this week to discuss the project?" Do you see that?

A. Right.

Q. And then, I want to also show you what's been marked as Exhibit 11, and ask you to take a look at that and tell me if you recognize that.

A. I do.

Q. Okay. And what do you recognize it to be?

A. We would call this a "Specification sheet."

Q. And this one is entitled "Requirement Specifications for HVS handheld." You see that?

A. Correct? Yep.

Q. And who was it authored by?

A. Lindsey.

Q. Lindsey Sanders, and I believe her last name now is Calcutt, right?

A. Correct.

Q. Okay. Did you remember working with her?

A. I did.

Q. You worked with her for a couple of years or more?

A. Correct.

Q. And the date of this is February 15, 2016, right?

A. Correct.

Q. So...

A. I believe I was an intern at this time.

Q. Do you -- is it your belief that Exhibit 11 is what was attached to her email on -- it's Exhibit 12, on February 16th at 11:47 a.m., where she says "Attached are the project requirements for the CreatiVasc handheld"?

A. That would make sense.

MR. FEW: Your Honor, at this time, I'd like to move Exhibits 11 and 12 into evidence.

MR. SHEALY: Okay.

THE COURT: Okay. No objection. I believe that was in with no objection anyway from the original (inaudible). All right. So in without objection.

(Plaintiff's Exhibit Numbers 11 & 12 admitted into evidence.)

MR. FEW: Thank you, your Honor.

BY MR. FEW:

Q. So did you continue -- the whole time that you were involved from the start with CreatiVasc until when you said you left Diaxamed, roughly December of 2020, where was your office?

A. Haywood.

Q. Was it the same office?

A. Yes.

Q. And other than Lindsey Calcutt, who else do you remember working with on the -- this project?

A. We had a number of interns over the years, Frank Patterson, fairly small group.

Q. Who were the -- who were your superiors at Diaxamed, do you recall any of their names?

A. Brian McMurray, CEO for a short period of time, I believe. Bob Scribner came in as COO, and then after that being (inaudible).

Q. Were they working out of the Greenville office?

A. They would fly in -- time to time, they lived out of state.

Q. And without getting into any specifics, did you ever work on anything -- any projects at Diaxamed other than this HVS handheld and implantable?

MR. SHEALY: Objection. Relevance.

THE COURT: I -- I'll overrule the objection.

THE WITNESS: I did.

BY MR. FEW:

Q. And without getting into specifics, do you know how many other projects were going on?

A. Just a couple, not many.

Q. And to your knowledge, has the -- this dialysis, was it fair to call for, like, a dialysis improvement? Do you know if it has ever been commercialized?

A. I don't believe so.

Q. It hadn't been when you left in December of 2020?

A. (Inaudible).

MR. FEW: Mr. Clark, thank you for your time. Please answer any questions that Mr. Shealy may have.

THE COURT: Yes. Cross-examination?

CROSS-EXAMINATION

BY MR. SHEALY:

Q. Mr. Clark, just a couple questions. So the whole time that you were working with CreatiVasc through Brookhaven and then Diaxamed, you were working on the part of this system that goes inside the body, correct?

A. Correct.

Q. Okay. And there were challenges and problems with -- that you were trying to solve that entire time, right?

A. Correct.

Q. All right. And you and others were earning a salary and spending money to test what you were doing, correct?

A. Correct.

Q. Okay. And -- I mean, that process takes time and -- and money to -- and -- and you all were spending that time and money trying to get to the inside piece, the -- in the implantable part to work as everybody hoped it would?

A. Correct.

Q. But you never got even that to the point where it would be ready to be put on the market, right?

A. Correct.

Q. And you stopped working for Diaxamed when?

A. Late 2020, I believe.

Q. And at some point while you were there, the -- the -- the focus became just working on that implantable part, and -- and -- and not focusing on -- on any kind of an external handheld piece; is that right?

A. Correct.

Q. Okay. And no -- no project that you've ever worked on has anything to do with a -- a externally activated implantable device, correct?

A. All biomaterials, no electrical at all.

MR. SHEALY: Okay. No further questions. Thank you.

THE COURT: All right. Ready to re-direct?

MR. FEW: Yes, your Honor. Briefly, hopefully.

RE-DIRECT EXAMINATION

BY MR. FEW:

Q. Did anybody ever say to you that, "We're not working with Sealevel anymore," like it was a purposeful decision?

A. I don't recall specifically, but yes, I think at some level that decision was made.

Q. Who made that decision?

A. I want to say when new management came in, Diaxamed decided to focus on the blood contact enforcement of the device.

Q. That's when Brian McMurray took over?

A. Correct.

Q. Did -- were you aware of the -- of any contractual relationship between CreatiVasc and Sealevel?

A. I was not.

Q. Were you aware of any contractual relationship between Brookhaven Vascular or any of the Brookhaven entities in Sealevel?

A. No, sir.

Q. Did you ever hear any discussion about a contract with Sealevel or the relationship with Sealevel with Diaxamed?

A. No, sir.

Q. So it's your understanding that there was a -- a decision was made not to work with Sealevel, is that -- is that your testimony?

A. An engineering principle alone, is my understanding.

MR. FEW: Thank you.

THE COURT: All right, thank you. You may step down.

Call your next witness.

MR. FEW: Your Honor, Plaintiff calls Tom O'Hanlan.

THE COURT: Mr. O'Hanlan, come forward and be sworn.

THE CLERK: Place your left hand on the Bible, and raise your right hand.

TOM O'HANLAN,

being duly sworn, testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Tom O'Hanlan.

THE CLERK: Thank you. Please be seated.

DIRECT EXAMINATION

BY MR. FEW:

Q. Good afternoon, Mr. O'Hanlan.

A. Good afternoon.

Q. Well, the jury's heard a little bit about you, but I'm going to ask you some background questions to fill in on some other things before we get into this. Where'd you grow up?

A. Gainesboro, Virginia.

Q. And your dad was a doctor because he performed the surgery on one of the earlier witnesses, right?

A. Apparently, yes, sir.

Q. Pretty small world.

A. Yeah.

Q. And where'd you go to high school?

A. In Gainesboro as well.

Q. At the public high school?

A. Yeah, public school.

Q. Okay. What'd you do after that?

A. Well, went to -- I mean, to put it in exact detail, I went to a small church college called "Bridgewater College" for less than a year, and then I enrolled in Blue Ridge Community College. I got an associate's degree in electronics engineering, and then at the time you could transfer to Virginia Tech with your associate's degree and get a bachelor's degree in electrical engineering technology. So I did all that, and I got married in the process.

Q. And your wife, is she involved with the company today at Sealevel?

A. She is today and she was so -- and when we started the company together -- and then she took time off -- you know, raise kids and be at home, and recent developments, so she's back running the company because she's actually a better manager. And then, I would be -- I was the engineer, kind of a dreamer-type guy, she was the bookkeeper and manager.

Q. What's her name?

A. Susan.

Q. Okay. And -- so you got a bachelor's degree from Virginia Tech in electrical engineering, basically?

A. Yeah -- yeah. Technology.

Q. What year was that?

A. 1978.

Q. And what'd you do after you got that degree? And you said you were married at that point in time?

A. Yeah, I went to work for National Cash Register and Corporation. Big company, kind of like IBM, a computer company in Delaware. And then, a few years -- two years into that, they decided to move the plant to South Carolina, and they built a new plant in Liberty.

Q. That was -- is that the -- the red NCR logo that you could see from Highway 123?

A. Yeah. Right there. Now it's a -- a waffle-baking facility, unfortunately, but NCR built a real nice facility back then.

Q. And what did you do -- what -- what were your job -- what kind of things were you asked to do -- what kind of problems were you tasked with solving when you first went to work?

A. It was the best job in the world. I was in manufacturing engineering, and so what we had to do was make the product, which was a -- a very complicated cash register system, but to make it manufacturable. And that meant testing it at various phases during the production, and then putting -- like, if it was going to Store Number 33 for

Rich's -- you know, at Haywood Mall. It had to be loaded with all of the store information and the address and Haywood Road at -- I mean, they wanted the machines to be able to be delivered in store and then pulled out and run. So, part of our job in manufacturing engineering was to be able to load all of that information -- you know, so the printers would print -- you know, Rich's, Haywood Road store, things like that.

And it just made the whole installation process easier. So -- and being a manufacturing, we had a lot of power to say -- you know, we need a connector on the board to be able to program all this stuff into it, and things like that.

Q. Back then, you had to do the specific programming for each machine -- each -- each machine or each device; is that right?

A. Yeah. We basically had to make the machine. I mean, each machine got its own set of programmable variables into it at the factory, and then they got put in boxes and shipped to the -- where they're supposed to go.

Q. You need to get you some water?

A. I'm sorry, yeah. You push this button?

Q. Twist that.

A. Twist it, okay. It's a -- it tests for engineering.

Q. First time I appeared in these courtrooms, I spilled that all over the counsel table. Fortunately, it was motions only, there was no hearing.

A. It's funny, your mouth doesn't get dry until you have to talk in front of people.

Q. Yeah. So how long did you work at NCR?

A. Five year -- five years total. Two years in Delaware and three years down here.

Q. And then, what happened? What came to be where you were no longer --?

A. NCR was having trouble. They laid off all the engineering group. This was December of maybe 1983, and it was pretty tragic. I mean, I was without a job and things like that. And they basically shut the plant down in Liberty, and then started hiring some people back.

But I -- I didn't go back. I went into consulting for the textile industry. I was developing products that would monitor textile equipment -- you know, show production efficiencies and -- you know, count how long the machine ran in the (inaudible) room, and things like that.

Q. And that involved -- so you were having design around some heat, vibration, moisture, all the things that electronics probably didn't like?

A. Very -- very challenging, yeah. One -- one day we're in a building in Georgia and a room caught on fire. If you know textiles, that wasn't uncommon 50 -- 60 years ago, but it scared the hell out of us.

Q. How long did you stay in that consulting role?

A. About three years.

Q. And at some point in time, you were the founding owner of Sealevel; is that right?

A. Yeah. I had been doing jobs on the side for different companies. There was a couple here in Greenville, one was called "Computer Dynamics," and I would approach them and say "Hey, I can design this for you," and when they'd say "Okay. And pay you to do it," and that -- that went fairly well but the textile company that I was involved with was losing business because textiles were going out at the time, this was '85 to '86.

Unfortunately, they were closing plants everywhere. And -- so, I decided at that time that I was going to start a business and -- I -- I've been planning on it a long time. So I talked to my wife, and my father cosigned a note, and we started a company called "Sealevel Systems."

Q. And was it always located in Liberty?

A. We actually started first in Easley. We were out on the highway in Easley, across from the plant Central Noble. And then, unfortunately that building burnt down, not while we were there, but we moved to Liberty. And we moved to, like, an old drug store in Liberty, and then we moved up by the airport, built a building, and now we're on Highway 93 in a very large building of 17 acres.

A. How many employees does Sealevel have now?

A. A 100, but less count.

Q. And the business is going good?

A. It -- it couldn't be better, so... We -- want me to elaborate, or?

Q. You don't have to go into what we're doing, right? I mean...

A. To establish (inaudible).

Q. The -- so, tell the jury how you came to be involved in CreatiVasc.

A. Ben was president of the company. I guess I could say I had a little bit of time on my hands. For the first time in -- in my life, I was -- you know, middle-aged and didn't have to work as hard as I always did, so I started just looking for ways to grow the business. I mean, we were -- people will tell you we got involved with a couple other little projects in Greenville, but nothing -- nothing came of that. But when CreatiVasc came along, it seemed like a real good opportunity to expand our -- you know, wheelhouse or whatever, and look at some of these medical things that were going on. I think at the time too, I may have been involved with Baptist Easley Hospital as a board member, and eventually a board chair. And having had a medical background with my father, I was always drawn to -- you know, the medical community. We had closed in on one side of us in Prisma Health -- well, it wasn't "Prisma" back then, it was "Greenville Health."

On the other -- and I told people it's like a two-legged stool -- you know, it won't stand, you've got academia, and you've got medicine and doctors, but what you don't have is the third leg, it's the industry. You don't have people that can build products -- that do build products for a living. So -- you know, a three-legged stool -- two legged. And frankly, I had a passion -- I'll be honest with you, it led to arguments between Ben and I as far as the direction of the company. You know, "Why are you -- why do you want to get in this medical stuff?" And I said "Well, it's -- it's got a future and it's got a future here in Greenville and -- you know, Clemson." Clemson -- if you remember, at the time, was pushing biomed. You know, SC Launch was doing things, SCbio. I mean, it was -- it was kind of the -- like the AI of today, but back then it was medical and bio.

Q. I'm going to show you what's been marked as Exhibit 2, and ask you to take a look at this. And you may want to start from the bottom up. It's a series of emails.

A. That's the way I read anyways.

Q. When you get to the bottom, just if -- if you recognize the document, just let us know and then I'll ask you some questions.

A. Yes, I -- I recognize them.

Q. Okay. And who is Matt?

A. Gaybar (ph)?

Q. Yeah.

A. I think that's his name. Matt is -- I don't know what he is doing now, but he was sort of a -- at the time, by Clemson, Greenville, biomed guy. He'd been involved, I think in like getting some grants to start some companies and things like that. I didn't -- I didn't really know him that well, but used to read about him in some of the things that were happening at the time. I think he might have launched another company at the time.

Q. And -- and looking at this -- these bottom two emails, first one's from Steve Johnson to Matt, it appears, and then Matt responds to him on September 26, 2014. How did this come to involve you, or does this refresh your memory about what was going on at that time?

A. Well -- I mean, if you read this, it looks like Steven had -- and Matt were talking about -- you know, "Who could do this set or the other?" And Matt wrote, "Steve, I couldn't be more pleased to introduce you to Tom O'Hanlan in Sealevel." Copy. "We've been working with them for about a year. Been regularly blown away about what they can do in this space. You won't believe the capability you have right in our backyard, and didn't know it." Can I keep going? Now, I realize now too -- looking at this, we had worked with Matt at a company called "K-Tech," and they were developing -- there's -- I think they're still around. And have some cancer research product, but...

Q. And that -- that's the email that he's using down at the bottom, right?

A. Yes, sir.

Q. (Inaudible). And so, -- is it fair to say that the -- this email exchange between Matt and Steve Johnson is what led you to become involved in CreatiVasc?

A. Absolutely. And then, as part of it too, you can see that I pointed out to Steve that I realized David Cole was involved in that. David and I met over previous discussion involving my dad.

Q. More small world stuff, right?

A. Yeah.

Q. I'm going to also hand you what's been -- did I hand you Exhibit 3?

A. No.

Q. Let me do that then. I'm going to hand you what's marked as Exhibit 3, and ask if you recognize that. Exhibit 3 appears to be an email from Steve Johnson to you on October 13, 2014. Is -- is that what you see?

A. Yep.

Q. And you --
A. Yes, sir.
Q. -- you see that? And then, you responded that same day?
A. Yeah. Do you want me to explain the email?
Q. Sure.
MR. SHEALY: Your Honor -- your Honor, objection. It's relevance, and if we can approach?
THE COURT: Okay.
MR. FEW: Your Honor, I understand your ruling. I won't ask a one follow-up question --
THE COURT: Yeah.
MR. FEW: -- about this document. Don't want to misstep like I have done before.
BY MR. FEW:
Q. Do you see a reference in the second paragraph down here? He says "I would like to link you up with somebody." Who is he referring to there? This is Steve Johnson to you on October 13, 2014.
A. Yes, sir. That was Brian McMurray.
Q. With ATEX Technology?
A. Yes, sir.
Q. Did you ever meet Brian McMurray?
A. Not that I know of. I don't recall.
Q. Did you ever meet anybody from ATEX?

A. Not that I recall.

Q. And this was -- I believe, before that the agreement was entered into between Sealevel and CreatiVasc; is that right?

A. It's -- I believe so. This -- this was like probably after our first introductory meeting. They -- they brought us some technology to show us this fellow Andrew, was from Clemson and his whole concept working with Steve Johnson was to use bluetooth to monitor the implant.

And we presented at that meeting that bluetooth requires batteries as the -- as the engineer here said earlier, and that there's no way to do bluetooth inside of a human body, but we proposed Near-Field Communications, NFC it's called. And as a result of that, this fellow Andrew, kind of fell out of existence because all he had to offer was bluetooth, some technology he developed at Clemson with some pressure film.

He had some pressure film that would -- they were thinking that the balloon pushed against this film, they could sense the pressure, and you'd know when the balloon was full versus empty. And using bluetooth to read the pressure on the film was just the -- the wrong approach. Not technically feasible approach. So we proposed a newer field of communication, which is -- became the standard for what they -- in my understanding, used from then on.

Q. So you were already into the details of working on the device even before you had a working agreement with -- with CreatiVasc?

A. Yes, sir. If I could say anybody that knows me, and David Cole didn't say this today, but he should have and could have. As soon as I met -- Steve will confirm this. I -- I started emailing David and Steve -- you know, in the middle of the night. I'm writing emails to them saying -- you know, "Here's a way we could do this, here's how you could monitor the pressure, here's how you could do this kind of stuff."

And -- I mean, I'm -- I'm a consummate, not hacker, but I guess engineer tried to solve problems. And David and I hit it off very well. Steve and I and the whole team well hit it off in early days. But there was -- you know, late night emails and -- you know, "This might be a crazy idea of, but -- you know, what if we did this?" And it was -- yeah. It was fine.

MR. FEW: Your Honor, at this point, I'd move Exhibit 2 into evidence.

THE COURT: And I will stipulate 2 by Defense Counsel.

MR. SHEALY: Correct.

MR. FEW: Was it 3?

MR. SHEALY: 2 or 3?

THE COURT: I got 2, is what have got (inaudible).

MR. FEW: 2 is correct.

MR. SHEALY: Your Honor, just for the record, I'd like to move 3 in, but I think you may --

THE COURT: Right. I object to -- I mean, I sustained his objection on that one.

MR. FEW: Okay.

(Plaintiff's Exhibit Numbers 2 & 3 admitted into evidence.)

BY MR. FEW:

Q. Mr. O'Hanlan, take a look at that document, which has been marked as Exhibit 4. Tell me if you recognize it. It's actually in evidence, so it's entered as Exhibit 4?

A. Yes, sir. This is a supply agreement.

Q. What's the date on it?

A. October 28, 2014.

Q. And I believe there's already been testimony that it was signed by Ben O'Hanlan as president of Sealevel on page 10, and Steve Johnson as CEO of CreatiVasc Medical Inc.

A. Yes, sir. (Inaudible) up here.

Q. What do you recall about how this document came to be? I mean, did you draft it?

A. I didn't draft it personally. I mean, we -- we used the law firms that draft these kinds of agreements. Ben testified earlier he was more responsible for the contracting and things like that since he was president of the company.

But this is a -- I'll say a standard agreement that we've used with other companies when we go into a co-development agreement. And basically, it -- it -- as it says it's a supply agreement saying, "We're going to do this joint venture together, and then you're going to be the supplier."

Q. Do you remember if there were negotiations back and forth or how the document came to be signed?

A. It's my understanding there was no problem with it. I mean, I think I remember saying -- you know, did -- did you get the document signed? Ben said "Yes. I sent it to Steve and Steve signed it." I mean, it was just, like, there weren't -- there weren't a lot of back and forth. None that I know of.

Q. Let me direct your attention to page 5, paragraph 14.

A. Okay.

Q. I don't want to read it, but it is -- it's talking about the disclosing party and the receiving party, is it -- what's your understanding of what a provision like this would be intended to accomplish in the agreement where parties are exchanging information, like what's happening here?

MR. SHEALY: Your Honor, I'm just going to object. Contract speaks for itself.

THE COURT: Mr. Few?

MR. FEW: That's fine. I agree it speaks for itself.

THE COURT: Okay.

MR. FEW: I think I can ask him what he -- what he understands why it would be in there.

THE COURT: I'll let him -- I'll let you ask that.

MR. FEW: Okay.

THE WITNESS: Could you repeat the question, please?

BY MR. FEW:

Q. Do -- do you -- would -- do you know if this is a -- something that would be in all of the agreements that you entered into like this for these types of situations that you described a moment ago where you have a collaborative effort with another group?

A. Yeah. I mean, this -- this sort of reads like an NDA, but we don't -- we'd already executed an NDA, Non-Disclosure Agreement. So, I think this just tightened up the confidentiality and the -- I guess you call it "mutual trust" between the two parties.

Q. Flip to the next page, and take a look at paragraph 16.

MR. FEW: Your Honor, may I -- I put the -- use this?

THE COURT: Yeah.

THE CLERK: We're going to have to turn that monitor on. (Inaudible).

MR. FEW: Sideways. (Inaudible). Okay, there we go.

BY MR. FEW:

Q. Can you just read what it says there under limitation of liability --

MR. FEW: Your Honor.

MR. FEW: -- Mr. O'Hanlan?

MR. SHEALY: Objection. Relevance. Sealevel's liability is not an issue in this case.

THE COURT: Mr. Few?

