

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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

Case No. 2018-CP-23-04092 / Case No. 2022-CP-23-01310
Ct. App. Case No. 2025-001630

Sealevel Systems, Inc.Appellant,

v.

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

**RECORD ON APPEAL
VOLUME II
(pp. 403 - 707)**

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1 MR. SHEALY: I'll keep my distance.

2 THE COURT: Now, we can go ahead right now.

3 (Inaudible) this time. Anyway, as you will recall, the
4 Plaintiff is still in their case-in-chief, and at this time,
5 Mr. Few, you can call your next witness.

6 MR. FEW: Your Honor. May it please the Court?
7 Plaintiff calls Steve Johnson.

8 THE COURT: All right. Mr. Johnson, come forward to be
9 sworn.

10 THE CLERK: Place your left hand on the Bible and raise
11 your right hand.

12 STEVE JOHNSON,
13 being duly sworn, testified as follows:

14 THE CLERK: State your name, please.

15 THE WITNESS: Steve Johnson.

16 THE COURT: Thank you.

17 DIRECT EXAMINATION

18 BY MR. FEW:

19 Q. Good afternoon, Mr. Johnson.

20 A. Good afternoon.

21 Q. When you were employed with CreatiVasc, and then
22 eventually Brookhaven Vascular, and then at the end,
23 Diaxamed, you had computers and flash drives, didn't you?

24 A. That is correct.

25 Q. What happened to those computers and flash drives?

1 A. Those were all turned on, and turned into the new
2 owner of the company, who was Brian McMurray.

3 Q. That was around March the 30, 2017?

4 A. Yes, sir.

5 MR. FEW: And then -- one thing I want to try to get clear,
6 because it -- I should have had done this a long time ago,
7 but -- and I'm going to hand you what I'll mark for
8 identification as Plaintiff's Exhibit 29, and it's a big one.

9 (Plaintiff's Exhibit Number 29 marked for identification.)

10 BY MR. FEW:

11 Q. Take a look at that, and tell me if you recognize
12 that document.

13 A. I do

14 Q. And tell -- tell the jury what it is.

15 A. This document basically says that CreatiVasc
16 Medical will be merging into Brookhaven Medical, who will own
17 it and everything associated with it.

18 Q. And what was the -- what was the result of the
19 CreatiVasc contract with Sealevel as a result of this
20 transaction, as -- as -- as far as you understand it?

21 A. We continued to work with Sealevel.

22 Q. Tell the jury the date that this -- of this
23 document, and I --

24 A. It says in filing date of March 10, 2016.

25 Q. I believe that's 2015, isn't it?

1 A. You're correct, 2015.

2 Q. And then, it looks like you signed it on the
3 second page on March 6, 2015.

4 A. Correct.

5 Q. And to be clear, these are -- these are -- this is
6 something that was filed with the South Carolina Secretary of
7 State's Office, right?

8 A. Correct.

9 Q. And you can see that it was downloaded by my staff
10 today on the upper right on February 12th, which is today --
11 June 25, hard to believe. What is the date on the agreement
12 and plan of merger, that's about five or six pages in there?

13 A. That is dated February 5, 2015.

14 Q. And so -- as of this point in time, do you recall
15 if CreatiVasc had a supply agreement in place with ATEX?

16 A. There was a...

17 MR. SHEALY: Objection -- objection. Relevance.

18 THE COURT: Okay. Overruled.

19 THE WITNESS: Yes. We had an agreement with ATEX,
20 which was owned by Brian McMurray, to supply materials for
21 the balloon valves and the original device. It did not
22 include anything to do with the handheld actuator that you
23 had heard about.

24 MR. FEW: I'm going to hand you Exhibit 5, and ask you
25 to take a look at this and tell me if you recognize it.

1 (Plaintiff's Exhibit Number 5 marked for identification.)

2 MR. FEW: Is 5 still objected to?

3 MR. SHEALY: Not -- not by me.

4 BY MR. FEW:

5 Q. Tell -- take a minute to look at that,

6 Mr. Johnson, and tell us if you recognize it.

7 A. Yes, I do. This is the supply, as I see it, with
8 -- between CreatiVasc and ATEX Technologies in North Carolina
9 for the balloon valve component.

10 Q. And it's dated February 18, 2015, isn't it?

11 A. Correct.

12 Q. Which is 13 days after -- that this big old
13 document was executed, it's been marked as Exhibit 28, right?

14 A. Correct.

15 Q. So do you recall if there was an earlier agreement
16 with ATEX or was that the first one?

17 A. I do not recall.

18 Q. Okay. All right. On the big document, 29, if you
19 would flip over to section 4.08, which is on page 18 as that
20 document is numbered, do you see that?