MR. FEW: Well, your Honor, the -- this is the agreement, it speaks for itself, isn't what Mr. Shealy has said?

MR. SHEALY: Then if it speaks for itself, then why is -- I mean, but still, if it's got to -- I mean, you're introducing evidence that's got to be relevant whether, I mean...

THE COURT: It's -- it's relevant to the issue of limitation of damages. We may need to approach, but...

THE COURT: Yeah.

(Bench conference.)

BY MR. FEW:

Q. Okay, let me see if I can make this quick, Mr. O'Hanlan. Do -- do you understand paragraph 16 to limit Sealevel's liability?

MR. SHEALY: Objection. Relevance.

THE COURT: And that's not what we discussed up here.

MR. FEW: I'll just have him read it, that's all.

MR. SHEALY: Why don't we -- yeah.

THE WITNESS: "Sealevel's aggravated liability. The customer shall not exceed the aggregate sum of all amounts paid by customer to Sealevel under this agreement. In no circumstance should Sealevel be liable for any special incidental or consequence damages, even if Sealevel has been advised of the possibility of such damages.

Customer acknowledges that this section is a material inducement for Sealevel to enter into, and perform its obligations under this agreement. This provision shall survive the expiration or termination of this agreement."

BY MR. FEW:

Q. Do you see any -- anything in there about limiting CreatiVasc's liability?

A. No, sir. And if I could add there -- we've never paid anything either, so I'm not sure the -- that's relevant.

Q. So, let's take a minute, that -- I think that -- I think that we're up to the point where the agreement's been executed, you've already testified that you were working, thinking, sharing ideas.

Just in -- in your own words, kind of explain to the jury what you remember about what you were doing and what the Sealevel engineers were doing subsequent to execution of this customer supply agreement. Exhibit 4. And -- and just what you remember. Just kind of go through and I'll prod you along.

A. Well -- I mean, once we committed to the project, we were committed to it obviously, but we like gave access to their engineer, Frank Patterson. He could come into our plant. Now he had to sign in with security and things like that. But Frank had access to just -- you know, come in anytime he wanted and -- and go back in the lab and mess around with his stuff and equipment. We did go out and buy equipment that we needed. We were involved in the -- the pressure-sensor discussions.

Q. Let me stop a little bit on that.

A. I probably got this...

Q. Kind of briefly explain to the jury what was the -- what was the perceived need for a pressure sensor and where was it?

A. Okay. Yeah, I didn't understand the discussion that came up later about not needing a pressure sensor. But the idea was -- David Cole explained to you how you can have a balloon kind of constrict the flow of blood, then you essentially turn off that valve, and then when you open up, the blood would flow and the valve's now open and then you could do the dialysis.

So, the pressure sensor would be necessary so that you could -- while -- well, let me back up. The balloons were to be inflated by a small gear pump, kind of like you'd have in

-- in your car to do the oil pump, and it's literally two gears that are pumping fluid.

So, our handheld wand had a spinning magnet in the front, and you'd hold it up to the -- where the dialysis implant was, and the spinning magnet would then spin a magnet inside of the implant. This was the whole concept. That would turn the gear pump, and the gear pump would then pump fluid into the balloons and fill them up, and reversing that process would suck the fluid out of the balloons. So that's how you opened or closed the valve, and you do it by applying this wand.

And the wand just looked like a -- a -- a facial scrubber like a lot of people use them. In fact, we joked about making one out of just going to buy a facial scrub and putting a magnet on again. But it needed a whole lot more intelligence. When you -- when you held it up and started the spinning, you don't want to -- you know, just spinning and then this thing goes in there -- you know, and you blow up the balloons inside the person because you didn't read the pressure.

So, the algorithm was: You start it in a clockwise -- you know, forward direction pumping, and then you read the pressure through what was called "The Near-Field Sensor." The -- the wireless communication. It was really amazing. It was relatively good at the time. But the cool thing was the -- the wand could actually read the pressure of the solution that was filling the balloons inside of the implant.

And so, as you did it, you -- you know, pump the balloons up to maximum pressure and then stop. And then, to deflate them, you would go in and reverse that process. And so, you'd want to know that they were at max. And you would take them down to zero or close to zero pressure and know that the valve was open.

You wouldn't want to send a patient home -- you know, with a valve halfway opened or closed -- you know, because a lot of them are bleeding when they go home anyway. I mean, it -- it was just really a horrific thing. I -- I got emotionally involved with it, but David called. One, because of his connection with my dad. Two, because my dad had been in some things and there were -- he never patented them or anything. He just did it because the medical society needed it. And so, I sort of carried that. And there were five kids in my family. And so, (inaudible) you say "Which one?" "You guys are going to be doctor?" And then, I was scared. My sister became the doctor. So -- you know, I -- I was -- you know, anxious to be a whole part of this.

So, we gave Frank, their engineer, access to the lab. You know, we were kind of -- you know, whole and wholy committed to doing it, to doing the project. And -- and again, I started studying dialysis and things like that. I didn't nothing about it before, and it seemed like the most logical thing to do, and it seemed very doable. Achievable.

Q. I'm going to hand you what we've marked as Exhibit 6, and ask you to take a look at this document. I'll put this one up. You don't have to study it, but just...

A. Yeah -- no, I'm sorry, I -- I'm -- it just took me -- took me a minute. The way these are written too, sometimes it's hard to tell what -- who said what. This is an email from Steve Johnson to me. And one of the things he's saying in here, I think is significant, is that "Tri-Tech will likely have a pumping prototype by late this afternoon." Tri-Tech was another company that I brought to the table. They're located in Industrial Park in Liberty. I had met them through a manufacturer's association group that I had started to -- to -- for -- for boost manufacturing in Pickens County. But Tri-Tech was a small government contracting company. Unfortunately, they're not in business anymore. I think the Sequester wiped them out, but they built like these mobile kitchens for the military.

So, that when you saw early the Iraq war -- you know, military go in, pop up these kitchens and -- you know, basically it's mobile military on the go. Unfortunately, I think the Sequester took Tri-Tech out of the game, and they're -- they're no longer there, but I got to know the owners really well.

And when Steve came to us to talk about doing this, there was two aspects of it. What is the electronics aspect? And we're an electronics company. We -- we don't do mechanical designs. We don't do -- I mean, we do an enclosure, and put the circuit board in it, and lights and things like that, but as far as you know, do we build cars? No. Do we build trucks? No. Do we build things that move? No. There are generally circuit boards that perform -- you know, real complicated functions. So, I said we needed a partner, and I brought Tri-Tech in because they have CNC machines and they can do -- they have mechanical designers that -- you know, could do gears and design that gear pump. Like we were talking about.

Q. Were they working on the design of the handheld or were they implantable (inaudible)?

A. The implant -- the implant. It -- it was always said, we were going to do the mechanical wand. And again, that's just like a face buffer with some electronics and -- and a spinning magnet to control the implant. And the implant -- I mean, had to be done by somebody that could make gears, turn gears, thread screws -- you know, things like that. A little machine shop with CNC. And that was never us.

And we never implied we could or anything. So -- I mean, what bothers me about this whole thing is we were told that -- you know, "You guys let us down and you guys failed." We didn't fail anything. Our electronics always worked. And I'm sure we'll get to, one time it didn't in a minute, and then we'll explain that, but the electronics was -- was never the question. And then, we were doing the electronics for the implant as well. Not the mechanics, but the electronics. They couldn't produce -- when they went to two different companies -- three maybe, they could not produce the working mechanical part.

So, imagine Tesla saying, "We got the motor, we got the battery." You know, and the Tesla guy says "Well -- we -- we can't make a car." You know, "We can't make a wheel." You know. "Well, man, I got everything but" -- you know, "I got all the electronic stuff." And they're like, "We don't have the mechanical stuff." So...

Q. And this female also says "They" -- Steve Johnson says "They are on it, we got a handheld to take with us to ATEX in North Carolina tonight," do you see that?

A. Uh-huh.

Q. So, it appears ATEX was involved at least as early as March the 3 of 2015, right?

Q. Yeah. I'll be honest with you, though. I mean, our contact was with Steve and we went to Dr. Cole for technical questions. That was a little frustrating too. CreatiVasc didn't have the answers that we needed a lot of times. We spent a lot of time looking for a pressure sensor that could handle saline.

And then, we get Dr. Cole in the room and he says "Well, why does it have to handle saline?" And we all look at Steve Johnson like, "Because Steve told us it had to handle saline." Believe it or not, saline is really rough on -- on materials like rubber or thing -- I mean, not rubber.

So, we started coming up with ways to like take the pressure sensor and coat it with rubber and do all this stuff. I mean, we were outside of our wheelhouse trying to solve problems that were not even our problems, but we were desirable. Were desired to make the thing work, so. We stayed in stretch mode, I should say. But the -- to my knowledge, the electronics were -- were never an issue.

A. Okay.

MR. FEW: Your Honor, I move 6 into evidence, and I think it's already been without objection.

THE COURT: It has been.

MR. FEW: Okay.

(Plaintiff's Exhibit Number 6 admitted into evidence.)

BY MR. FEW:

Q. I hand you two exhibits, 8 and 9. They're -- I believe these are pretty closely related, but take a look at each one of those and let me know what you see -- if you recognize them.

A. Yes, sir.

Q. Tell the jury what the substance of -- what you understand the substance of Exhibit 8 to be.

A. Exhibit 8 is -- he's saying that, "We're having a big team meeting at" -- I think it was at Patewood, and people are coming down from North Carolina. We've got a special guest, Dr. Hugh Trout, who's been working with Dr. Cole for a long time.

And basically, it was a show-and-tell for I guess all the people from ATEX. Ryan McMurray, I see his copy. But -- I mean, again, I didn't know a lot of those guys because the local guys were our contacts. We didn't know there was deals being made.

Q. Did you ever --?

MR. SHEALY: Your Honor, I object and move to strike the last part of that testimony as being nonresponsive to the question.

THE COURT: Well, he can explain the answer, but I -- I'm not sure about the...

MR. FEW: Do we -- we got -- going to a move on?

THE COURT: Well, I might need a little explanation, but I mean...

THE WITNESS: Could I just say that I was just trying to --

THE CLERK: You want me to his whole answers or just his last?

THE COURT: I mean, let's just move on.

MR. FEW: Thank you, your Honor.

BY MR. FEW:

Q. Did you attend this meeting in Greenville?

A. Yes, sir.

Q. Okay. And take a look at Exhibit 9. Sent email from Mr. Johnson, dated November 5, 2015, and the subject is, "What a day." And tell the jury what you -- I'm going to fuse the (inaudible).

A. Is that a question? Wes, I'm sorry.

Q. Yeah, I mean --

A. Explain the email.

Q. Yeah. What -- yeah.

A. This email was from Steve Johnson to everybody on the team saying that what a success it was and how impressed they were with the whole team, and I'd forgotten that Mr. Feldman said this, "If that team could have been assembled 150 years ago, the South would've won the war." So, I'd forgotten all about that, but --

A. He said that --

Q. -- Mr. -- Mr. Feldman was extremely complimentary of what the team had done at this point. But what the team had done was create a wand that worked, and didn't have a implant to talk to. There was no mechanical device at this team meeting.

MR. FEW: And I believe 8, 9 are in without objection, correct?

THE COURT: Aren't -- those -- those are?

MR. SHEALY: Yes.

MR. FEW: Correct.

(Plaintiff's Exhibit Numbers 8 and 9 admitted into evidence.)

BY MR. FEW:

Q. Did there ever come a point in time where -- I don't want to get too detailed on this, but that there was a patent application that you were involved in?

A. Yes, sir. That was very frustrating experience.

MR. SHEALY: Your Honor, objection. Relevance.

THE COURT: Can you just -- relevance?

MR. FEW: I -- that's all the questions I had on it, really, I don't need to go into it any further. I -- I -- I'd have one other question is.

BY MR. FEW:

Q. Do you recall who the -- was there a patent attorney that was involved?

A. Yes, sir. Jason Jennings Dougherty meeting.

Q. And do you know -- was he ever in communication with some of your attorneys about some issues?

A. Well, the in --

MR. SHEALY: Objection. Relevance.

THE COURT: Just relevance.

MR. FEW: I'll just move on.

THE COURT: Okay.

BY MR. FEW:

Q. So, we're up through the end of 2015. And then, what -- what happened if you can recall, in the year 2016?

A. Well -- I mean, that was when we basically contacted them and said "We have a wand that we'd like to deliver to you. There was -- I think a purchase order for six that was contingent on one being accepted. But 2016, basically, we -- we didn't get any answers. You -- you probably got some emails that show -- you know, "What's going on, please tell us."

So, finally we had our attorney at Nelson Baldwins write their attorney or write them, and we got an answer back that the company had been sold, but that only the assets had been sold, not to liabilities. Which seemed kind of unusual.

We didn't know we were a liability, but apparently, we were. So, we got ghosted. We got -- we got whatever you call it. Just ghosted. No answer. Nobody would take our calls. We're sitting on our hands with a -- you know -- again, this agreement in place.

Q. I -- I want to back you up just a second. This is Exhibit 12, and this is dated February 16, 2016, from Lindsey Sanders, and she wants a quote for the production of the six

HVS handheld prototypes. You see that?

A. Yes, sir.

Q. Okay. So, from that point forward, what do you recall happening significantly in 2016?

A. I mean -- I mean -- they just went blank. It's like the lights went off, I guess they got acquired or something, but we never got an answer back. We -- I mean, they did -- they just turned us off. So, I mean, is that -- what -- is that --

Q. What you -- you --

A. I'm sorry, I --

Q. You just answered it.

A. Okay.

Q. Let me show you --

A. I shouldn't be asking questions.

MR. FEW: This has been marked as Exhibit 17. I believe this is without objection, right, sir?

MR. SHEALY: That's correct. It's already been entered.

(Plaintiff's Exhibit Number 17 admitted into evidence.)

BY MR. FEW:

Q. So that's in evidence. Take a look at it and tell us what that is, Mr. O'Hanlan.

A. This is an email from Steve Johnson telling us "You'll see a strange name below my name." Which is now, I guess in the name of -- the new name of the company. "CreatiVasc, Brookhaven (inaudible). This is the tip of the iceberg of changes that happened over the last several weeks. Would you have time tomorrow to get together? I can do -- let me know if that works." So, that's what it says.

Q. And that's dated January 12, 2017?

A. Yes, sir.

Q. Okay. Do you recall what was the message that Mr. Johnson passed along to you on or about this time period?

A. I am trying to think. I mean, there was a discussion about signing patent rights, but I'll have to ask Kirby if I can say that.

Q. Well, did -- did -- did he -- did -- did he come and tell you that all bets were off, we're not dealing with you anymore?

A. No, sir -- no sir. I mean, the extent of it was just this email that said "You'll see a new name."

Q. And then, Exhibit 21 -- I'm going to show you this as well. This is in evidence. What do you remember about Exhibit 21, if anything?

A. Well, in this email it was written to be in my son because we had asked what was going on.

MR. SHEALY: Your Honor -- sorry to interrupt. Objection. I mean, this -- this is a document that is not authored by this witness, not directed to this witness. I would just object.

THE COURT: But I think it's been -- and I've got it marked as in Plaintiff's Exhibit 21 as --

MR. SHEALY: It -- it is absolutely in evidence.

THE COURT: All right.

MR. FEW: The question is just the -- the witness's personal knowledge of the -- to -- to comment on the document.

THE COURT: All right. I'm going -- I'll overrule the objection. He has knowledge to this.

BY MR. FEW:

Q. Do -- do you recall receiving that letter or being made aware of that letter at any point in time?

A. Yes, sir. At the time that it was received by my son, Ben. And -- I mean, it upset us greatly, as you can tell, because they were talking about -- you know, assuming the assets but not the liabilities. They said that they denied any liability set forth from terms of the invoice, and then the most troublesome part is after discussion with Steve Johnson is also apparent that Sealevel was unable to reverse -- produce a working device capable of any commercialization.

Well, I say again, they never ever produced a mechanical design that could have been even tested with what we did. We produced a prototype that they could take and show people, it had a couple battery issues that I'm sure the

Defense will deal with in a minute, but they didn't last more than a week. But we produced electronic equipment, and that's what we do and that's what we did in this case. It was never tested with a mechanical pump, because they could not have a pump produced by at least two different companies.

Q. Did Steve Johnson ever tell you that he was terminated from Diaxamed?

A. At some point, socially, possibly. I mean...

Q. Did --

THE WITNESS: Can I tell you what he told me, your Honor?

THE COURT: Well, you can't ask me questions.

BY MR. FEW:

Q. Let -- let me ask -- let me re-mark the question, or ask a different question. In June -- on June 28, 2017, were you aware that Steve Johnson was no longer working for Diaxamed?

A. I'm not sure the exact date, but probably not. But knowing Steve socially, and I'd see him at church and some things he did tell me what happened. And what happened was --

MR. SHEALY: Objection.

THE WITNESS: -- all the investors got hosed down --

THE COURT: Hold on.

MR. SHEALY: Objection. Relevance.

THE COURT: Sustained. (Inaudible) based on what he was going to testify about. I sustained the objection.

MR. FEW: Your Honor...

BY MR. FEW:

Q. Tom, I want you to tell the jury about the effort that you have made -- that Sealevel has made to quantify the amount of time and effort that they put into this project.

MR. SHEALY: Your Honor, I'm going to object on the basis of Exhibit 4. That's an inappropriate measure of damages based on the contract that's in the record.

THE COURT: All right. I think we need to probably approach this outside the presence of the jury. So ladies and gentlemen, I'm going to send you to your -- for your afternoon break. Don't discuss the case, we'll bring you back out in just a few minutes.

(Jury exits room.)

THE COURT: All right. Yes?

MR. SHEALY: May it please the Court? Your Honor, this is the -- one of the major faults in the Plaintiff's case is the customer supply agreement. The consideration for that agreement is that Sealevel would be the exclusive supplier of these devices if they were ever ordered.

The -- there's no obligation set forth in Exhibit 4, the customer supply agreement, for CreatiVasc or any of it's successors interest to pay Sealevel for its research and development, time, costs. That was the risk that Sealevel under -- undertook by entering into this, knowing that if the device was produced, they would be selling every last one of the handhelds that were required to -- to work the device.

And so, to -- so this is the -- the question of quantifying how much time and the value of that time is to create a measure of damages that is inappropriate for the record that is before this court, and the -- the contract that has been sued on by the Plaintiff.

That is not an appropriate measure of damages. In fact, there is no -- there are no damages. That's ultimately where we get -- get to, but there's no -- there's no obligation on the part of the Defendants to pay Sealevel for its time developing this device.

THE COURT: Yes, Mr. Few?

MR. FEW: You -- your Honor, that's why I went to the pains of going over the specific limitation and liability that is included in Exhibit 4, which is the customer supply agreement, that is a one-way street only towards Sealevel. Mr. Shealy is correct that the contract contemplated that there would be a product and that once it's made, that Sealevel would be able to be the exclusive manufacturer of the handheld.

If it had gotten to that point, then one of our measures of damages, if they had gone and let someone else manufacture it, would be to sue for those lost profits. But just because that is perhaps the primary-contemplated measure of damage, it's not the only measure of damage.

And further, your Honor, this is why it's so important. This Exhibit 21, Brookhaven's lawyer writes them and tells them that, "You don't have a contract." So, what the Defendants are wanting to do, they want to have it both ways. And if we -- if you don't have a contract, then that's when we get into the equitable claims of the -- the -- the work that we gave you that we were never compensated for. So, your Honor --

THE COURT: Well -- I mean, the equitable claim, you're talking about quantum meruit?

MR. FEW: Correct.

THE COURT: Is that not the value that -- that -- that was deferred upon them? It's not the -- the value of their work in the -- in the measure of damages, quantum meruit is the value conferred on the other party?

MR. FEW: Well -- and they have that. Mr. O'Hanlan has just testified, and we have their own words in February of 2016, saying that "We want six handhelds, and we want you to give us a quote for them." So the -- the witness's testimony is, we've done -- is that they had done their part under the customer supply agreement.

The only way that we can quantify the -- the value is

-- is with the -- the hourly rates. Which are -- have been stated very conservatively in our discovery responses. And -- you know, your Honor, that's -- that would be the appropriate measure of damages under the quantum merit claim.

And I think it's also a proper measure of damages given the way that this contract was breached and under the confidentiality provision in our contract that says the receiving party will give back to the disclosing party. They -- they never -- they -- they didn't even -- they weren't even honest with us about what was going on. And yet -- and -- and -- and they kept all of our confidential information.

So, what's happened here is this company, Diaxamed, has all the work that Sealevel did, and then in this quitsmanships here, between the lawyers for Brookhaven, they're saying, "Sorry, but in the shell game, no one -- to the extent you even have a contract, we're not obligated to pay you."

And so, your Honor, this is in the record that -- that there's a dispute -- disputed fact on their own statement as to whether or not there was a contract. And we -- we believe there was a contract. But...

THE COURT: And again, okay, if you believe your contract -- I mean, how does -- how does paragraph four get you to the damages that you're trying to testify to? Was there a shipment of product to customer under a purchase order?

MR. FEW: No, your Honor. But there -- there's no exclusive remedy to Sealevel under this contract.

THE COURT: I mean, you're suing under this contract?

MR. FEW: That's right. And that -- that's one of the ways that we could recover, but...

THE COURT: What's the other way? Under this contract.

MR. FEW: Under a breach of a contract. The damages that are force -- that are reasonably foreseeable from the -- from the breach of the contract. Particularly in a situation like this where there not only was a breach of the contract, but there was an interference with the contract in all these efforts to say that it never even existed, and then to just go away from it.

And we've shown that this company continued to exist, they continued to develop the product. We would have a right to make the handheld if they ever got to that point. Apparently, they say that they hadn't. But just because that something is one of the contemplated remedies under a contract does not mean it's the exclusive remedy.

If this contract said "Sealevel can only recover, yada, yada, yada," similar to what paragraph 16 says, a limitation of liability, there's no limitation of liability put upon Sealevel by virtue of this customer supply agreement. Whereas there is a limitation of liability put to CreatiVasc for -- for Sealevel back to CreatiVasc.

And so, -- and the very things that they talk about, that there wouldn't be liability for special consequential-incidental damages. And that's -- that's what we're seeking by way of the calculation of the hours that were put into the -- the effort by Sealevel.

THE COURT: Okay. Mr. Shealy?

MR. SHEALY: Your Honor -- all right. My objection is, it goes straight to the -- the question here. Mr. Few has injected a whole bunch of other -- other issues that we'll talk about if we can get to -- when we get to the end of the -- of the case. But I'm talking about the asking about, what was the value of your time spent in developing this product that has -- that the evidence before this court is that no product has ever gone to market. Every witness that has testified, that has any knowledge of that, they said "There is no product."

This -- the -- the -- as I said earlier, the consideration here is not, "And will purchase it for -- purchase the -- these wands from you for this price." Price hadn't been determined at this point because the product hadn't been determined at this point. The consideration is that "If we ever get there, you are going to be the exclusive supplier."

And we never got there. And there's no evidence of breach that we -- that we got there and then got somebody else to make these things. So -- but that's its own argument. There's no -- there is no evidence of breach. But I'm -- I'm asking about the foundation for -- or the propriety of asking a witness to quantify the value of the time they spent as a measure of damages under this contract.

That's not appropriate given what these parties agreed to do. It -- it -- that's not what the consideration is. We didn't agree to pay them for their time. That's the risk they took, just like we took on the risk -- I mean, everybody spent time and money on this thing. Everybody lost time and money.

THE COURT: Mr. Few?

MR. FEW: Well, your Honor, there's just arguments that they don't -- that -- that the Court -- the Opposing Counsel wants the Court to restrict the contract to read the way they want it to read, which is not the way it reads. They cited no cases saying that "Under a breach of a contract, thou shall only recover this." It's just not -- there -- there's -- there's not a valid basis for the objection. And so, your Honor, breach of a contract law applies. Incidental damages, foreseeable, consequential damages.

But not only that, your Honor, that's why the quantum merit is so important is the jury -- if this jury is going to find that there was no contract based on their own testimony, then they have a right and they -- they must know what -- how much it was. They can't just -- they can't just guess.

THE COURT: Well, again go at the -- but his time and money spent is not the same thing as the benefit conferral duty. You're talking about quantum meruit.

MR. FEW: I believe it is, your Honor. If they had -- if they had solved --

THE COURT: What benefit did they -- regardless of all this time he spent on it, what benefit did the Defendant have -- get from this?

MR. FEW: They -- they have all of our work. They have all -- they have the handheld that's been designed, they have all the problems that were solved, they have -- they got all of this stuff.

THE COURT: What's the value of that?

MR. FEW: The value is what Mr. O'Hanlan says it is. Because he has to quantify --

THE COURT: That's the Plaintiff's version of that, but it's not the value that is converted on the Defendant for quantum meruit.

MR. FEW: Well then, how do we -- so, if -- if -- if -- if I go do work for somebody and I have an hourly rate and he can testify what his time would be worth, then -- and -- I don't get paid for it, then that's how --

THE COURT: Then it's what -- okay. It's whatever increased value that that person has on their house, for instance. That's quantum meruit, that's basic quantum meruit law, is the value that the Defendant gets, not the amount of time or money or value of the Plaintiff's time.

MR. FEW: Your Honor, they would've paid hundreds of thousands of dollars if Sealevel was doing this to -- just to provide to them without the exclusiveness. So, by way the contract is structured, their position is we can just drop you anytime we want. And -- and under the circumstances and the way it was done, it -- it's even more inappropriate because they just quit communicating with them.

And so, under this contract, that they don't have the ability to -- to bait us into doing this, and then not suffer any consequences. Your Honor, they know -- they know the value of -- of what -- what -- what if they had said "Let's explore making a handheld and let's go hire somebody," they would've had to use money from Brookhaven, or ATEX, or whoever to go out and hire people to do that. And Sealevel provided that.

And not only they provided, but they got it all the way to the point to where their own documents are showing that "They wanted a quote for our handheld that we had developed. Our portion was done." Mr. O'Hanlan has testified, "Our portion was done." Theirs is the -- theirs is just the portion that wasn't done. And so, the value that -- that they don't -- they don't get that for free. I mean, it -- it's not -- he didn't do it -- he didn't volunteer to give it to them.

THE COURT: Let me ask you this. If they never produced this device, then is it -- is the value of their work in it zero?

MR. FEW: No, your Honor. If they never produced the device, they -- they could sell this. They -- they could -- and that's the thing too. Tom was working on all these other things to help them get it going, then he was -- he was just cut out of it.

THE COURT: Well, we're getting way far in it.

MR. FEW: Well, I think, your Honor, the -- there has to be -- no one can say there's no value as to what they did. There's tremendous value to what they did.

THE COURT: But it is not through with his time. That's what I'm saying. That his time is not the value of the item conferred on the Defendant.

MR. FEW: I would -- your Honor, it's absolutely an appropriate way to calculate what it would've cost to develop this product. If they took -- if -- if ATEX, at any point in time after January -- December 30, 2016, if they decided they didn't want to work on it anymore and they had a buyer for it, they would tell that buyer, "Look at all of our stuff. We even had these people do this handheld for us. And you can have that too." And they still have it. They have all of our stuff. They took it. They took our confidential information -- they -- they took all of our development work, all of our ideas, and the product that we gave them, and that has value.

THE COURT: It has value, but I mean, that's not necessarily the value of the time they spent into it.

MR. FEW: Well, that -- that -- that's for the jury to decide.

THE COURT: Well, that's --

MR. FEW: That's for them to also (inaudible).

THE COURT: -- for me to decide whether it goes to the jury on that issue.

MR. FEW: They've cited no case to say that that's not an appropriate measure of damages.

THE COURT: Well -- I mean, I'm going to look out, I'll tell you I'm going to take a break and I'll let you know when I come up with it. Mr. O'Hanlan, you're in the witness bubble as I say, which means you cannot discuss your testimony with your lawyer or anybody. Short break.

MR. SHEALY: Thank you, your Honor.

(Off the record.)

(On the record.)

THE COURT: I looked at the case law contract. Ruling of the Court is I'm going to overrule your -- the Defendant's objection, and here's my reasoning. Is that, one, we have numerous causes of action including a declaratory judgment.

So, at this point, I'm not sure what claims are still in there or not, and if at some point, we -- that changes, then we'll have to just make appropriate charges to the jury like that. So, I am going to allow the line of questioning, so. But over your objection.

MR. SHEALY: Understood. Thank you, your Honor.

MR. FEW: Thank you, your Honor.

THE COURT: All right. So, are we ready?

MR. FEW: Ready, your Honor.

THE COURT: Okay. Bring the jury in.

MR. FEW: Hold on just a second, your Honor. I -- in looking at this, I want to revisit -- well, I was going to put -- I was going to use Exhibit 3 again. And I might -- might make the same argument that I made, but given that the testimony that Exhibit 21 shows that the group of defendants take the position that there is no contract, and if you look at Exhibit 3, Mr. Johnson says to Mr. O'Hanlan on October 13, 2014, before they entered into the customer supply agreement "Please let me know a round number of what you think your time -- team's time will be to oversee the chips' sensor incorporation." Your Honor, the owner of a company or the owner of a law firm, it's within their personal knowledge of what their time is worth. And your Honor used the example of

-- of a roof and a house.

THE COURT: Let me ask you this. Was this before the contract was entered?

MR. FEW: It was.

THE COURT: What I mean, it's -- but -- but this wasn't incorporated in the contract?

MR. FEW: But -- but -- but there's evidence in the record that there is no contract. That's their position, not ours. The jury...

THE COURT: And that's what you all -- in your pleadings, (inaudible) exist as the contract?

MR. SHEALY: I don't believe we do, your Honor. What -- what Mr. Few...

THE COURT: I know what -- I know the letter referred to, but is -- what are your pleadings saying?

MR. SHEALY: I mean, paragraph two of the -- of the answer says "Defendants admit that Defendant CreatiVasc Medical Inc and Sealevel Systems Inc. entered into a customer supply agreement, dated October 28, 2014. And that the parties to the customer supply agreement amended such agreement, blah, blah, blah, blah." And it said "This customer supply agreement and its amendment speak for themselves." All right.

THE COURT: I'm not going to -- that letter does not -- I mean, that -- that is a letter -- I mean, a lawyer -- but

I'm not going to allow you to say that, that they can't -- I mean, because you're not going on -- you're -- you're -- you don't have a -- you have quantum meruit for -- but you don't have an implied contract or anything like that that you pled.

MR. FEW: Your Honor, you -- the Court used an example, if -- if it's the roof, then that's the value of -- that you improved the house. But the one roofer may say "It's 55,000 to put a new roof on your house." And the next roofer might say "Well, I can do that for 35." They would each come in and testify --

THE COURT: It still doesn't make that Exhibit 3 admissible.

MR. FEW: Well --

THE COURT: So that the ruling is, it is not admissible over your objection.

MR. FEW: Okay. But I would like to ask questions -- I'd like to use it to ask him some questions again, because what it shows is that Mr. Johnson believes that he has the ability -- which of course he does as the owner of the business, to give an estimate of what it would be. And that's what companies do, your Honor.

A lot of people in construction projects or something like this, they may do a flat-fee project, and they may make out great on it, and they may lose money on it, but it's inherently within the business owner's knowledge what his company's time is worth. And that's what -- that's why -- I know you said we could continue on with that --

THE COURT: I'm going to let you do that, but I'm not going to let you put in Exhibit 3.

MR. FEW: Okay.

THE COURT: Or reference -- I mean, I'm not -- you can't read -- I mean, I'm not going to let it in and I'm not going to let you read it too.

MR. FEW: Well, what -- what -- what -- I --

THE COURT: You can -- you can ask him questions from his standpoint, but you're not -- but I sustained the objection as to 3.

MR. FEW: Understood, your Honor. And just to -- for the -- for the record, it's -- the Court is finding that paragraph -- the Exhibit 21 does not refute the existence a contract? I mean, the pleading that -- that's what's -- that's what's already in evidence.

The jury has already heard that -- that -- that in 2017 when it mattered, before we filed the lawsuit, their lawyer said "We don't have a contract with you. Prove that we do." And then, when we filed the lawsuit, that the -- they give a different answer a year later. I -- I --

THE COURT: Well, has that proven (inaudible) deep down that's what you're doing?

MR. FEW: Prove the contract? Yeah. Well, but I -- I think --

THE COURT: All right, you've got 21 -- I mean, we can -- I'm not going to stay here all day and keep going back over this, okay?

MR. FEW: I -- I understand what -- I don't understand how the -- the 21 can be replaced by their pleadings. I mean, if they did -- if -- if -- if -- if 21 said --

THE COURT: You -- you've placed your objection on the record, Mr. Few.

MR. FEW: Can I say one more thing?

THE COURT: Yes.

MR. FEW: If 21 said "Well, of course there's a contract." And then, their pleading said "Denied it," the pleading doesn't take precedence over the facts.

THE COURT: Okay. All right. You're ready for the jury?

MR. FEW: Yes, your Honor.

THE COURT: All right. Bring the jury in.

(Jury enters room.)

THE COURT: All right. Thank you for your patience. And at this time, you may proceed, Mr. Few.

MR. FEW: Thank you, your Honor.

BY MR. FEW:

Q. Mr. O'Hanlan, you testified earlier when we were going over your background that at one point in time you were a consultant between the time that you were with NCR and the time that you formed Sealevel?

A. Yes, sir.

Q. Okay. Tell the jury how you would've been compensated under those consultant agreements back during that time period.

MR. SHEALY: Objection. Relevance.

THE COURT: Right. I'm going to go and over your objection as previously ruled.

MR. SHEALY: I mean -- well, this question -- line of question -- I mean, has to --

THE COURT: Okay. I got you. Yeah. So, yeah, his previous -- go -- go to the --

MR. FEW: Well, I was laying the foundation, your Honor, that he was -- of how he was being compensated years and years beforehand, which I think is -- is helpful too.

THE COURT: Okay. I'm going to allow it then.

THE WITNESS: I was -- I was considered an hourly contractor, and so I was paid -- you know, grossed-up amount per hour. Grossed-up meaning they didn't withhold tax because I was not a W2 employee.

BY MR. FEW:

Q. Recall -- did you have a -- a standard engagement letter that you would use or something to that effect?

A. Well, it was just with one company, so we negotiated a fee initially, and -- I mean, I just charged that fee per hour for --

Q. And that was in the mid-80s; is that right?

A. 1984, 1985 time frame. Yes, sir.

Q. And do you recall would -- you had an hourly rate at that point in time?

A. Yes.

Q. And what was it?

A. Back then, it was -- I think $54 an hour.

Q. That really was a long time ago, wasn't it?

A. It was good money then.

Q. If -- if you -- what would you say that your time would've been worth on an hourly basis in the 2014, 2015, 2016 time period?

MR. SHEALY: Object -- objection. Relevance.

THE COURT: Overruled.

THE WITNESS: There's two ways to look at it. One is you can say "What do I make in a year?" And divide up by 2000 hours, and that'll give you an hourly rate. And the other way is -- is to say -- you know, kind of like an attorney, "My -- my time is worth -- you know, 250 or $350 an hour."

BY MR. FEW:

Q. Okay. Well, do the math and tell us what those answers would be.

A. Well -- I mean, I -- I think I took my salary. My salary at the time was maybe $120,000. So, I divided that into that's, what? 60 -- $60 an hour maybe in my head.

Q. And then, what if you, but you -- you're -- you own the company, so you're -- you're being -- you're really being compensated in other ways than just your salary, right?

A. Yeah. But like for engineers' salaries, we -- we had a standard bidding, like you might pay an engineer -- you know, a certain salary, but if he's doing work for a company, for your company, you might charge, say, a $100 an hour for that employee. Or you're not paying him a hundred dollars an hour, but his time is worth a hundred dollars an hour and that's the -- you know, the -- the market. Is what the market either will bear or going rate for contract.

Q. How many hours did you put into the -- this project?

A. I don't have the number in front of me, but hundreds would be conservative, I think. Especially early-on meetings in talking with Dr. Cole and exchanging emails late at night, things like that.

Q. In discovery responses, you said 500 hours?

A. Yeah.

MR. SHEALY: Objection. Leading.

THE COURT: Sustained.

BY MR. FEW:

Q. And what would your hourly rate be at that time? What would -- what would you have charged as the president of the company?

A. I --

MR. SHEALY: Objection. Objection. Relevance.

MR. FEW: I'm sorry.

MR. SHEALY: Objection. Relevance. And I'm just -- to -- I -- so that I don't have to keep doing that --

THE COURT: Right. I'm -- and your objection is on the record for this line of question.

MR. SHEALY: Thank you, your Honor.

THE WITNESS: I'm sorry, I don't recall. It would be in the -- the invoice we send them, but I...

BY MR. FEW:

Q. Be conservative and -- and --

A. I guess 125 an hour, maybe.

Q. And how about -- and be conservative again on the amount of hours that you put into this project.

A. Conservative? 300 -- 400.

Q. Okay. What about who were the other upper-level engineers that worked on this project?

A. It was Tony Martin, Jeff Hunter.

Q. All right.

A. Gary --

Q. Tony -- what would you, what would you have --

because what would Sealevel have charged clients for Tony's time during that time period?

A. I -- I apologize, I didn't prepare for these answers. I'm going to guess maybe $100 an hour.

Q. And be conservative in -- in stating how much time you think Tony put into this project.

A. You know -- I mean, his time would've been -- you know, during the week he puts it -- you know, turned in time sheets saying how he spent his week on different projects, but I'm going to guess there are a couple hundred hours.

Q. But you -- he has time sheets that would show how much he did?

A. Yeah. That's where we got those numbers that we created the invoice from.

Q. And Jeff Hunter, how about him?

A. It would've been less. Maybe 75.

Q. And how much total -- total hours do you think Tony Hunter put into the working on this project for CreatiVasc?

A. Well, he was one of the chief engineers, so probably more than -- I mean, because it was his day job as well. Maybe 500 to 600. I'm trying to get a feel, but it's 40 hours in a week. 10 weeks is 400 hours. So yeah, I mean, I think that's probably conservative, but 500 to 600 hours.

Q. Okay. And what about Jeff Hunter?

A. Same. Tony -- Tony would've been less. Tony was a manager. Jeff was the newer engineer.

Q. So, you think Jeff was a 600 and Tony was 500?

A. Yeah, maybe Tony 400. But...

Q. And the rates you gave were -- as the owner of the company, your testimony is that Jeff's time would've been billed out at -- at $75 an hour?

A. Yeah. That's what I said, but I'm -- I'm not sure that's accurate.

Q. And Tony at 100 and yourself at 125, I believe? As a part of running the business, did you have occasion to have those types of agreements with customers in 2014, 2015, and 2016, where you would set a rate for your engineer's time?

MR. SHEALY: Objection. Relevance.

THE WITNESS: We did, but...

THE COURT: Overruled.

THE WITNESS: Looks like I can answer. We did. Generally, we didn't -- there wasn't a normal way of doing business. It's not like somebody came to us and said "I need this designed." And we said this would take him eight hours, him six hours, him three hours. "So, pay us this." It was more like the customer said -- you know, "I bought a bunch of these from you, now I need to program them to do this or add some feature." So, we would then say "We can do that work for -- you know, a $100 an hour for one of our programmers or engineers." So -- but we didn't normally bid jobs by saying -- you know, "It's X number of hours." We would work up estimates.

Like, if you came to us -- said "I want you to build me an F-15 fighter, jet." We'd say "Okay, well" -- you know, take this much of his time, this much of his time, and we build an estimate, and then we'd say -- you know, basically -- you know, "This is how much time," so. I'd like to point out too that if we were building -- you know, a thousand jets for the military and we put a thousand hours into it, we would bill one hour per jet. You follow me?

Q. Yeah.

A. But if we built one jet, we'd have to charge for a thousand hours.

Q. So -- but it was a -- even though you -- I believe I understand your testimony that a lot of your contracts did not have those types of provisions in there, but the company did do engagements for, like you described, for improvements on existing --

A. Yes.

Q. -- products where you would charge by the hour?

A. Yes.

Q. And so, as the -- your role as owner of the company, you were knowledgeable about how those rates were set?

A. Yes, sir.

Q. Okay. And the testimony that you gave regarding the hourly rate of Jeff Hunter and Tony Martin and yourself is consistent with that knowledge?

A. Yes, sir. But again, I could be wrong. I mean, if we go back and look at the notes, you'll see what we did charge. So I'm just guessing.

Q. Sealevel, these fellas, these employees, they kept up with their time? Like if they work an eight-hour day, four hours on one project, four hours on another, they tracked it?

A. Yes, sir.

Q. As a normal part of their business?

A. Yes, sir.

Q. Okay. And that was done so that you all could determine what it was costing you to provide --?

A. To be there. Yeah. Just overhead and survive. Yeah.

Q. Yeah. So you could evaluate profitability of one project versus another? And so, Tony Martin would write his time down every day, and he would write down how much he put for Sealevel?

A. Yes, sir.

Q. And you all have those records?

A. I -- we would hope so. Yes, sir.

MR. FEW: And that's all the questions I have.

THE COURT: Cross-examination?

MR. SHEALY: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. SHEALY:

Q. Mr. O'Hanlan, so Sealevel's been operating since 1986, right?

A. Yes, sir.

Q. And you -- I understand you have two lines of business: Custom electronic systems for large corporations and then off the shelf industrial control communications products. Is that correct?

A. Yes, sir.

Q. All right. And you're semi-retired at this point, correct?

A. Yes, sir.

Q. All right. So, you've looked at Exhibit 4, the customer supply agreement, that's what we're here about today, correct?

A. Yes.

Q. Okay. All right. And just the point in time that is important is you all entered into that agreement on October 28, 2014, correct?

A. I believe that's correct. Yes, sir.

Q. All right, and would I be correct in sort of summarizing for the jury that Sealevel's involvement in this project was the development and construction of an external handheld device that would connect through the skin without having to puncture the skin with the implanted part of the device that CreatiVasc had been developing long before 2014, using magnets to open and close the internally-implanted balloon valves?

A. They never had a working device that used magnets or other.

Q. All right, so Mr. O'Hanlan --

A. I mean, I disagree with your statement.

Q. Okay. Well -- so do you remember giving a deposition on August 2, 2023 in this case?

MR. SHEALY: Your Honor, may I approach the witness with a copy of that deposition?

THE COURT: Yes.

BY MR. SHEALY:

Q. Mr. O'Hanlan, if you would turn with me to page 34. And this was -- this deposition was taken in your attorney's office, correct?

A. Yes, sir.

Q. Okay.

A. Where are the page numbers, sir?

Q. So there are four pages per page there in the top right-hand corner of each page.

A. Parenthesis and the page number?

Q. The page number is in the top right-hand corner.

MR. FEW: Your Honor, can we approach?

(Bench conference.)

MR. FEW: I don't know yet. I got to pull it up. (Inaudible).

THE COURT: Any -- I mean, any issues with the authenticity of this deposition?

MR. FEW: I don't have any questions with the authenticity, even though it's not a sealed copy, your Honor, but I know that the question that it's -- it was objected to during the deposition.

MR. SHEALY: May I proceed, your Honor?

THE COURT: Yes, you may.

BY MR. FEW:

Q. So, Mr. O'Hanlan?

A. Yes, sir.

Q. If you turn -- you -- you are at page 34?

A. Right.

Q. If you look at line 19 and I said "And it's specifically the development of the external handheld controller using a magnetic system to open and close internally-implanted balloon valves?" You see that question?

A. Yes, sir.

Q. Okay. And your answer is "Yes, sir. And it -- the scope of work included the electronics for the implant as well."

A. Yes, sir.

Q. Okay. All right. So -- and we're talking about Exhibit 4. You'd agree with me that the -- that Exhibit 4, the customer supply agreement doesn't obligate CreatiVasc to actually purchase anything, does it?

A. Well, I think it says "We'll be the exclusive supplier of the device."

Q. Okay. So, turn with me to page 51.

A. Okay.

Q. Are you there?

A. Yes, sir.

Q. And the question at line 11 was, "But you'd agree with me that Exhibits 2 through 4" -- and I'll represent to you and to the Court that at the time of that deposition, we were talking about Exhibit 4 and its amendments. "Don't contain any provisions that require CreatiVasc or any entity that is standing in CreatiVasc's shoes to pay Sealevel for its engineering time?"

And -- and you said in response, "I would agree with that as stated, but the contract does provide for the exclusive rights to manufacture the product," correct?

A. Well, yeah.

MR. FEW: Your Honor, I -- noted. Can we approach again? Because that question was also objected to during the deposition.

THE COURT: I need some clarity, please. We're going to break for the day. And we're going to have to stop now. Later, there's some issues we have to address. And so, don't discuss the case. If you'll be back in your jury room at 9:30. Let me give you your four rules. Don't discuss the case, do not do any type of research about the case or the issues or anything like that, do not pay attention to media coverage, including social media, and finally if anybody contacts you other than someone from the clerk's office, then please let the bailiffs know. All right. So see you back in here at 9:30.

(Jury exits room.)

THE COURT: All right. Mr. O'Hanlan, you can step down, but now -- again, you're still in the -- you're still in the witness bubble -- hold on.

THE WITNESS: I'm sorry.

THE COURT: You're still in the witness bubble as I call out, so therefore you cannot discuss your testimony with your attorney or anybody else right now. As long as you -- until you complete your testimony, you're kind of -- I know that's very difficult to do tonight, but that's what you're -- you're stuck with.

THE WITNESS: Any discussions at all, or --?

THE COURT: You don't have -- you can't have any discussions about your testimony. So, any discussion about the case will therefore have an impact.

THE WITNESS: All right, sir. Okay.

THE COURT: All right.

THE WITNESS: Thank you, sir.

THE COURT: And I just felt like -- I mean, if we want to take another break at 15 to 5:00, that it was not going to be -- you know, after we wrangled over this and then bring them back in, I just felt like we were going to break with this, look at all these issues. And like I said, I've never had the -- I've never had this issue raised. So -- I mean, I'll be glad to hear from you, Mr. Few.

MR. FEW: Well, your Honor, it's two issues, and -- and again, to be clear, as I was up there, I could be mistaken on the rules for state court versus federal court, but it's always been my practice and my understanding that you -- that you got to have a sealed copy of the deposition.

And not only that, but the witness has to be -- they have to be impeached about it. And he followed some of the rules, but it's not a sealed version. And the -- the questions that he's impeaching him upon, I -- I -- first one, I didn't have a copy of, and the -- they're all questions that I objected to during the deposition and I objected to them during the deposition because I felt like they were either compound or multiple, there was a reason that I didn't think that they were fair questions.

And, your Honor, I -- I also would have to point out that it's been stated that the contract speaks for itself, and he wants Tom to give Tom's interpretation of the contract, which I think is fair testimony for a witness to say "This is what I thought it meant," and they may very well be wrong or they very well may be right. But so, those are the reasons I have the objections. He was asked a question about one thing -- when was the first one occurred? You know, page --

MR. SHEALY: On page 34?

MR. FEW: -- 34. Yeah, 34 line 19. He asked a question, I objected to the form. And then, it's a question about the scope of work. Well, the scope of work's in the contract.

THE COURT: Is the jury still here? They haven't left yet?

THE CLERK: I don't think so.

THE COURT: Check this in. I realized we may have to stop them if they are. The reason I'm saying that is we may have some issues that -- what's -- going to happen is I'm -- for instance, we probably need to look at some of this stuff tonight. I need to look at these other deposition issues and

I don't want the jury sitting back there at 9:30, if we want to them to.

MR. FEW: Sure.

THE COURT: I just -- so that's why I was just --

MR. FEW: Okay.

THE COURT: -- interrupt you. I'm sorry. Yeah, go ahead.

MR. FEW: And I've got a witness out there too. I thought we were going to get to -- should I just tell her she can go?

THE COURT: Well -- I mean, obviously we're not getting to her today.

MR. FEW: Yeah. Can I step outside?

THE COURT: Yeah. All right.

THE CLERK: I think they are downstairs. They had not left the building.

THE COURT: Okay. Are they in?

THE CLERK: I'm sorry?

THE COURT: Where are they in the building?

THE CLERK: Yes, they're in the jury room downstairs.

THE COURT: Okay.

THE CLERK: They were about to exit --

THE COURT: Okay.

THE CLERK: -- and I asked them to hold.

THE COURT: Okay. All right. The jury is still here.

I'm going to tell them to come back -- be back here at 10:00 in the morning. Okay?

THE CLERK: Okay.

THE COURT: All right.

THE CLERK: Okay.

THE COURT: Can you call them --

THE CLERK: I'm calling.

THE COURT: Yeah, let them --

THE CLERK: I don't know if Janine is still here, but I'll go down to this --

THE COURT: Okay.

THE CLERK: -- and come back.

THE COURT: All right. Okay, go ahead.

MR. FEW: Well, your Honor, the -- you know, there's a couple -- there's a lot of different types of impeachments. There's impeachment where -- and it is debatable if they actually are impeachments, and that's your job to -- I believe, to determine if -- if it is an -- an impeachment under the rule.

But the perfect way to do it is you ask a word-for-word question, and you get a different answer, and then you use the transcript. But the rule also says that the witness will have an opportunity to explain their answer, and -- you know, it says "And the scope of work included the electronics for the implant as well." Well, that may have been his interpretation and he's certainly entitled to that because he's tasked with making an external device that has to communicate with the internal device.

So, obviously they had to -- you know, they had to communicate one way or another. But like I said, he could be mistaken. And -- and I just -- you know, I think we were stopped or slowed down for asking questions about the contract, where the contract did -- did the scope of work is laid out in -- in paragraph one.

And it says "Sealevel agrees to design, manufacture, sell and deliver to customer hardware and software the product used in the system's handheld actuator and implanted balloon-pressure monitoring and reporting devices."

So, I don't even know what the impeachment is? His testimony was correct. I -- I -- I mean, it's -- it's up to Opposing Counsel to decide when they want to try to impeach in the quality of the -- of the impeachment, but we objected to that question, and I think the more proper way is to impeach on a question in the deposition transcript for which there was no objection.

THE COURT: Mr. Shealy?

MR. SHEALY: Your Honor, I'm having trouble following what -- what the objection is. A whole bunch of things have been raised. But, your Honor, as your Honor pointed out at the bench, a party can -- can do whatever they want with the deposition of a party opponent. And I asked a question that the witness answered differently than the answer that he gave at a -- in the deposition itself.

The questions are not identical. They don't have to be identical, they have to be substantively the same. If there was an objection to the question that I asked the witness on the stand, it is incumbent upon Opposing Counsel to object when I ask the question in trial. If he doesn't -- if he doesn't object at trial, then when I -- I read him the -- the question that was posed to the witness during his deposition has been waived.

Your Honor, the other objection that has been raised at the bench is to the use of a copy of the deposition. If -- if -- if I've ever seen a more blatant example of elevating form over substance, I don't know, I don't remember it. There's been no suggestion, no -- no -- no proof offered that somehow, I've been -- with the two questions I've used, that I'm using an -- an -- some sort of doctorate or altered version of the deposition. I'm happy and have asked my paralegal to have in my hands in the morning the sealed copy but that to me, your Honor, is -- is inappropriate for where we are. Unless there were some -- some proof that what I have is different than the copy that Mr. Few has when he ordered a copy of this very same deposition when it was taken.

Your Honor, I would appreciate the opportunity to cross-examine the witness in accordance with the rules and common practices in this state without being interrupted with inappropriate form objection.

THE COURT: And I guess at some point, a copy of the -- did you have an extra copy of this deposition?

MR. FEW: I certainly do, yes, your Honor.

THE COURT: My fault.

MR. FEW: Your Honor, there was a lot to follow there, but Mr. Shealy doesn't want to be interrupted. Which I didn't interrupt when -- when he asked a question of Mr. O'Hanlan. How am I to know that he is going to then embark on an impeachment based on this question that I objected to, particularly when the words he used are not identical to what's in here.

Again, the -- in -- in the rule about and -- and -- and so, I have two questions that might show my complete ignorance, but what is the rule that says that you can do anything with a deposition with a party opponent? I've never been familiar with that. I think -- I thought we're operating under Rule 613 for impeachment. And you impeach a witness on a prior out-of-court statement. And --

MR. SHEALY: It's Rule 32, the rules of civil procedure.

MR. FEW: So, then your Honor, there's no way it's --

it's a tall burden on anybody to have the deposition transcript memorized. He asked a different question than this question that I objected to, and then immediately started impeaching the witness. And -- and I didn't have my copy of -- I -- I mean, he gave me a copy, obviously doing the -- you know, the most courteous things and I don't disagree if it's form over substance, but I just -- if that's what the rule requires, that's what we were prepared to do.

So, if I'm wrong on the rule -- on that rule too, then -- then I can eat that. But, your Honor, the -- the whole discussion, it's -- it's phrased as some type of impeachment and all it really is, is the discussion about questions, about, "What's the scope of work?" And they've taken the position that the contract speaks for itself. And it says -- you know, "The system's handheld actuator and implanted balloon-pressure monitoring and reporting devices."

So -- and then we've put in evidence to show that in February of 2016, they said "We're not doing the pressure-monitoring situation," and Tom's testified about that as well, so those are the objections. That it was an objected-to question. And I don't think that -- that the question is really subject to impeachment.

I mean, that he could ask him what is his interpret -- you know, what -- what is -- "What do you interpret the scope of the contract to be?" And -- and -- and question him about that without making it an impeachment based on an objected-to question.

THE COURT: All right. Well, I'm going to look at all this tonight. I'll look at the contract. I'll -- I mean, that's something that I -- I have not had a chance really to sit down with the contract. So -- and then I'll -- I'll be ready to go at 9:00 in the morning. I would revisit this 21.

And Mr. Few, I don't read your Exhibit 21 the same way you do. I'm looking at this letter of June 28, 2017. It does not say that. It probably says that they talk referencing the invoice. It says "CreatiVasc also denies any liability for any items in the invoice." And it said "Does -- does not have a copy of any purported supply agreement supporting this invoice." That is not the same thing as saying that the agreement that you've sued on is not a valid contract, but they're just saying, "We don't agree that you all have a contract." I mean, that's their whole argument. You -- I mean, that's not what you characterized to the Court earlier at all.

MR. FEW: Well, if -- if --

THE COURT: After I finally read this, it's like, "Well that's not what that says."

MR. FEW: "The document speaks for itself," and it certainly could be read to be them saying, "We deny the existence of a contract and you must prove to us that you have one."

THE COURT: It says it denies liability for this invoice and any contract that supports this invoice.

MR. FEW: It speaks for itself.

THE COURT: Well, I -- I know it does. And I think you mischaracterized it when you argued earlier. And your -- your other exhibit is violating the parol evidence rule in the formation of the contract after the contract is -- has already been prepared, so you're talking apples and oranges there.

MR. FEW: Understood, your Honor. And maybe we'll need some clarity on -- on it. I mean, I feel like if 21 is in evidence and --

THE COURT: Right.

MR. FEW: -- we can argue the way -- the way we -- we believe that it was interpreted, and they can argue a different interpretation, just like with anybody. But the -- the -- anyway, I think my position's clear. My position is that they took the position that there was no contract, and -- and the document speaks for itself. But the -- that's why the parol evidence -- but I -- I'm not concerned about Exhibit 3. I mean --

THE COURT: I just wanted to clarify on that.

MR. FEW: It's (inaudible) on that.

THE COURT: Okay. All right. We'll see you all at

9:00 in the morning.

MR. FEW: Thank you, your Honor.

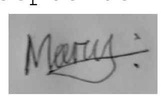
(THERE BEING NOTHING FURTHER, THIS HEARING CONCLUDED)

CERTIFICATE OF TRANSCRIBER

I, MARY RAGSDALE, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had, and evidence introduced in the trial of the captioned case, relative to appeal, in the South Carolina Circuit Court 13 of Greenville County, South Carolina, on February 11, 2025.

I do further certify that I am neither of kin, Counsel, nor interest to any party hereto.

September 22, 2025.



MARY RAGSDALE

Transcriber

CONTINUATION OF PROCEEDINGS - FEBRUARY 12, 2025.

THE COURT: All right. Back on the record. I think we kind of left off yesterday with some issues with depositions from -- during the cross-examination of Mr. O'Hanlan. And I know that -- my law clerk -- Mr. Few said that you had sent an email, so I'm not sure what the status of any objections or what I need to rule on as far as depositions go.

MR. FEW: Why don't I just kind of read my email into the record, which is what I plan to do. Make sure that that's clear that you're not -- I think I remembered all. "Went back, looked at the rules, turns out federal rule requires an under-oath statement, but somewhat unbelievably to me, the state rule doesn't even require a sworn statement, so I withdraw any objections about Opposing Counsel not having a sealed copy of the deposition transcript. I guess that's an example of custom and practice sometimes prevailing in our minds over reading the rule, which we should always do is read the rule."

And then -- but what I was also saying is that Rule 6 -- under Rule 613, the statement -- the comments say this: "That the statement has to be a prior inconsistent statement before the deposition transcript is to be used." And -- and so -- well, I stand on that objection and also stand on the objection that in the deposition transcript, the portion that was used, I objected to the question, and --

THE COURT: Right. And we'll get to that in just a minute. But 613 also says "Does not apply to admissions of party opponent as defined in Rule 801(d)(2). If you look at 801(d)(2), then you get to the point of basically any statement used against a party opponent that was made by that statement is -- in (inaudible).

And then, you go to the rules of civil procedure. And if you look -- it's interesting the rule of civil procedure says "A deposition can be used to contradict and impeach based on the rule of evidence." It says "But a deposition of a party or a representative of a party can be used for any purpose." And that's 302(d)(1) and (2), I think.

MR. FEW: It's -- Rule 32(a)(1), is of the rules of civil procedure.

THE COURT: Yeah.

MR. FEW: Yeah, your Honor, the -- the question is -- is -- is something in admission, is the question, I mean, they're both, it is the same.

THE COURT: Well, but if you go to 801(d)(2), it has a heading admission, but the -- actually, it says it's defined in 801(2), but if you go to the definition of 801, it just -- it doesn't define it that way. It says "The statement is offered against a party and is the party's own statement, either individual representative capacity."

MR. FEW: That's just a statement as to what is not hearsay, but six (inaudible).

THE COURT: Well --

MR. FEW: That just gets it past hearsay and --

THE COURT: Well, but 613 says that this doesn't apply, if you use the definition of 801(d)(2), that you don't have to go through all that rigmarole that you normally have to when you have a prior statement of somebody.

MR. FEW: It does not apply to admissions, there has to be an admission.

THE COURT: Well, but it says "Admissions is defined by 801(d)(2)." And if you -- to define -- the definition of admission in 801(2) is quote "The statement is offered against the party and is the party's own statement in either individual representative capacity."

MR. FEW: No, I don't -- I don't see where 801 defines admission, it defines statement.

THE COURT: 801(d) is -- 801(d)(2), which is what? 613 references.

MR. FEW: Right. Your Honor, I think that the -- the -- the proper interpretation of it is -- is that 801(d)(2) is limited by what's an admission.

THE COURT: It does. The -- the -- the heading says admission, but the actual rule does not say admission.

MR. FEW: But -- but it has to be an admission before it's a (inaudible), in other words, it has to be --

THE COURT: Well -- I mean --

MR. FEW: -- ultimately --

THE COURT: -- I'm ruling -- I -- I'm going by the rule and not the heading, so...

MR. FEW: I'm not going by the heading either, I'm going by the language in 801 and 613(b), in the final sentence, it says "This provision does not apply to admissions of a party opponent as defined in 801(d)(2)."

THE COURT: And it defines admission by party opponent, as the statement is offered against the party, if the party is on statement. That's going to be the rule -- I mean, that's my ruling of court, that's the way I've -- in 35 years, that's the way I've always treated it on a deposition, so...

MR. FEW: Okay. So then he's able to use -- you're able to use the deposition, but the witness has to be given an opportunity to read it, and frankly, it -- it went a little too fast. That means the witness has to be given the statement, he has to have the opportunity to read the question and read the answer, and then he can explain it.

THE COURT: Well -- I mean, I think he was doing that. It went a little fast though, but it -- so he gave him the deposition, turn to this page here, here's the question.

MR. FEW: Right. And then -- so then we get to the issue of -- of the objection. (Crosstalk).

THE COURT: Objection. That's a different issue. And I think we're going to -- and I -- now that I've got a copy of the deposition -- I mean, I guess we're going to have to -- if -- if there is an objection, we'll just have to address it at the time that...

MR. FEW: And I think having had a little bit of time to think on it, the question was about the scope, so -- anyway -- it's...

MR. SHEALY: May it please the court?

MR. FEW: I'm not going to -- I mean...

MR. SHEALY: Your Honor, I...

MR. FEW: You've probably got a better idea of how to handle -- handle it than -- than I do, but it didn't seem to me to be much of a matter of impeachment, it's just an interpretation of the contract.

THE COURT: Contradicting or impeachment.

MR. FEW: Okay.

THE COURT: Yes.

MR. SHEALY: May it please the Court? Your Honor, with respect to questions that are posed to the witness in the deposition, if they are substantially the same as what I asked the witness from the stand, the objection needs to be raised now. It's my -- my position is that the objection is -- if you've got an objection, and I ask the question to the witness here, he's got to object to it when I ask that question before we get to -- the -- showing him how he answered differently in the deposition.

THE COURT: And I guess what we could do -- and I -- like I said, I have a...

MR. FEW: Your Honor, can I -- can I comment on that? Because that would place such an -- and I said this yesterday, such an unbelievable memory burden on -- on the Opposing Attorney, that there's not a practicing attorney in the world that could do that. And if that's the -- their position, then what we need to do is go back and look at the transcript and see if his question was substantially identical to lines 19 to 22 of page 34, where he said "Okay," and it's -- it's specifically --

THE COURT: Well, hold on. Let's just -- I mean, I don't -- you don't need to read all that. I mean, what -- what you need to do is when he references the deposition place, you can -- you all have an opportunity to look at it, and if there was an objection there that we need to address, we'll address it at that time.

MR. SHEALY: Your Honor, for the Court's -- benefit of the Court, I don't anticipate this coming up, but maybe two or three times.

THE COURT: Okay.

MR. SHEALY: And what I anticipate to be a -- I'm going to try to make it as brief a cross-examination as I possibly can.

THE COURT: Okay.

MR. SHEALY: But notwithstanding the withdrawal of the objection, my paralegal handed me the original as I walked in the courtroom -- courthouse today, so I got it, and I'll hand it to them.

THE COURT: Hand it to Ms. Cooper come in here.

MR. SHEALY: Ms. Cooper would be happy to unseal it.

MR. FEW: I -- I don't know if you can use that if you want, but I'm --

THE COURT: By golly, after yesterday (inaudible).

MR. FEW: Well, sure, but my objection you in front of the jury too, but -- so I have a right to do that.

MR. SHEALY: But, your Honor -- anyway, I -- I -- I think we're on solid ground. I -- and -- but, I mean, we're going to need to strike the testimony because if not, I think we need to determine how close the question was to this. That's why I was reading it into the record.

MR. FEW: I'm going to start over and approach this a little differently.

MR. SHEALY: Okay.

MR. FEW: And maybe we'll avoid some of it.

THE COURT: All right.

MR. FEW: Of this.

THE COURT: All right. So that takes care of that issue?

MR. FEW: I think so, your Honor.

THE COURT: All right. Now, let's talk about the designations.

MR. SHEALY: Your Honor, I think we just probably need to go through those one by one, don't we?

THE COURT: Yes.

MR. SHEALY: Okay.

THE COURT: Unless you've had a chance to look at them after his objections.

MR. SHEALY: No, I -- I'm -- and I'm not any of my designation especially on his objections.

THE COURT: Most of them were -- I mean, there's a lot of them that just didn't even -- were nothing, they don't (inaudible) to hear from. All right. Where are you all, to start with?

MR. FEW: Kirby, which one? You --

MR. SHEALY: I'll pull up the objections, which we -- do you want to start with Feldman?

THE COURT: Okay. All right. Feldman.

MR. FEW: 37, 24 to 39, 6, is the first one.

THE COURT: All right. And I've got those. And you -- your objections were on relevance -- what's the relevance of -- of this -- all this through here, Mr. Few?

MR. FEW: Well, your Honor, I'm asking the witness about the legal documents, specifically what is known as a Private Placement Memorandum, which has never been produced in the case. It's been admitted that such applied Private Placement Memorandum existed, but it's never been produced, and if the Court would note the -- the total number of documents that we got from the Defendants was in exhibits -- it ends at, like, 225 or somewhere in that range.

And so, what I'm asking him about is the PPM, is it available? He says "I'm sure it is," but then the point is the -- it's uncertain in the record exactly when Brookhaven made their investment into CreatiVasc. We believe it was sometime in March or April of 2015, based on Secretary of State records.

And I think the answer is probably in the testimony, but the real answer is in the documents, and -- and -- but beyond that, your Honor, Brian McMurray, who's represented by Counsel, his company ATEX, and whatever company they work under, and John Feldman, who's represented by his counsel, Mr. Achenbach, who he had worked with for 30 years, got both sides represented by Counsel.

They're preparing a Private Placement Memorandum, it's a very complicated document. The purpose of the document is disclosure, and what should have been in the document is disclosure of the existence of the Sealevel contract dated October 28, 2014. At this point, based on the discovery we've been provided, we don't have the PPM, and so it's just an open question as to whether or not -- as to what was in it, but certainly we know that the disclosure document was prepared and it existed --

THE COURT: But if you don't know what's in it house it probative to anything?

MR. FEW: Because McMurray would've known that -- that it -- it disclosed to Sealevel. I mean, there's evidence in the record for that as well, your Honor, but --

THE COURT: But that doesn't say that in there, it just says it exists.

MR. FEW: Well, and you got to look at all the questions because we -- there's questions about what would be in there, would you be buying the series A, would you be buying the Series B? I mean, this is just not a situation, your Honor, of -- of somebody coming along and saying, "Hey man, I'm going to invest in that car lot, it looks like a good business," based on the discussion over a couple of cocktails.

This was a sophisticated document; we get an adverse inference jury charge over the fact that the -- the PPM exists and it was never produced. I -- I -- I didn't -- I mean, if they're not going to produce it, they're not going to produce it. I asked for it -- I asked for it -- I asked for it.

THE COURT: You file a motion to compel?

MR. FEW: Nope, they said it existed and they said they would get it to me, and they never did, and so...

THE COURT: All right. Mr. Shealy?

MR. SHEALY: Your Honor, I'm not saying all of what Mr. Few said, I just don't see that there's anything relevant to -- and any of this colloquy about what was revealed to or disclosed to potential investors in a company -- I mean, I'm worried in addition to not being relevant, even if it were relevant, the probative value is so outweighed by the danger of further confusion of this jury.

This -- the issue of what's in a -- I mean, whether there were series A, series B stock issued, and what is a Private Placement Memorandum? My goodness, we're going to get this jury into the weeds. And it's just -- none of this is germane to the issues in this case.

THE COURT: All right. Then how about --

MR. FEW: Could -- could I speak to that, your Honor? It's absolutely germane, because if you -- when you get into McMurray's deposition, as I recall, you're going to see that -- he testifies, "I didn't know who they were." "I didn't know who they were." And what -- but what -- what's in the other documents is, "We knew who you were, but we didn't -- we didn't -- we didn't take an assignment of your contract."

Even though the -- then our agreement says "She you can't do that." Our agreement -- paragraph 24 says that it's only assignable if the entire company is assigned. So what they did is -- they -- they knew about Sealevel, and they chose not to take an assignment, and they tried to play "quitsmanship" and -- and some type of a shell game to say "Well, we took everything from CreatiVasc, but we didn't take your contract. And too bad, so sad."

And -- and that -- that's not what's in their pleading. Their pleading sets forth an answer on behalf of all of these parties. But what -- what's also in the evidence that's going to come in is that their attorney says "We didn't take your contract." In other words, "We chose not to include your contract." So they can't -- it goes to the issue of, what did they know? And that goes specifically to the issue, your Honor, of the interference-with-contract claim, and we have to prove that they knew of our contract, and they certainly -- there's already evidence in there that they knew of our contract, that that Private Placement Memorandum would've had disclosure.

And that's all I'm going to say is -- you know, and they've admitted the PPM is designed so that an investor knows what they're investing in. And our position is -- and the facts will bear out, that Brian McMurray is very sophisticated person with legal counsel, the -- Brookhaven has legal counsel. They knew what they were doing, it was disclosed -- Steve Johnson in his deposition says "I certainly would've made all these documents available to Robert Achenbach (ph)." Talking about the amendments to the customer supply agreement, which are also made in the name of CreatiVasc only, and we believe that was after Brookhaven Vascular had taken over CreatiVasc. So -- your Honor, if we're not able to put this evidence in, it's going to be a tremendous prejudice to our ability to prove knowledge of the contract and effectuating a breach thereof under the interference claim. So -- yes.

MR. SHEALY: Your Honor, the decision not to purchase -- or every asset -- or assume -- I mean, in an asset sale, is not the basis under the law of an intentional interference claim. So -- I mean, the whole premise of -- of this being germane is false. Companies do that all the time. In an asset sale, you can decide, "I'm going to buy that -- but not that." And -- it's -- it's different as the Court knows from purchasing all of the stock, then you take everything lock stock and barrel, the assets, the liabilities, everything else.

So there's no shell game, that is just -- that -- but regardless, this material here is not germane. This is about issues that the -- what was disclosed to investors in -- in the company doesn't have anything to do with this breach of a contract action, it doesn't have anything to do with the other causes of action, this is just going to confuse the jury.

THE COURT: All right. I'm going to think about that one. 39, 14 through 23, basically the same?

MR. FEW: It is.

THE COURT: Okay. All right. I'll let you all know before you all get after that. All right. 48, 15 through the next one there?

MR. SHEALY: All the same.

MR. FEW: All right. Your Honor, you see that -- that -- there -- that he's going into all of the details, not only was the investment involving disclosure of CreatiVasc, but it also involved the disclosure of this future matrix company in Texas.

So highly-sophisticated arrangement. Lawyers on both sides did a due diligence, they knew about our contract, and that is absolutely -- and -- and I -- I want to take issue with the last comment that Opposing Counsel argued that an asset sale with selective assets is not interference with a contract. Well, it certainly could be. I mean, there's no case law that says that it can't be. The -- the -- the -- the act is that you knew of the contract and that you interfered with it, and that's what we maintain the evidence is here. And, your Honor -- yeah.

So -- I mean, their position may be that we're stuck with CreatiVasc, but that's not the legal issue that's been put before this court in the pleadings, because their answer is the same on behalf of all parties. That they didn't -- they didn't -- Diaxamed didn't provide a separate defense or a separate answer. And as they said yesterday, they admitted the contract.

THE COURT: All right. 54, is that pretty much the same? Any additional argument on that? I'm just going to have to look at this, after we get a little further down the road and I have a better feel for exactly where all this is going. 54, pretty much the same?

MR. FEW: Yes, sir. And your Honor, you can see there he's saying, "Not only did we have Robert Achenbach, but we had Greenberg Traurig as our outside counsel." So this is the document that could have been provided, it was in the hands of multiple lawyers, and its existence is critical to the issue of the disclosure and knowledge of the Sealevel contract.

THE COURT: All right. 60?

MR. FEW: I think there was...

MR. SHEALY: It's just nothing really in there, it's germane. I mean, it's -- this is all really talking about these ancillary issues.

THE COURT: Mr. Few?

MR. FEW: Well, it goes to even other issues about the knowledge of our client, your Honor. If you see on page 61, the answer is: "Bob is a securities and corporate lawyer. He was not an IP lawyer." And I say "Yeah, but he understood he had prepared PPMs that referred to patent applications and trademark applications for many years?" "Sure." "Did it ever rise concerns over the right to practice the hemo-access device that CreatiVasc was developing?" "Not that I recall." So not only would Sealevel have been mentioned in that PPM with respect to the existence of their contract, but also with the existence of their intellectual property rights as Tom had been named and added to the patent applications.

And that was the subject of those amendments, which are now starting to become a little more possibly relevant, that -- that -- there was an issue with the intellectual property. It goes to show that they knew about Sealevel, they knew that Sealevel had rights in the handheld invention pursuant to paragraph six of the customer supply agreement and the amendments, and they took steps purposefully to cut Sealevel out of the equation and get rid of them.

THE COURT: But here it talks about somebody else, and talks about -- he says "Not to my knowledge, will you have any conversations." I'm going to rule out from 18 on page 60 to line 16 on 61. I will allow line 17 through 20 on 61.

MR. FEW: Thank you, your Honor. 17 through 20, right?

THE COURT: Yes. And then, 79.

MR. SHEALY: So your Honor, this pertains to a non-disparagement agreement that when Mr. Johnson was terminated from Diaxamed in March of 2017, part of that separation was he was to sign a non-disparagement agreement. Again, these are not issues in the case, and the -- I just -- I -- I see no relevance to the circumstances giving rise to Mr. Johnson being terminated. I mean, that -- he's going to talk about that -- that's what happened, but -- but the fact that he had to sign a non-disparagement agreement doesn't make any difference to the issues in this.

THE COURT: It looks like the non-disparagement agreement is from line to 9 through about 23, but then it goes into the letter that was sent.

MR. FEW: Your Honor, if I may correct the record on this? The non-disparagement agreement is part of an Asset Protection Agreement that Mr. Johnson signed on January 6, 2017, which was pretty much immediately after Diaxamed took over. That is the agreement that has the non-disparagement agreement in it. When they write him a letter after they terminate him, they remind him of his obligations in this agreement.

When I took his deposition, we didn't have these documents. He had not produced them, because the non-disparagement agreement had such a chilling effect on him that he didn't think we were entitled to have it. That's why it's marked "Confidential," because we had to follow up and say "They told you not to say anything that's going to hurt their feelings," and that's what a non-disparagement agreement is. Nobody in the world can really determine what non-disparagement means. "Oh, you hurt my feelings." It -- it's not defamation. And, your Honor, it goes to why would he not tell us -- why would he not tell us what had happened? Why did -- why did he contact us on -- on January the 12, 2017 and say "Hey, let me tell you about the changes," and he -- he either didn't know or didn't want to tell us that their position is, Diaxamed took over and they don't owe you anything.

THE COURT: And this is not the deposition of John, this is Feldman, so...

MR. FEW: Well --

THE COURT: I'm ruling at 9 through 23 -- I'm granting the objection, or sustaining the objection to that.

MR. FEW: Okay.

THE COURT: Line 24 on that page down through to page 81, what's your objection to that?

MR. SHEALY: Well, your Honor, for the same reasons that -- that we objected to the testimony yesterday about that -- trying to quantify damages in this -- based on the value of these engineers' time, because the contract itself doesn't call for Sealevel to ever pay -- I'm sorry for

CreatiVasc to ever pay Sealevel for its time, that's an inappropriate measure of damages.

The only measure of damages that would be appropriate, had we breached, would be the lost profits that Sealevel would've gained from selling all of these handheld devices to us. That is -- that would be the breach, and that would be the measure of damages. And so...

THE COURT: And I guess that -- and after further contemplation about that, it depends on -- I'm not sure exactly sure how the case is going to ultimately go, but I believe that there is a theory which I think the road he's going down where that could be considered incidental damages depending on how the breach occurred or what they did to cause the breach.

Did they not fulfill the agreement because they did nothing was ever presented to them? But I don't know at this point, are they also saying, "But they" -- he -- I think he uses some kind of cutesy phrase. What are you -- what is it you used?

MR. SHEALY: I think he said they ghosted them.

THE COURT: Well, he said "Cutesy," something about cutesy.

MR. FEW: The -- the --

THE COURT: (Inaudible) something you --

MR. FEW: -- the cute certification was when -- was when Diaxamed --

THE COURT: No, I know that, just easier to (inaudible). But if they didn't pursue it for whatever, then I think that this could come in under incidental damage. At this -- like I said, I don't really know at this point, so I'm going to rule as far as what I know now, I'm going to say that is relevant.

MR. FEW: So your Honor, 20 -- 70, line -- line 24 all the way down to line 12 of 81?

THE COURT: Yes.

MR. FEW: Okay.

THE COURT: All right. Then 82, 13 through 15.

MR. SHEALY: I'm not sure I understand. That's a -- that's a question?

THE COURT: That's a question with no answer.

MR. FEW: Well, it -- it gets down to 24 and 25 when he finally answered, he said "I have no idea." If it...

THE COURT: How is that probative of anything?

MR. SHEALY: The question itself is argumentative, because he's asking, "Why -- why wasn't it to say so and so and so and so?"

MR. FEW: Well, and -- and -- this is the -- this is the person who still owns CreatiVasc, and he says "I have no idea." So it indicates that Feldman is saying, "I didn't know that they weren't assigning the Sealevel contract."

THE COURT: Why was the response saying, "You need to talk to Doc"? I mean, the -- the way the question's worded, I -- I'm going -- I'm going to grant -- I'm going to sustain his objection to that.

MR. SHEALY: Thank you.

THE COURT: So I guess it's down to --

MR. SHEALY: 83, 5 to 20. Yes, I do. The issue I'm -- I'm trying to avoid our getting into issues of who owns patents, trademarks the -- and I've been trying to do that the entire time, because I -- that is not an issue in the case, there's no -- it's not an -- it's not even framed by the complaint. There's no complaint that we -- that there's -- there's some dispute over the ownership of intellectual property. And that whole subject is -- introduces things into this case that confuse the jury. So I just, that's -- that's why I -- I thought we omit this section.

MR. FEW: Your Honor, I'd be delighted to speak on that as well. I thought more about the proposed stipulation that we stipulate that there's no dispute as to the intellectual property ownership. But that stipulation in and of itself then bags the question, "Well, who owns what?" And then, we have to explain it.

Well, we don't -- we had not made it an issue in the case, and what this testimony is -- is this is Feldman saying, "We didn't have it," and he's also saying that

Diaxamed took over everything. He -- he has no knowledge in here that -- that they did not take over the -- the Sealevel contract. And it just -- this testimony shows that from the seller that I'm not involved anymore as of December 30, 2016. And that Brian McMurray and ATEX are the new owners and that they took over everything -- lock stock, and barrel, except for the Sealevel contract. All the patent applications -- all the trademark applications, all that. We're not concerned with getting into the patent applications. I only put in Exhibit 1 because I thought it was helpful to the jury and -- and everyone to understand the -- the little bit of the nature of the -- of the invention coming from the person that conceived it.

THE COURT: I think I'm going to allow that. I don't think that really confuses the -- the issue.

MR. SHEALY: Understood. Thank you.

THE COURT: All right. Now, Mr. McMurray? Thank you. The jury's going to be awake the time you get through about first half of any of this, some of this stuff. All right. Page 20.

MR. SHEALY: Your Honor, there are -- there are lots of questions about a company called ATEX. ATEX it's not a party, it's never had a contract with Sealevel. By introducing testimony about another company that Brian McMurray owns, again, just this potential for confusion.

MR. FEW: Well, your Honor, that's just not an entirely accurate reflection of the record. ATEX had the supply agreement with CreatiVasc, that was dated in 2015, several months after my client had his -- that's included in the record as Exhibit 5.

THE COURT: All right. I'm going to allow this -- this portion. All right. 22?

MR. SHEALY: Right. I mean, he's getting into this -- this arrangement between ATEX and CreatiVasc, which I -- I -- I said there was no -- there's no contractual relationship between Sealevel and ATEX, if -- and if I said -- if I said ATEX and CreatiVasc, I'm sorry.

The CreatiVasc had all kinds of agreements with suppliers, people that have supplied different parts of the -- of the device. And so -- again, this is -- ATEX's supply agreement is not being litigated here, and the -- the Plaintiff has sought to introduce that supply agreement has nothing to do with this case.

MR. FEW: Plaintiff to differ, your Honor. Paragraph six of their supply agreement, which is according to the top dated February 18, 2015, says "CVM agrees to purchase 100 of its internal balloon-valve component requirements from ATEX, including any future component additions and/or line extensions." There's no mention of the prior obligation to have an exclusive obligation for Sealevel on this, and then, your Honor --

THE COURT: But that question doesn't even really get to there -- I mean, just in fact -- because you interrupt him in the middle of his answer, so he doesn't even finish answering his question.

MR. FEW: Right. Well -- I mean, the -- the whole point there I think is just the existence of the agreement. So -- and if the Court wants to call anything that's cumulative to that, but once again, it goes to the issue of his knowledge, your Honor, and this -- these -- these provisions that I'm talking about -- then it says on 17, "The successor entity or licensee of CVM or if applicable its parent expressly assumes all obligations of CVM and this agreement, including to purchase 100 percent of requirements from ATEX pursuant to Section 6 thereof." There's a conflict --

THE COURT: Right. I don't believe that gets you there, so I'm not going to allow that. I don't -- I mean, I don't --

MR. SHEALY: You're not going to allow that portion?

THE COURT: Yeah. That applies two through eight, I mean, it's not even -- it's not even a full question or a full answer.

MR. FEW: Right. I -- I should have marked -- the -- the witness answer was on 13 and 14 where he says "I said there was a supply agreement," that's all I said.

THE COURT: Okay.

MR. FEW: That's just -- I'm just getting him to acknowledge --

THE COURT: All right. 24 and 25. Termination of -- I guess, Steve Johnson, is that who this is?

MR. SHEALY: I mean, this is the -- this is just a whole lot of stuff that has really nothing to do with the -- the lawsuit itself.

THE COURT: Yeah. What is this, Mr. Few?

MR. FEW: Well, your Honor, the relevance when I was taking the deposition was to determine, if not --

THE COURT: I don't care -- what's the relevance now?

MR. FEW: The relevance is that it's an ongoing entity with a bunch of employees, and that it still exists, and that -- and that it's still using -- it's still in possession of our intellectual property, which it never gave back, and -- and it's still in possession of -- of everything that we gave to CreatiVasc, that -- that it's not abandoned.

THE COURT: I mean, is that not already (crosstalk).

MR. FEW: -That Probably into other --

THE COURT: -- by the way?

MR. FEW: -- testimony, yes, your Honor.

THE COURT: All right.

MR. FEW: But I -- I didn't know what was coming in --

you know, when --

THE COURT: All right. So not on that, then I think on 24 and 25, well, there's a question on nine-page line 19 through 23.

MR. SHEALY: It's the same stuff.

THE COURT: Same stuff, okay. And 26, that's kind of the same -- that's the same --

MR. SHEALY: Same stuff.

THE COURT: 27, looks like the employee list there.

MR. SHEALY: Right.

THE COURT: All right. Over to page 35.

MR. SHEALY: What number? 35. Okay. So, your Honor, everything from 24, 1, down to 27, 8, is out -- is that right? Or is there -- is there one portion that you --?

MR. SHEALY: All right. This -- next section on page 35. Going back to this ATEX supply agreement, your Honor, I want to make sure that you -- you're clear on what that involves. That's for the balloons inside for the implantable that predates, that has nothing to do with the external handheld.

That the -- the -- as Dr. Cole testified, that was part of the original idea, that the supply of the balloons inside has zero to do, there's no conflict whatsoever with the customer supply agreement that is executed with Sealevel, and it -- it has no place in (inaudible).

THE COURT: Mr. Few?

MR. FEW: Well, there's two issues there. We're looking at 35, 16 to 23. There is a mention of Dr. Cole, he's already testified, but then there's a question again confirming the existence of the supply agreement with CreatiVasc.

THE COURT: And what does that -- again, how's that probative to your case?

MR. FEW: Well, as I've said, your Honor, that particular supply agreement was executed after our supply agreement. It purports to be an exclusive supply agreement of all parts and components. It does not reference our supply agreement, which it should have, because we had an exclusive right to do the handheld. First -- and -- and exclusive right to whatever would be determined as a matter of law, that our customer supply agreement says we have a right to, and that's why it goes to the motive of -- and -- and the intent to interfere with our contract and -- and do away with it -- purport to do away with it.

THE COURT: All right. I'm going keep that one under advisement. Page 36, I guess 36 and 37 are all kind of together?

MR. SHEALY: Right -- I mean, we're just getting into ancillary other arrangements. A company called "Future Matrix." Again, these are -- these are contractual arrangements that CreatiVasc gets into with companies that can produce other parts of the device. It is an absolute misstatement of the -- the -- or -- or mischaracterization of the ATEX supply agreement to say that it covers the waterfront. So that -- that -- that -- it is to supply all parts. It does -- it's all parts associated with the balloons, because that's what ATEX makes, is the -- is the material, it's a fabric that -- that that ATEX has been in the business of making for a long -- long time.

It's that -- this is -- this is why this is such a -- an important thing to -- and -- and why we need to be careful about putting guardrails about this, because it's very easy for this jury to get confused if we keep talking about a whole bunch of other -- other entities that are involved. They -- they have nothing to do with this contract.

THE COURT: Mr. Few?

MR. FEW: Well, your Honor, they have everything to do with this contract, because this is the first round of Steve Johnson who contracted with us when he was the CEO. And while he remained the CEO, he had a whole new Board to report to. And the -- the really important part here, now that some of this other stuff is -- is in is this question where it says "Who else was involved?" And he says "Obviously our advisors, our attorneys, our technical people," you know, he's saying, "I had people looking into this," but yet "I didn't know Sealevel existed," is what they say at one time, and then later they say, essentially admit that they purposefully avoided continuing to do business with Sealevel.

THE COURT: I find -- I mean, I don't -- I -- I -- I agree with Mr. Shealy, I'm not going to allow -- I don't think 36 and 37 are relevant.

MR. FEW: Well, your Honor, just to be completely heard out on that, the -- the references to these attorneys and there's --

THE COURT: You mean spelling of their names, and? No --

MR. FEW: It doesn't have to --

THE COURT: I rule that they're not relevant.

MR. FEW: Okay. 42.

MR. SHEALY: All right. So that also takes care of -- let's see, okay, 42 is the next 9 through 15. Right. This is -- this is identifying the supply agreement between CreatiVasc and ATEX.

MR. FEW: Your Honor, again, this is Exhibit 5, Brian McMurray signed it. This is the one that's specifically included as a part of the Assignment and Assumption Agreement. That's Exhibit 15. For all the reasons I've already said, if anything that I designated that is the most important thing in here, is that the gentleman who had this agreement is admitting to the existence of it with

CreatiVasc. And as I've already said "Its provisions are in conflict with the exclusivity provisions that my client has." And Mr. Shealy a moment ago made some characterization of -- of the scope of this agreement, and I would just respectfully say that his characterization is entirely contradictory to Section 17, which says that they assume all obligations including to purchase 100 percent of requirements from ATEX, pursuant to Section 6 thereof, and Section 6 thereof says "The balloon components and any future component addition or line extensions."

THE COURT: All right. I'm going to have to look at that agreement, I'll let (inaudible). You know, this is stuff we could have all done on Monday, and the problem is, you're asking me to rule on this basically off the cuff, and we had an entire day waiting on the jury and -- you know, now I got to address these issues. 45?

MR. SHEALY: So this is the Contribution Agreement whereby Diaxamed is -- and I don't completely understand the mechanics of this, but this is the -- this is Diaxamed basically purchasing, I think, the assets of -- of Brookhaven.

Again, it is a -- to call it "cute certification" or a "shell game," is -- it is outrageous, it's just things that people do in the normal courts. I don't believe that having -- that be introduced and having testimony about it advances the ball In terms of explaining to the jury who has -- who's legally responsible for this contract, that's the predicate for this lawsuit.

THE COURT: Mr. Few?

MR. FEW: Well, your Honor, the -- Exhibit 15 is the Assignment and Assumption of Supply Agreement, and it has -- as its Exhibit A. This document is signed by Steve Johnson, it has as its Exhibit A, the February 18, 2015 supply agreement. So this has everything to do with the case, and this has everything to do with why Diaxamed is liable in the case, for breach of our contract and/or interference with our contract.

Now, Mr. Shealy makes the distinction that what they've done, people do it every day. Well, that's fine, that doesn't mean it doesn't give rise to liability. If -- if we were bringing a civil conspiracy claim that we would have to show that something was done that was illegal or unlawful, we don't have to show that here. All we have to show for interference of contract is -- is that you knew of a contract and you interfered with it. And that's -- that's what the facts fare out here.

Before that, your Honor, Exhibit 14 is a Contribution Agreement, which is a much longer agreement. It is also signed by Steve Johnson, John Feldman, and Brian McMurray, and -- so those are the -- the documents whereby the mechanics of which effectuated the selective transfer of everything that CreatiVasc or Brookhaven Vascular ever had, lock, stock and barrel, with exception of Sealevel contract.

THE COURT: All right. Now I'm just going to have to look at that one during lunch then. 46?

MR. SHEALY: Again, this is just further conversation about the -- this -- contract.

THE COURT: Just renaming of the company, yes?

MR. FEW: Well, your Honor, it kind of makes the obvious point, but it has the -- probably the most important witness admitting to it. Brookhaven Vascular was CreatiVasc, and -- and he invested in Brookhaven Vascular as a secondary investor, is what some testimonies earlier in the record, I believe from Dr. Cole, and -- but then when he invested as a primary investor --

THE COURT: All right. I'm going to allow it. 47? We going -- we're going to do 10 minutes, we're going to stop, because I'm not letting the jury sit in there any longer. We'll just have to figure this out at lunchtime.

MR. SHEALY: Your Honor, 47, this just has to do with -- you know, who's the lawyer for these transactions, I just -- it's just extraneous.

THE COURT: Yes. Mr. Few?

MR. FEW: Your Honor, I just think that we have the right to get into evidence that they had counsel, so it could be any one of these designations, it doesn't have to be that one.

THE COURT: All right. I'm going to not allow that one. 47, 10?

MR. SHEALY: That's the answer.

THE COURT: Okay, so 47 is out.

MR. SHEALY: Okay.

THE COURT: 53?

MR. SHEALY: Again, this is just getting into that -- that customer supply agreement between ATEX and CreatiVasc, it's not an issue in this case.

MR. FEW: (Inaudible) did you write that right, because I -- I don't have --

MR. SHEALY: 53, 12 through 17.

MR. FEW: I think it should be 50, 12 through -- 50, 13 through 21, I'm sorry.

MR. SHEALY: Your Honor, I'm looking at what I objected to, is page 53 12 through 17.

MR. FEW: Well, hold on. Okay, I'm sorry -- I'm sorry. I see.

THE COURT: Well, and that kind of goes back to my -- what I've rest the stuff I've taken under binder.

MR. SHEALY: Right.

THE COURT: So I'll hold that one. 76?

MR. FEW: Your Honor, I think frankly that one speaks for itself as long as those two agreements are in evidence. All it's saying is that -- you know...

THE COURT: I said I'll look at it later.

MR. FEW: Okay.

THE COURT: I didn't ask the comments. 76.

MR. SHEALY: 76, 21 through 77, 3, and this is -- this is the letter terminating Mr. Johnson, not an issue.

THE COURT: Mr. Few?

MR. FEW: Well, your Honor, I've dealt with these Non-Disparagement Agreements and there is almost nothing more sinister than a non-disparagement agreement, and the -- and what it does to someone and how it makes them feel like they can't even tell the truth about what happened.

And so, -- you know, it -- they -- they made him sign the non-disparagement agreement, not when they terminated him, but this also gets into like the issues that are going on in this other trial when a witness is -- is -- is facing criminal charges, but they don't have a deal, so we don't know what they got for it. So we -- we still don't know what Mr. Johnson got as his severance package, because as I said before, these documents that we're looking at in this -- these contribution -- these -- we didn't have this stuff, we didn't have it when we took this deposition. We only got the non-disparagement and the termination documents after the fact. So we just need to -- at some point in time, we need to be able to touch on the existence of the non-disparagement agreement and -- and why they -- you know, that he acknowledges that they did it. Because in his letter --

THE COURT: I'm not going to allow anything in about the non-disparagement agreement. I'm going to find that's not relevant, so -- all right. The next one, 8 to 21.

MR. SHEALY: Your Honor, this is all about that same thing.

THE COURT: That's all the same thing?

MR. SHEALY: Yes, sir.

THE COURT: About 78, is it all or still 78?

MR. SHEALY: Yes, sir.

THE COURT: And 79, same?

MR. SHEALY: This is a -- the 79 is about -- is an email from a lawyer Robert Achenbach that says "Copied to Steve Johnson," but Steve Johnson is not even working for CreatiVasc anymore. I think that's passed the date when he was terminated, that's correct.

MR. FEW: Your -- your Honor, if I -- I'd like to have the record preserve that. This non-disparagement agreement goes to bias, it goes to all types of motivation. The -- the -- the -- the timing of it and everything has to do with why the witness would say or do things or not do things, or whether or not he would act in good faith.

He did not act in good faith, because he told us -- he contacted us on January the 12th of 2017 and said "Hey guys, I want to tell you about the changes," and -- and he never told us about the non-disparagement agreement. We believe was part of the reason that he never told us he was fired, he never told us specifically who we needed to be talking to.

THE COURT: All right. 79?

MR. SHEALY: 79 was that the -- the email from Robert Achenbach.

MR. FEW: I'm trying to figure out which Exhibit that is. Yeah -- they -- they -- it's not an email, I don't think it's -- well, they're -- they're talking about reaching out to Steve Johnson in -- in the Exhibit 21, which is already in evidence, and he ain't working for the company anymore, he's been fired.

THE COURT: I mean, how is that relevant?

MR. FEW: I think if I can get that in other ways, I don't need to get it through this witness.

THE COURT: All right. So then we have the final one?

MR. SHEALY: The last one, your Honor.

THE COURT: 86.

MR. SHEALY: It's -- again, this is all talking about ATEX and --

THE COURT: So this is the ATEX question that I've taken under advisement.

MR. SHEALY: Well, and this is even -- this is not about the ATEX contract, this is about showing this device to ATEX. And it doesn't -- and -- and just various other questions that really haven't -- don't advance the ball in this case about who was working for whom.

THE COURT: And they don't even (inaudible). Mr. Few?

MR. FEW: Your Honor, this is consistent with an -- another email that's in the -- in the record, I think it's in evidence already where Mr. Johnson says "Well, we have a prototype and we're going to show -- go show it to ATEX."

And it just -- further, it goes to ATEX knowledge of the existence of Sealevel and that -- that there -- this goes to more to the -- that you should have done, they had a contract, but these other things go to the fact that they absolutely knew that we had a contract, because they went out of their -- they -- they specifically chose not to include it in what they assigned.

THE COURT: Well, he just says "I do not recall, I don't" -- he didn't -- didn't ever -- all his answers, "I have no idea, I don't recall." "Because she had some person have involvement?" "No -- no, she's actually employed (inaudible)." I mean, I don't --

MR. FEW: Well, he confirms that all these other people that worked for him were there. I mean, those are the people that were in the -- in that meeting, Stephanie Noir, John Ruga (ph).

THE COURT: I don't think that ever really missed anything -- I mean, it just vague responses, and I'm not going to allow it. I don't believe it's relevant.

MR. SHEALY: Thank you.

THE COURT: All right. Are we ready for the jury?

MR. SHEALY: Yes, your Honor. We are.

THE CLERK: Judge, can we take a quick break, please?

THE COURT: Okay. Short break, then we can move (inaudible).

(Off the record.)

(On the record.)

MR. FEW: Plaintiff is ready, your Honor, but I think Mr. --

MR. SHEALY: Yeah, we're ready.

MR. FEW: He's in the middle of his examination that's on that.

MR. SHEALY: Right. I mean, Defense is ready.

THE COURT: Yeah. Okay. Well, I'll -- I'll -- I'll pull you back up when the jury comes out, so -- all right. Bring the jury in.

(Jury enters room.)

THE COURT: Either party -- you know, if you're going to be mad of somebody being late, blame me, okay? All right. Mr. O'Hanlan, if you could retake the stand, and I'll remind you're under oath from yesterday. So we're in the middle of cross-examination. Mr. Shealy, you may presume.

MR. SHEALY: Thank you, your Honor.

CROSS-EXAMINATION (cont'd)

BY MR. SHEALY:

Q. Mr. O'Hanlan, good morning.

A. Morning.

Q. We were in the middle of kind of a discussion yesterday, and I want to kind of -- because I got interrupted, I want to go back and ask you a couple of questions. You're familiar with the customer supply agreement that Sealevel entered into with CreatiVasc, are you not?

A. Yes, sir.

Q. All right. That's Exhibit 4, that is already in evidence, correct?

A. Yes, sir.

Q. And I'd asked you -- I asked you a question yesterday about whether you agreed with the what Sealevel's responsibilities were under the customer supply agreement, and you took issue with the question that I asked you. I think it might be helpful perhaps if I -- if we just look at the customer supply agreement together and make sure we're both on the same page, would that be helpful to you?

A. Yes, sir.

MR. SHEALY: Okay. Could we have the element warm up?

THE COURT: Okay. Element warm up.

BY MR. SHEALY:

Q. And while this is warming up, the customer supply agreements, Mr. O'Hanlan, is -- was entered into -- in October of 28, 2014, correct?

A. I believe so, correct. I have it in front of me.

Q. And you were here when your son testified, right?

A. Yes, sir.

Q. That he signed it on behalf of Sealevel Systems?

A. Yes, sir.

Q. Okay. And Steve Johnson -- it's your understanding, signed it on behalf of CreatiVasc, right?

A. Steve signed everything.

MR. SHEALY: Okay. So are we going to have it?

THE COURT: You got to turn it off there.

MR. SHEALY: Yeah.

THE COURT: Yeah, action. Yeah.

BY MR. SHEALY:

Q. Okay. So I'm showing you Exhibit 4, and paragraph one is the scope, do you see that?

A. Yes, sir.

Q. All right. And the first sentence is what Sealevel agrees to do under this customer supply agreement, right?

A. Yes, sir.

Q. All right. And so, you were to design, manufacture, sell, and deliver to customers hardware and software that would be defined as the product used in the system's handheld actuator, and implanted balloon-pressure monitoring and reporting devices in accordance with the specifications set forth in Exhibit A, do you see that?

A. Yes, sir.

Q. All right. And I won't go through this again, but Exhibit A of course was blank at the time this was entered into, right?

A. I believe that's supposed to be filled in by the customer.

Q. But it's -- but you'd agree with me the page I just showed you was blank, right?

A. Yes, sir.

Q. All right. And so, you'd agree with me that the scope that I just showed you -- or that we just read together, was what Sealevel agreed to do in this project, right?

A. Yes, sir.

Q. Okay. So it's producing the -- designing and producing the components that went into the handheld and then pressure monitoring of the -- of what was going on inside --?

A. We did that.

Q. But I -- I'm not asking you what you did, I'm

asking you what you had agreed to do in Exhibit 4, correct?
A. Say the question again, please.
Q. We can move on. I think you -- you -- you -- you agree that Exhibit 4 sets forth the agreement between you and Sealevel that forms the whole reason that we're here today, right?
A. Yes, sir.
Q. All right. And the agreement says that upon the development of the hemo-access device for sale to the public, CreatiVasc would purchase all of the handheld wands from Sealevel, right?
A. Yes, sir.
Q. All right. And at one point in 2016, CreatiVasc did order six wands from Sealevel, didn't it?
A. I believe so.
Q. And Sealevel never delivered them, did -- did it?
A. We never shipped them.
Q. So is the answer to my question, "No, you never delivered them"?
A. We never delivered them, because we didn't know where to send them.
Q. All right. Now --
A. You know why we didn't know where to send them?
Q. I didn't ask that question.
A. I did.

THE COURT: You can explain -- you can explain your answer.

THE WITNESS: Sir?

THE COURT: You can explain your answer.

MR. SHEALY: Well, he actually asked me a question.

THE COURT: Okay. Well, move on.

BY MR. SHEALY:

Q. All right. So Mr. O'Hanlan, there were some hurdles with this project that just couldn't be overcome, isn't that correct?

A. Could not be overcome?

Q. It couldn't be overcome fully to develop the device, correct?

A. I don't know that. I disagree with that.

Q. All right. I'm going to show you -- bring to you the official sealed -- it was unsealed by the clerk of court, copy of your deposition transcript that we were talking with you about yesterday when you gave your deposition, August 2, 2023.

MR. SHEALY: May I approach the witness, your Honor?

THE COURT: Yeah.

BY MR. SHEALY:

Q. And if you will turn with me to page 66, line 23 of your deposition? Tell me when you're there. Are you at page 66, line 23?

A. It says, there were --

MR. SHEALY: Your Honor?

THE WITNESS: I'm just checking to make sure I'm in the right place.

MR. SHEALY: You're in the right place?

THE WITNESS: Yes, sir.

MR. SHEALY: And so --

MR. FEW: Excuse me. I think that the witness now reads the question and the answer into the record, because the question -- the way it was just asked, it's not --

THE COURT: I don't think he had gotten to that point -- you know -- go ahead.

MR. FEW: I just want to make sure that --

THE COURT: Go ahead.

MR. FEW: -- impeachment is on what was in the deposition --

THE COURT: Go ahead, Mr. Shealy.

MR. SHEALY: Thank you, your Honor.

BY MR. SHEALY:

Q. So on that day, Mr. O'Hanlan, did I pose the following question to you? So there were -- there indeed were some hurdles -- were hurdles that could not be overcome and that -- that weren't necessarily Sealevel's hurdles, but they were hurdles facing the project itself that ended up not being overcome, and was the answer you gave, "Yes, sir"?

A. Yes, sir.

MR. SHEALY: All right. Now to talk about those hurdles a little bit, I want to show you a couple of exhibits. I'm showing you what's been marked as Defendant's Exhibit 1. May I approach the witness, your Honor?

THE COURT: You don't have to ask that.

MR. SHEALY: Thank you.

THE COURT: You all have permission to approach.

BY MR. SHEALY:

Q. Mr. O'Hanlan, is this an -- an email thread between you and Steve Johnson, the top email of which is dated September 11, 2015?

A. Yes, sir.

Q. All right. And in that email, were you apologizing to Mr. Johnson and Frank Patterson and Lindsey Sanders, for some of the problems that were happening with the project?

A. I apologized for what happened with the prototype that he came and got early from us, because he was desperate to get it in front of some investors. Now, if that -- you know, I apologize because I care about the quality of the products we make. Obviously from this email, the magnet came loose because the motor wasn't mounted, and it wobbled in his hand. All the emails you have that show any kind of problem that existed were resolved within a week. Is that true?

MR. SHEALY: Your Honor, I would move to admit Defendant's Exhibit 1 into evidence based on this witness's prior --

THE COURT: Any objection?

MR. FEW: No objection.

THE COURT: All right. Entered without objection.

(Defendant's Exhibit Number 1 admitted into evidence.)

MR. SHEALY: Your Honor, I'll just publish this email to the jury.

BY MR. SHEALY:

Q. So this -- Mr. O'Hanlan was an email that you sent in response to an email that Mr. Johnson sent you, pointing out problems with the -- the handheld, as it existed at -- at that date, correct?

A. Correct.

Q. All right. And we are now about 11 months since the Exhibit 4 was executed, right?

A. You say so.

Q. All right.

A. And this was a prototype.

Q. And I want to show you what's been marked as Defendant's Exhibit 2. And ask if you can identify this email.

(Defendant's Exhibit Number 2 marked for identification.)

BY MR. SHEALY:

Q. Is this an email from you to Steve Johnson and Frank Patterson of CreatiVasc, dated September 16, 2015?

A. Yes, sir.

Q. All right. And -- again, you are apologizing for the state of this project, is that correct?

A. Yes, sir.

MR. SHEALY: Okay. Your Honor, I move to admit Exhibit 2 into evidence.

THE COURT: Any objection?

MR. FEW: No objection.

THE COURT: All right. Entered without objection.

(Defendant's Exhibit Number 2 admitted into evidence.)

BY MR. SHEALY:

Q. Okay. So, again, we are 11 months past -- the parties entering into Exhibit 4, and you are -- said you're apologizing for the state of the project, and said you have a good reason for the motor still not working, correct?

A. Yes, sir.

MR. SHEALY: Okay. I'm going to show you what's marked as Exhibit 3 -- Defendant's Exhibit 3, and ask if you can identify this email thread with the top email.

(Defendant's Exhibit Number 3 marked for identification.)

BY MR. SHEALY:

Q. The last email from you dated September 18, 2015, you see that?

A. Yes, sir.

Q. Okay. And you're referencing a person named Tony in that email, correct?

A. Yes, sir.

Q. And Tony is an employee of yours?

A. Yes, sir.

Q. Does he still work for you?

A. No.

Q. Okay. So -- but again, you are saying you -- you're embarrassed and you've had these issues with Tony before concerning the way he's handling this project, correct?

A. Yes, sir.

MR. SHEALY: Okay. Your Honor, I move to admit Defendant's Exhibit 3 into evidence.

THE COURT: Any objection?

MR. FEW: No objection.

THE COURT: Entered without objection.

(Defendant's Exhibit Number 3 admitted into evidence.)

BY MR. SHEALY:

Q. Okay. And you were embarrassed at that point, correct?

A. Sir, this shows that -- that I care about the quality of the product that we do. Tony was a problem employee, and I think it's very clear here. Unfortunately, all your dirty laundry gets aired in a deposition or in a trial. So I think every employee has had a problem with another employee at a company, every boss has had a problem with an employee. I reprimanded them here for not paying attention to the project because I wanted the company to deliver this. And these were not insurmountable hurdles; they were developmental hurdles that got resolved.

Q. But nonetheless, as we just saw -- saw in your deposition transcript, there were --

A. Perfectly normal development, if you understood research and development.

MR. SHEALY: Your Honor, if you would advise the witness to allow --

THE COURT: Yeah. Let (crosstalk) ask a question, so that you can answer.

BY MR. SHEALY:

Q. There were indeed hurdles that were insurmountable in the project where they're not, as we just saw in your testimony?

A. There's always hurdles, as you define it.

Q. Okay. So -- then I'm going to show you what's been marked as Exhibit 4. So we're moving through the fall of 2015, and you see this as an email that you received from Steve Johnson on October, 2015 -- October 26, 2015?

A. Yes, sir.

Q. All right. And this is letting everybody that's working on this project know that he's getting ready to go to a meeting with the FDA to report on the progress of this project, right?

A. Yes, sir.

Q. Okay. So everybody's very -- has great expectations, has high anticipation for this meeting, right?

A. Yes, sir.

MR. SHEALY: Okay. Your Honor, I move to admit Exhibit 4 into evidence.

THE COURT: Any objection?

MR. SHEALY: No objection.

THE COURT: All right. Entered without objection.

(Defendant's Exhibit Number 4 admitted into evidence.)

BY MR. SHEALY:

Q. Okay. So -- so you all are -- sort of put on notice that, "We got to have everything ready for this meeting," right?

A. Yes, sir.

Q. Okay. I show you Defendant's Exhibit 6. Do you identify that as a -- an email you received from Steve Johnson on November 9, 2015?

A. Yes, sir.

Q. All right. And Mr. Johnson was reporting that he was -- had taken the prototype handheld to a meeting -- at --

with SC Launch, what's SC Launch?

A. I believe it's a venture capital, something that Steve was associated with.

Q. Okay.

A. Probably still is.

Q. Okay. But -- but a source of potential funding -- additional funding for the project, would -- would you agree with that characterization?

MR. FEW: Objection.

THE WITNESS: Well, they already had funding.

THE COURT: Hold on.

MR. FEW: If he knows, he knows, but I think it calls for him to speculate as to why he was (inaudible).

THE WITNESS: I have no idea why.

MR. SHEALY: I just asked if he knew what SC Launch was.

BY MR. SHEALY:

Q. Okay. But ultimately, what Mr. --?

A. I've never seen him launch anything. So, I'm sorry.

Q. Ultimately, what -- what Mr. Johnson's reporting is that he takes the handheld to Charleston and it's dead when he gets there, correct?

A. That's what he asserted.

MR. SHEALY: Okay. All right. I'd move to admit

Defendant's Exhibit 6 into evidence.

THE COURT: Any objection?

MR. FEW: No objection.

THE COURT: All right. In without objection.

(Defendant's Exhibit Number 6 admitted into evidence.)

BY MR. SHEALY:

Q. All right. So -- all right, so this is November 9, 2015, okay? So we are now 13 months, if I remember right, since -- yeah -- well, just over 12 months from when the parties entered into the customer supply agreement.

All right. I'm going to show you Defendant's Exhibit 7, and ask if you can identify this as an email that you sent to Steve Johnson on February 3, 2016, in response to -- and this is actually an email thread, but it start -- it ends with the email you sent to Mr. Johnson, February 3, 2016. Do you see that?

A. Yes, sir.

Q. All right. If you recall this exchange of the emails?

A. Yes, sir.

Q. Okay. And you had been on vacation at St. Bart's, and Steve Johnson had emailed you on February 2, welcoming you back from your vacation, and he -- he is concerned about a -- a redesign that you had mentioned to Lindsey Sanders, and that if -- of the handheld, it would cost another

$100,000. Do you see that?

A. Yes, sir.

Q. Okay. And you said "I didn't know that's what you were told. We can incorporate the display we offered it months ago," you talk -- this is something to do with the display on the handheld, right?

A. Yes, sir.

MR. SHEALY: Okay. Your Honor, I'd move to admit Exhibit 7 into evidence.

THE COURT: Any objection?

MR. FEW: No objection.

THE COURT: All right. In without objection.

(Defendant's Exhibit Number 7 admitted into evidence.)

BY MR. SHEALY:

Q. All right. And then -- let me show you Defendant's Exhibit 8. And Mr. O'Hanlan, do you recognize this email exchange with Mr. Johnson dated February 9, 2016?

A. Yes, sir.

Q. And here you are -- the subject matter is, while -- I think what is meant to be "fought," but you're saying -- you -- you're the sort of talking about the problems that you -- you all are currently having because of the lack of a sensor inside the body that the handheld could communicate with; is that right?

A. Yes, sir.

Q. Okay. So you all are still dealing with problems with the design of the handheld and the -- and the communication with the sensor inside, and getting the appropriate sensor inside for the handheld to communicate with it, as late as February 9, 2016, correct?

A. It appears that way, but let me ask this: Everything you asked me is a "Yes," or "No" question when you kind of explain all this. You're throwing all this in front of the jury.

THE COURT: Well, hold on. First of all, he has a right to ask you a question, you have to answer and you can explain your answer.

THE WITNESS: I can explain?

THE COURT: That's the rule. Yes.

THE WITNESS: He was trying to cut me off earlier.

THE COURT: Well, don't -- don't be having interchange with (inaudible).

THE WITNESS: Could I explain this email then, since you asked about it?

THE COURT: You can explain your answer to the question, your attorney can ask you questions afterwards.

THE WITNESS: I don't know what the question is now, except the email exists.

MR. FEW: Well, your Honor, I think what the witness is saying is that he would like to explain his answer, and maybe if the question could be reread to him, then he could answer it and in a timely fashion give the explanation that he has as to --

THE COURT: Well, the way this goes, cross-examination, he has the right to ask the question, he can answer if he needs to explain his answer, he can, otherwise it'd be on re-direct from you.

MR. FEW: I -- I understood, your Honor, but I'm just saying that the witness was confused that he -- he apparently --

THE COURT: Okay. Well, don't -- don't be coaching your witness. All right.

MR. SHEALY: Your Honor, I think based on the identification that's been made in the record, I just -- I now need to move to admit Exhibit 8 into evidence.

THE COURT: All right. Any objection?

MR. FEW: No objection.

(Defendant's Exhibit Number 8 admitted into evidence.)

BY MR. SHEALY:

Q. Mr. O'Hanlan, I'm going to show you Exhibit -- Defendant's Exhibit 9. And -- all right, is this -- do you recognize this as an exchange of emails you had in August -- August 28, 2016, with David Cole, who testified yesterday?

A. Yes, sir.

Q. Okay. And Dr. Cole had said that he had gotten off the phone with Steve Johnson to talk about an issue indirectly related to the -- the hemo-access valve system. During the call, he asked about what was going on with the prototype, and Steve had told him that the new technology, a sliding magnet mechanism had failed, and he's back to using technology you helped him -- you helped him develop.

So -- and you said back to him -- he asked, "Could we get together for dinner?" And you said "Absolutely. I was supposed to, but I never did talk to them, sorry about that." Is that -- did I accurately state the first line of your email?

A. That's the first line of the email, but I'm trying to catch up with you.

Q. Your -- your email is --

A. Who did I say I wasn't -- didn't never talk to them? That's what I'm trying to understand, sir. "Absolutely. I was supposed to, but I never did talk to them." I don't -- I don't understand that.

Q. Okay. But this is your email, is it not?

A. Yes, sir. But I mean, it starts, "Absolutely." It -- it doesn't make sense is it -- looks like there's a previous page maybe.

MR. SHEALY: Your Honor, based on this witness's identification, I would move to admit Exhibit 9.

THE COURT: Okay. Any objection?

MR. FEW: Well, your Honor, the objection is: It's -- it's -- it's much of hearsay, but I have no objection to it coming in.

(Defendant's Exhibit Number 9 admitted into evidence.)

MR. SHEALY: Okay. And then, we get to Defendant's Exhibit 10, I'm going to show you this.

(Defendant's Exhibit Number 10 marked for identification.)

BY MR. SHEALY:

Q. All right. This is an email exchange between you and Steve Johnson, January 13, 2017, correct?

A. Yes, sir.

Q. And this is Steve saying, "You'll -- you'll -- you see a very strange name of -- below my name, CreatiVasc and Brookhaven Vascular are no more, this is just the tip of the iceberg of changes that happened." And the name -- below his name on the second page is Diaxamed, right?

A. Yes, sir.

Q. Okay. And -- so Steve Johnson's telling you this, that this has happened, and he wants to get together and talk, does he not?

A. Yes, sir.

Q. And you said "Steve, I'm open all afternoon. Happy New Year," correct?

A. I believe Steve wanted to get me to assign patent rights to CreatiVasc. That was what the meeting was about.

We were going to meet at Northampton Wine, and the supply agreement already dealt with IP rights.

MR. SHEALY: Your Honor, based on this identification, I would move to admit Defendant's Exhibit 10 into evidence.

MR. FEW: The Defendant's 10 is the same as Plaintiff's 17, so...

MR. SHEALY: Yeah.

MR. FEW: They can both go in.

THE COURT: Do we need both of them now? Yeah, I thought that we already --

MR. SHEALY: I withdraw it, if -- if it's the same thing as Plaintiff's 17.

THE COURT: Yeah, I think it is.

MR. SHEALY: Okay. I'll pull it back.

BY MR. SHEALY:

Q. Okay. Mr. O'Hanlan, you have -- just to -- just to come to the end here, you have no evidence that the project -- that the product that was the subject of the customer supply agreement was ever developed, marketed, or sold by anyone, do you?

A. No.

Q. And you would agree that Exhibit 4 does not contain any provisions requiring CreatiVasc to pay Sealevel for its engineering time, would you agree with that?

A. Can we look at it again, please?

Q. I'll show you Exhibit 4.
A. And you're asking if I would agree that it says "Will never be paid"?
Q. No, that's not what I said.
A. Sorry.
Q. I said "You would agree with me that Exhibit 4 does not contain any provisions requiring CreatiVasc to pay Sealevel for its engineering time."
A. I would never agree with that.
Q. Okay. Let's --
A. If you understood -- if I could answer the question and explain, if you understood product development and engineering, which I doubt very many people in this room do, you would know that the number of hours that go into a product determine what the product cost is going to be. If I made a thousand jets and sold them for a dollar apiece, that'd be a thousand dollars. If I sold you one jet, it would be a thousand dollars.
So the fact that this contract was basically nullified without our agreement -- not nullified, just we were ghosted and -- and lied to consistently, we decided to send an invoice for the one unit that we did have that worked and we put all of the engineering time into that one unit because that was the only way we knew to get their attention. We couldn't even get their attention, and the agreement is still

in effect. So who shadowed who?

Q. Mr. O'Hanlan, if you turn with me to page 51 of your -- of your deposition transcript, which is in front of you, below -- underneath the exhibit.

A. I didn't know what impeachment meant yesterday, and I'm not going to be impeached by you. I will read the deposition again, if that's what you're asking me to do.

THE COURT: You've got to go by me. He's going to ask the questions, and I'll rule how it's going to be done, okay?

THE WITNESS: Yes, sir.

BY MR. SHEALY:

Q. If you turn with me to page 51 of your deposition.

A. 51.

Q. And at that time, did I ask you -- at line 11, "But you'd agree with me that Exhibits 2 through 4" -- and if you look, Exhibits 2 through 4 are attached to the event -- to the deposition transcript that you are reading, and Exhibit 2 is the same thing as what's now in evidence as Plaintiff's Exhibit 4. "But you'd agree with me that -- that Exhibit 2 through 4 don't contain any provisions that require CreatiVasc or any entity that's standing in CreatiVasc's shoes to pay Sealevel for its engineering time?"

Mr. Few objected to that question at that time, but the answer that you gave was, "I would agree with that as stated, but the contract does provide for the exclusive rights to manufacture the product." So that's how a lot of companies make their money, is you forego the front-end cost in exchange for the manufacturing rights in anticipation that it's going to be a high -- high volume or profitable venture." Is that what you said on August 2, 2023?

A. That's what this says I said, so I have to agree with that, that's what I said.

Q. All right, sir. And you said -- just a minute ago, that you sent an invoice notwithstanding the fact that you -- that there's no provision in the customer supply agreement requiring CreatiVasc to pay Sealevel for its engineering time, you nonetheless sent an invoice for that engineering time?

A. They were in breach at the time. We never breached the contract, they were in breach.

Q. So -- so turn to page 50.

A. Yes, sir.

Q. So on that date I said -- line 14, "Okay. You ended up, or Sealevel ended up sending an invoice to CreatiVasc," correct?

A. Yes, sir.

Q. And then, I said "Okay. And the invoice was for Sealevel's work to date on the development of the product," is that right?

A. Yes, sir.

Q. Okay. And there is --
THE COURT: (Inaudible) relevance.
BY MR. SHEALY:
Q. And there's no provision in Exhibit 4 that says that you have the right to do that even if CreatiVasc was in breach, is there?
A. That's what it says. Yes, sir.
MR. SHEALY: Your Honor, I have no further questions for this witness.
THE COURT: All right. Re-direct?
MR. FEW: Yes, your Honor.

RE-DIRECT EXAMINATION

BY MR. FEW:
Q. Mr. O'Hanlan, keep Exhibit 4 in front of you, and tell me if you see any provision in there that sets forth what the remedies to Sealevel are going to be in the event of a breach.
A. I can search the whole thing, but I don't believe there are --
Q. Take (crosstalk).
A. -- liabilities statement. Confidential information, H5, Part C, maybe.
Q. You're talking about under the "Confidential Information" section?
A. Yes, sir. And I think the limitation of liability

made paragraph 16.

Q. That's the one you read in the record yesterday, what you just reviewed -- and you said you saw that it's 14C is all about confidential information. It says, "It is not a breach of Section 14 for the receiving party to disclose as required to be disclosed by law provided the event disclosure, pursuant to provision the receiving party shall give written notice."

So that's just a provision about steps you have to take if -- if a third party is trying to subpoena confidential information. I want to hand you what we marked as Exhibit 23. I need a sticker for that.

THE CLERK: I've already marked 23 to 27 earlier.

MR. FEW: -- Oh, you -- on the copy that you have? Did you put it over here?

THE CLERK: I thought you wanted those marked, and I marked them and gave them back to you. 23.

MR. FEW: I trade for the marked copy. Okay. Sorry about that.

BY MR. FEW:

Q. Take a look at Exhibit 26, and tell me if you recognize -- tell the jury if you recognize it, please?

A. Yes, sir.

Q. Okay. And what is it?

MR. SHEALY: Your Honor, objection. Relevance.

THE COURT: I think it braces on previous discussions and rules, I'm going to allow it.

MR. FEW: May we approach just briefly?

THE COURT: Yes, I guess.

MR. FEW: Thank you, your Honor.

BY MR. FEW:

Q. Mr. O'Hanlan, what -- what is Exhibit 26?

A. Basically, it's an email from Bob Achenbach who I never met, but apparently was Brookhaven's attorney, and as written from Ben O'Hanlan, my son, who was president of the company at the time. And it basically says "Since you all aren't interested in engaging with Sealevel, here's -- you know, an invoice for the work done."

Q. You said "email," I think this is a letter, isn't it?

A. I'm sorry, it looks like a letterhead. Yes, sir.

Q. And this is the letter that Mr. Shealy asked you about a minute ago when he asked you about the invoice, isn't it?

A. Yes, sir. This is the invoice --

Q. It was the letter --

A. -- attached.

Q. -- the letter attaches to the invoice, right?

A. Yes, sir.

Q. And the invoice sets forth the total invoice amount of $321,540?

A. Yes, sir. I did misstate the hourly rates yesterday, because I've been prepared that you asked me about.

Q. As you sit here today, do you think that number that's on that invoice is conservatively stated, or aggressively stated?

A. I think it's very conservatively stated considering that CreatiVasc blew through millions of dollars, never paid us any of it, and we actually developed a product when they couldn't. So I consider $300,000 very conservative.

Q. You ever had any discussions with Mr. Johnson about what he thought the value of Sealevel's contribution might have been?

A. Steve --

MR. SHEALY: Objection -- objection. Relevance.

THE COURT: Mr. Few?

THE WITNESS: Can I answer, or no?

THE COURT: No. Hold on.

MR. FEW: Well, I think if he has had those conversations, then that's the first question, has he ever had any of those conversations?

THE COURT: Well -- I mean, it's relevance?

MR. FEW: Relevance, it's an admission of the value of what Sealevel contributed.

THE COURT: I think I might take this up outside the presence of the jury. Ladies and gentlemen, I'm going to ask you to step back to the jury room. Do not discuss the case.

(Jury exists.)

THE COURT: I -- and -- and I guess I wanted to get -- maybe clear the air on this one before we get in front of the jury. So the question is: At what point was this -- who was Steve Johnson? What -- what was his role at the time that this discussion was had, I guess?

MR. FEW: Well, Steve Johnson was the primary point of contact for our client all along. He's the one that's -- that was on --

THE COURT: No, I mean, at the time of this conversation that you've asked about.

MR. FEW: I said "Have you ever had any conversations with Steve Johnson about the value that -- that Sealevel contributed?" And of course, already in evidence is that the -- the "What A Day" email and "these people could have won the war."

THE COURT: Okay, listen to my question. At what time was this conversation that you're obviously getting ready to put into evidence? I mean, was Steve Johnson still part of the Defendant's company?

MR. FEW: I'm asking him for the whole time period. I don't know that I --

THE COURT: Okay. You -- you, I guess your -- your objection was relevance -- I mean, does it not go to their quantum meruit claim, which is still in -- live right now?

MR. SHEALY: Well, your Honor -- you know, what my client thought -- my client has not been admitted as an -- as an expert on the value of engineering time to a project. This is almost getting Mr. O'Hanlan to get -- to sort of qualify Mr. Johnson as an expert to quantify the value.

That's -- there's been no foundation laid for that. Mr. -- so to -- to say that this is an admission -- I mean, this is what -- this is a -- a matter of opinion. And that to me, has to be the subject of expert opinion if you're going to be asking other people about what the value of --

THE COURT: I mean, if your client stated a value at the time -- I mean, is that not admissible against your client?

MR. SHEALY: Well -- I mean, is it --

THE COURT: I mean, is it --

MR. SHEALY: -- is it an admission of fact? Because there is a difference between fact and opinion.

THE COURT: Yeah. Mr. Few?

MR. FEW: Your Honor, squarely within Rule 701, it doesn't require expert testimony. I have no intention to put his client up as an expert, but it -- because it doesn't require expert testimony, your Honor. He was the CEO of the company. He knew as well as anybody how to have to determine if there was value that was conferred upon the parties. That seems to be really no dispute amongst that from the evidence that's already in the record. But my question is -- to this witness is, "Did Mr. Johnson ever acknowledge to you the value that Sealevel had provided to CreatiVasc?"

That's -- I don't intend to ask him if there's a block -- if there is a number, then there may be a number. But it's just a question of -- and it goes to the point yesterday of -- of, they seem to take the position that it -- it's -- it's zero, like -- you know, because -- because of what the contract says "Nothing you provided was a value." Well, certainly, it was a value and -- and that's what laypeople do. That owner of a company knows how much they can rent their spaces for.

THE COURT: I'm going to -- I'm going to allow it. I think it -- I think it's relevant. All right. Bring the jury back.

THE COURT: Just for playing (inaudible) Mr. Few, how much longer do you have?

MR. FEW: Not a whole lot with Tom, and then I miss --

THE COURT: I mean, just on this witness that's all.

MR. FEW: Not much on this witness. In fact, I've got a short witness. May I check?

THE COURT: Yes. Well, the jury had -- hold on. Let (inaudible) check. Hey, go ahead. I was just making sure the jury (inaudible).

MR. FEW: I see her right now, let us just -- 11:37.

THE COURT: All right -- all right. Is the Plaintiff ready for the jury to come back in?

MR. FEW: Plaintiff is ready.

THE COURT: And Defense?

MR. SHEALY: Yes, your Honor.

THE COURT: All right. Bring the jury in.

(Jury enters room.)

THE COURT: All right. You may proceed, Mr. Few.

MR. FEW: Thank you, your Honor.

THE COURT: I guess objection is overruled. Yes?

MR. FEW: Mr. O'Hanlan, I'm going to hand you a copy of Exhibit 10, which is already in evidence. And your Honor, for housekeeping purposes, I'd like to move Exhibit 26 into evidence.

THE COURT: All right. I think subject to the objection of the Defendant, that's overruled. That is into evidence.

(Plaintiff's Exhibit 26 admitted into evidence.)

MR. SHEALY: Thank you.

BY MR. SHEALY:

Q. Mr. O'Hanlan, you were asked a bunch of questions by Mr. Shealy about the battery, or something to that effect, do you recall that?

A. Yes, sir.

Q. And also, about a pressure sensor, right?

A. Yes, sir.

Q. And I recall the pressure sensor is actually mentioned -- let me make sure I'm right, in the scope of work right here. It talks about pressure-monitoring and reporting devices.

A. Yes, sir.

Q. Okay. But that document that you have there -- if my memory is correct, Sealevel is being told -- hold on. That's Exhibit 12. Sealevel is being told, "Don't have (inaudible) censoring," and I apologize it's Exhibit 12.

THE COURT: Is this a question or statement?

MR. FEW: I'm just laying the foundation if I may, your Honor, for -- for this particular issue in his recollection.

BY MR. FEW:

Q. I'm sorry it's Exhibit 12. Direct your attention to this portion right here, and I believe that's an email to -- from Lindsey Sanders, and that was the testimony yesterday. That was when the spec sheet was sent, and then this is the email that has the response of Sealevel, but -- so with respect to changes, CreatiVasc was making decisions, for example, to have no pressure sensors, do you recall that?

A. Yes, sir.

Q. Do you recall what your thoughts were on that?

A. Yes, sir. Several thoughts on that, if I could take a minute. The pressure sensors were absolutely required to know how to fold the balloons were, so you didn't ever fill them in person. There'd be no other way to do it without a pressure sensor unless you maybe knew that running the pump for three seconds would -- you know, be long enough and -- you know, running the other way for three seconds would be long enough. But that is not medical, it's not accurate, it's not best practice, and we would not be party to that.

We recommended the pressure sensors, we recommended the Near-Field Communications to be used in that, and that was written into some of the patents that were initially drawn up. It's my personal feeling that they took out the pressure sensor, and they told us to remove it here, because they were removing my name from the patent application at the time.

MR. FEW: Your Honor?

MR. SHEALY: Objection. I'll make the objection. Objection to move to strike the last part of that testimony as irrelevant. It has no business in this case, that this case is not about patents or who owns what and who owns what.

THE COURT: All right. I'm going -- I'm going to sustain the objection in that portion of the testimony (inaudible).

BY MR. FEW:

Q. Who was Screwmatics (ph)?

A. Screwmatics was the second company that they tried to develop the pump with. The first one was Tri-Tech, who I mentioned yesterday, and the pump was either too big a challenge for them or it couldn't be done. That would be the hurdle that Mr. Shealy was referring to, but it was not Sealevel's hurdle that couldn't be overcome.

Screwmatics was a company they found up near Lancaster or somewhere and just like with us, they came back from Screwmatics saying, "We found the Christ child, they're going to solve all our problems, this big, ugly warehouse out in the middle of the country, these guys are brilliant." That's almost a direct quote. And so, Screwmatics also could not produce the pump that was needed to verify the operation of our handheld device.

Q. And then, at the -- this is Defendant's Exhibit 8, which was entered into evidence.

A. Could I keep going about the sensors since he put it up there? We brought AT&T into the building, had CreatiVasc there. AT&T quoted making a saline-proof pressure sensor that used Near-Field Communications, and they wanted a $50,000 up-front engineering calls to do that. CreatiVasc bought -- and that -- that frustrated us because we knew we needed a pressure sensor, we also were looking for a saline-proof pressure sensor, which proved to be an error on Steve Johnson's and CreatiVasc's part. When we got Dr. Cole into the meeting, he said "It doesn't need to be saline proof," he said "Who said we had to use saline?"

MR. SHEALY: Your Honor, objection.

THE WITNESS: "We could use fresh water."

THE COURT: Hold on. (Inaudible).

MR. SHEALY: Objection. This is hearsay.

THE COURT: I think Dr. Cole testified to that yesterday, so I'm going to overrule.

MR. FEW: It's not hearsay, I was there.

THE COURT: (Inaudible) Mr. Tom O'Hanlan.

BY MR. FEW:

Q. And then, this other email, was shown Defendant's Exhibit 9, portion of that was not directed to you. You said -- he says to you that Cole told me the new technology's sliding magnet failed, and he's back to using the technology you helped him develop. Remember that?

A. Yes, sir. We took this development very seriously. And frankly, I thought it would be earth-changing technology, and we worked to that extent.

Q. Briefly. Mr. O'Hanlan, just a couple quick questions, hopefully. Defendant's Exhibit 4 was an email that you were shown having to do with this -- around the time of

this technology summit that's very similar to Exhibits 8 and 9, do you remember the technology summit?
A. Yes, sir.
Q. And then, again here, this sets forth an agenda for Wednesday morning where FMI, which is that's Future Matrix, that's the corporation in Texas that was purchased along with CreatiVasc by Brookhaven, correct?
A. Yes, sir.
Q. And ATEX, and Sealevel, and Screwmatics, and SuperMagnetMan, were all going to share what they know about the project?
A. Yes, sir.
Q. Did Sealevel eventually fix whatever battery problem there was?
A. Absolutely. Within a week.
Q. And then -- was there any issue with Sealevel being told not to use a lithium battery in February of 2016, do you recall that?
A. Vaguely, I think there was fears about lithium or something blowning up or something up, but it -- the battery technology -- I mean, it was not terribly relevant they didn't want it to be rechargeable initially, and then I saw in the other amendment they said "No charger base," they just wanted to plug a wallboard into it to charge it. Those are all minor changes except for the pressure sensor.

MR. FEW: Thank you, Mr. O'Hanlan. That's all the questions I had on re-direct.

THE COURT: All right. You may step down.

THE WITNESS: Thank you, your Honor. Apologize for my temper, your Honor.

THE COURT: That's okay. You want to check? I think you -- is your -- you got a few minutes before the next witness comes in, I believe.

MR. FEW: Yeah, your Honor. It might be a good time for a break if the Court could indulge it? She's still --

THE COURT: Right. And we got other witnesses supposed to be in the next few minutes. Instead of you all sitting here looking at me, I'm going to let you go back to your room and look at each other. So do not discuss the case. You got one last of the day, that's good.

(Jury exits.)

MR. FEW: From housekeeping, I'm thinking if -- if we did this witness and then have lunch break, then Mr. Johnson will go up and his deposition notifications, and we should be done.

THE COURT: Okay. We're going to have all -- and I guess -- so we're planning on arguing charge in the morning obviously, because I think we're going to have to have some pretty serious discussions about the charge of (inaudible) form, I don't know. Have you all already got a good idea on those proposals?

MR. SHEALY: I have some templates, but I got to pull them together.

THE COURT: Just say there's nothing about this case that would fit within any template.

MR. SHEALY: Yeah.

THE COURT: And again, we'll have to say. Okay, so -- all right. So I'm ready to bring the jury in.

MR. FEW: Plaintiff is ready, your Honor.

THE COURT: All right bring them in.

(Jury enters room.)

THE CLERK: Mr. Few, who's your next witness?

MR. FEW: Savannah Forrester, not Samantha Forster.

THE CLERK: Thank you.

THE COURT: My trial back in April was Samantha, so (inaudible).

THE CLERK: Ready?

THE COURT: Yes. Right, I'm sorry. All right. You want to call your next witness?

MR. FEW: Thank you, your Honor. May it please the Court? Plaintiff calls Savannah Forrester.

THE CLERK: Place your left hand on the Bible and raise your right hand. Okay. Right hand on the Bible.

SAVANNAH FORRESTER,

being duly sworn, testified as follows:

THE CLERK: State your name, please.
THE WITNESS: Savannah Forrester.
THE CLERK: Thank you. Please be seated.

DIRECT EXAMINATION

BY MR. FEW:
Q. Good morning, Ms. Forrester. How are you?
A. Good morning. I'm doing well, thank you.
Q. Is this the first time that you've ever testified either in court or in a deposition under oath?
A. Yes. Yeah. How could you tell? Definitely.
Q. We'll try to be nice to you.
A. Okay, then.
Q. Tell the jury just a little bit about yourself, like where you grew up, went to college and that kind of thing.
A. Yeah, so I'm from Irmo, South Carolina, went to Clemson University and got my bachelor's -- my bachelor's in biomedical engineering. Worked for Diaxamed for two and a half years, and then in December of 2022, I decided to leave the industry and start my own business. So now I run a -- a painting company, a duck-sitting business, so --
Q. And your painting company is called "Painter1"?
A. Correct.
Q. That's what's on your shirt?
A. Yeah. Yep. Yeah, I just came from work, so...

Q. What were your -- what was going on at Diaxamed when you were working there?

A. So when I first started, I was a quality engineer and Chad Clark was the -- the lead RD engineer at the time. So when I was in quality engineering, I was just working on the quality management system, which was required by the FDA, so I was just doing mostly desk work.

And then, Chad left about six months in since working at Diaxamed, and then -- so I got promoted to RD engineer, and that's when I started doing more lab work. So I worked on two devices, one of which was the hemo-access valve, trying to engineer and problem solve on the -- the valve system, so...

Q. And -- what do you recall -- without getting too terribly detailed, but what were the kind of problems that were trying -- that Diaxamed was trying to solve with respect to the hemo-access device?

A. Yeah. So when I got to Diaxamed, they had just failed an animal study with the hemo-access valve, so one of the reasons that they found was that the blood was just pooling in the device. So when it -- the valves would open up, it would cause clotting later down the road. So one of the things I was working on was just improving upon the valve system, making sure that there's no residual blood left in the device after valves are closed so that way when you open them up, it's just nice and clean saline going through the system and through the sheet, as opposed to causing clots.

Q. And were -- was your work primarily focused on the implantable device?

A. Uh-huh.

Q. And what -- what were the methods that would've been used during the time that you were in development to actuate it?

A. So when I was there, really I was doing mostly desk work -- or sorry, lab-bench testing. So really what I was doing, was taking -- it wasn't necessarily the exact device we were using, it was just simulating the device because the biggest issue we found was that the device was horseshoe-shaped, and so when implanted the sheep would stand up, it would be like an upside down U. And so, when you close the valves, all the blood would pull on top of the valves. And we were struggling to clear out the residual blood when the valves were closed, because obviously if there's residual blood and you open up the valves and cause clotting.

So I was really just working with clear tubing and some stoppers on the end of it, just to really understand the flow dynamics of blood sitting in water, and we were coming up with different ways of flushing that out just on a benchtop with -- you know, fake blood, and found that, like, the density of blood was causing issues.

So it wasn't necessarily the actual device itself. I didn't really have much involvement with that, because things kind of took a turn after the failed animal study, so we were kind of back to the beginning. So a lot of it was just -- you know, stuff I found around in the lab, trying to test out the fluid dynamics of it.

Q. And so, the -- there was actual tests on sheep?

A. Yes. I -- I don't know very many details of it, because it happened before I was -- I started working for Diaxamed, but there was a few sheep studies.

Q. Do you know where the sheep were?

A. Where?

Q. Uh-huh.

A. I -- I don't recall.

Q. Okay. Do you know how the device was turned on and off when those sheep were being tested?

A. I believe they were inflating balloons. So the valves were made of balloons manufactured by another supplier, but they were -- they would just inject saline into the balloons to -- to make them grow and close the system.

Q. Did you ever hear any discussion -- did you ever know anything about Sealevel Systems?

A. No -- no, I'm not familiar.

Q. Based on what you know about, is there any reason to believe that if the implantable device became operational that it couldn't be actuated by something other than the saline pumps that you were just discussing?

MR. SHEALY: Objection. Calls for speculation.

THE COURT: Sustained.

MR. FEW: Well, your Honor, I think she has experience from working there, the actuating devices, so...

THE COURT: I'm going to sustain the objection.

MR. FEW: Okay.

BY MR. FEW:

Q. So the device has never been commercialized, as far as you know?

A. No.

Q. When you left the employment there in December of 2022, were they still working on developing the hemo-access device?

A. No, it got shelved pretty early into -- but probably for about a year, I would say, because we were working on two different devices, and the -- the hemo-access valve got shelved after -- I -- I can't recall when exactly it was. But it got put on pause, because we were focusing on other devices that we thought had more potential.

Q. So do you know if -- if Diaxamed abandoned the entire effort?

A. I don't know.

Q. When would it have gotten shelved if you left in December of 2022? Best your -- best you can recall?

A. I would say probably six to nine months before that.

Q. And what happened to people -- anybody else other than you that was working on it that continued to work there?

A. Yes. So after Chad left, they hired Aaron -- I can't remember his last name, but they hired Aaron, and he was the head of RD, so me and him were working on it -- the hemo-access valve, for a little bit before it got shelved. I -- I believe he was working on it behind the scenes, just brainstorming ideas on it, though.

Q. And when you were -- who were your supervisors when you were working there?

A. So when Aaron was hired, he was my supervisor, but -- I mean, it was a small team so -- you know, I kind of reported to everyone above me.

Q. Who -- how about Brian McMurray, what was his role?

A. I didn't have direct -- much direct interaction with him other than when we were working with the FDA.

Q. Did you -- did he approve your hire, or any promotions, or anything that you had?

A. Yes.

Q. Okay. So he was involved?

A. Yeah, for the most part.

Q. Is it your understanding that he's funding the effort?

A. Uh-huh.

MR. FEW: Thank you. That's all the questions I have.

THE COURT: Cross-examination?

MR. SHEALY: I have none.

THE COURT: All right. Thank you. Please step down. Counsel, I want to approach about scheduling discussion. The next witness is going to be a little more lengthy, so -- we just -- this is -- we're close to 12:00, so we'll go ahead and break, and be back in your jury room at 1:30, okay?

My rule is: Don't discuss the case on yourselves or anybody, don't do any type of research; don't pay any -- pay attention to media, including social media. If anybody contacts you, other than somebody from the clerk's office, please let bailiffs know. (Inaudible) 1:30. All right. You all have a good lunch.

(Jury exits room.)

THE COURT: All right. Anything else from the Plaintiff?

MR. FEW: No, your Honor. Is there anything in particular that you would want us to be prepared to discuss or come back with a verdict form? I can certainly --

THE COURT: Well, we're not going to be able to -- I mean, you all definitely need to -- I'm going to need that at the end of the day to -- I mean -- and -- you know, potential charges because -- you know, I assume the way it's going down on what you've said, looks like we probably will argue and charge in the morning, but tonight -- I mean, that's not a guarantee.

MR. FEW: That always seems to take longer than we think it would, but that would certainly be our hope (inaudible).

THE COURT: Yeah. That's -- that -- that's what we're shooting for, but (inaudible) flexible amount. All right. You all be back at 1:30.

MR. SHEALY: Thank you, your Honor.

MR. FEW: Thank you.

(Off the record.)

(On the record.)

THE COURT: I guess I have -- I guess you all need me to give you my decision on the designations and objections, because that's -- I guess, coming up pretty soon, correct? I'm trying to put it off as much as possible, but I think I've got to hit the end of the road, haven't I?

It's fascinating me about the peanut butter and jelly sandwich that I had for lunch. So -- all right. Let's go to the (inaudible), let's start with Feldman. And I -- my general concept and -- because they're all pretty much in the same ballpark, is relationships and possible agreements between various parties. I've determined -- and again, I'm going to go through these -- is relevant to the matters that have been asserted in the complaint, but the actual financing of these companies and all the information regarding financing, I have -- I think -- that's going to be the split, I don't think that is relevant, but let's go through these specifically. And again, Mr. Few -- or either side, feel free to put whatever you want on the record if you feel like it -- it hasn't been properly protected.

All right. I took under advisement of the willing Feldman's deposition, page 37, start with line 24 through 39, line 6. Again, that's -- goes into the actual mechanism of the financing of these other companies and I rule that that is not relevant.

MR. SHEALY: Your Honor, could I have just --

THE COURT: Okay, I'm sorry.

MR. SHEALY: I just -- I'm sorry. I thought I had it in -- in notes here. Okay. Got it. So which parts are in, or --?

THE COURT: On page 37, start with line 24 through 39. Okay. I find that as (inaudible), but I do -- will allow on page 39, line 14 through 23. I think that's a little bit different than the actual mechanism of a financing. All right. We go over to 48, lines 15 through line 9, on page

49. Again, that's the financing mechanism, and I find that that is not relevant.

MR. FEW: 30 -- I'm sorry, your Honor.

THE COURT: 48, line 15 through 49, line 9.

MR. FEW: And that was in or out?

THE COURT: That's out.

MR. FEW: Okay.

THE COURT: Page 54. That's lines 6 through 23. Again, that goes the finance, it really doesn't have a whole bunch of information, but I -- I -- I don't -- I find that it's not relevant, so that's out. All right. McMurray.

MR. FEW: The others were in from 60 on down?

THE COURT: We had already talked about that.

MR. FEW: Yeah, my notes weren't.

THE COURT: Okay. Those were just the ones that I did not rule on, previously.

MR. FEW: I had that 60, 18 to 20 was a partial, that you only allowed --

THE COURT: Let -- let me turn over the -- hold on. Yes, I think -- I think I -- it looks like my notes, it cut out -- lines 18 through line 16 on page 61, but allowed 17 through 20.

MR. SHEALY: That's right, your Honor.

THE COURT: A different story on McMurray because this didn't really deal with the financing as much.

MR. FEW: But then on 79-year-old --

THE COURT: We've already gone over all those. Do we need to go all the way back through these again?

MR. FEW: Well, I had it as a partial, I just wanted to --

THE COURT: Well, whatever the -- whatever I said before.

MR. FEW: Okay.

THE COURT: I mean, I don't -- my intentions were not to go back through all of these again unless you -- unless you don't -- I mean...

MR. FEW: I just wanted to make sure my notes were correct, so...

THE COURT: I mean, I'm not going to be cutting you off, I'm just like, we did go through all those, I just wanted to make sure that -- all right, but I'll...

MR. FEW: I need to do better note taker, your Honor.

THE COURT: Well, I'm not the best note taker either, so -- but I've got 79. I think I cut out 9 through 23 on page 79, and the rest of that section was in.

MR. FEW: That's correct.

MR. SHEALY: You're still on Feldman?

MR. FEW: Yeah -- yeah.

THE COURT: Okay. You good?

MR. FEW: Let me double-check. Yeah. Picked up at 79, 24, and went down to 81, 12.

THE COURT: I guess you also got to keep up with this when you all are trying to raise these. All right. McMurray 35, 16 through 23. I do find that that is relevant based on the claims being pursued. So that will be allowed. 42 passes the last 9 through 16, I believe that is relevant. So I'll allow that. Page 45, 13 through 25, I find that is relevant, and that will be allowed.

And then, the next one I have is, go over to 53, lines 12 to 17, I find that as relevant, calls of action (inaudible). And I think that's all -- that's all the notes I had as far as what I've took under advisement.

MR. SHEALY: That complies with my -- my notes.

MR. FEW: Your Honor, how does the Court want to go about logistically having someone read that? Do we have a bailiff to it, or do I --?

THE COURT: That's up to you all.

MR. FEW: All right.

THE COURT: I mean, I don't know that these bailiffs want to read this stuff.

MR. FEW: Yeah. Well, what -- what does your Honor normally do? I mean -- I -- I --

THE COURT: I mean, usually the parties figure that out. I figured that while Mr. O'Hanlan's son-in-law was in here for.

MR. FEW: I started his active career.

THE COURT: You almost -- you all --

MR. FEW: All right. Whatever he wants to do.

MR. SHEALY: All right. I -- I told Mr. Few I'm happy to be the witness, and so...

MR. FEW: I just -- we're going to need to know exactly for the record. I -- I know exactly --

THE COURT: I may have to take -- you all may have to go through that on a break or something.

MR. SHEALY: Okay, sure.

THE COURT: I mean. All right. So is the Plaintiff ready for the jury?

MR. FEW: Yes, your Honor.

THE COURT: And Defense ready for the jury?

MR. SHEALY: We are.

THE COURT: And the jury is ready from the jury room?

(Jury enters room.)

MR. FEW: Your Honor, permission to treat -- I believe under Rule 611, we can treat him as an adverse witness as necessary.

MR. SHEALY: I -- I don't have any objection.

THE COURT: Okay. That's what I thought, may I just was going -- and that -- he can be treated. That means -- it does not mean to allow you to do any physical violence or anything.