21 A. Yes, sir.

22 Q. Okay. And again, I believe this is a document
23 that you signed, correct? Very back page, John Feldman --
24 John Feldman --

25 A. Correct.

1 Q. -- Steve Johnson and Timothy Reed. Who's Timothy
2 Reed?

3 A. Tim Reed served on the board of directors of
4 CreatiVasc Medical.

5 Q. And this document says "4.8 material contracts,
6 subsection A, schedule 408 lists each of the following
7 contracts of the company, such contracts together with all
8 contracts concerning the occupancy of real property and all
9 contracts relating to intellectual property set forth on
10 Schedule 4.09 D -- 4.09 DB material contracts." And then,
11 under subsection two, at the bottom, it says "All contracts
12 that require the company to purchase its total requirements
13 of any product or service from a third party, or that contain
14 take or pay provisions," do you see that?

15 A. Uh-huh. I do.

16 Q. Would the -- in your understanding of it, would
17 the customer supply agreement with Sealevel dated October 28,
18 2014 fall into that category?

19 MR. SHEALY: Objection, your Honor. Calls for legal.

20 THE COURT: He knows that -- that was considered, but
21 yeah, as far as the legal conclusion, I'll sustain the
22 objection.

23 THE WITNESS: That would have to be a legal
24 determination, I'm not sure.

25 BY MR. FEW:

1 Q. Well, the customer supply agreement had an
2 exclusivity provision in there, right?

3 A. Yes.

4 Q. With respect to products, right?

5 A. Yes.

6 Q. And Sealevel was a third party, right?

7 A. And we would agree with that.

8 Q. And so, according to this document, the contract
9 with Sealevel would've been listed on Schedule 4.08 to this
10 document?

11 A. It would've continued in effect, yes.

12 Q. And it would've -- I mean, this says that Schedule
13 408 -- so there's -- there's a -- a schedule to this document
14 that apparently wasn't filed with the Secretary of State's
15 Office, and so my question to you is: Do you know if the
16 Sealevel contract was mentioned there?

17 A. Without having the attachments and the listings,
18 I'm not sure what was listed on the attachment, and then I
19 don't see it on here.

20 Q. Who were -- were lawyers involved in drafting
21 this?

22 A. Of course.

23 Q. Were lawyers involved in doing the due diligence
24 to identify all of the property of the company?

25 A. They were.

1 Q. And do you know who -- you remember who those
2 attorneys were?

3 A. Likely for us it was (inaudible) Dickenson.

4 Q. "For us," and you say --

5 A. CreatiVasc.

6 Q. -- CreatiVasc? What about for Brookhaven Merger
7 Corp?

8 A. That would've been an internal counsel Bob
9 Achenbach, and he would've likely had external counsel, but I
10 do not know who that was.

11 Q. So this document seems to establish that the --
12 the transfer -- the change in name of CreatiVasc Medical
13 Incorporated into Brookhaven Vascular Incorporated occurred
14 on or about February 5, 2015?

15 A. It does.

16 MR. FEW: Your Honor, at this time, I would move 29
17 into evidence.

18 THE COURT: Any objection?

19 MR. SHEALY: No objection.

20 THE COURT: Okay. Without objection.

21 (Plaintiff's Exhibit Number 29 admitted into evidence.)

22 BY MR. FEW:

23 Q. And then, you also had the Exhibit 5 there.

24 A. 5?

25 Q. Take a moment, if you would, and find -- well,

1 let's just back up to a higher level. What was -- how did
2 Exhibit 5 come to be? Did you sign it, were you involved in
3 it?

4 A. Yes, my signature is on the document. The intent
5 was to identify the specific components that ATEX would
6 manufacture for us.

7 Q. And -- and what is your understanding of what that
8 was supposed to be?

9 A. That was specifically -- and it stated here the
10 balloon valves.

11 Q. And those would be included -- those would be
12 where?

13 A. Those would be in the original -- what we call
14 "The Generation one device," which would activate it by
15 needles and not by any external magnetic actuator.

16 Q. This agreement is executed a couple of months
17 after you had done the agreement with Sealevel that's been
18 marked as Exhibit 4, right?

19 A. Correct.

20 Q. Did you -- to -- to your recollection, did you
21 tell Brian McMurray, who signed this document on behalf of
22 ATEX, that you had an exclusive supply agreement with
23 Sealevel for the -- the handheld and however the scope of
24 that project is defined in that document?

25 A. Yes, they were -- had -- they had developed a

1 finished balloon valve. So we were authorizing payment for
2 those because they were finished products.

3 Q. "They" is who?

4 A. ATEX.

5 MR. FEW: Take a look at the exclusivity requirements
6 -- and your Honor, if I -- I move Exhibit 5 into evidence so
7 that --

8 MR. SHEALY: Relevance is the objection.

9 THE COURT: Right. Okay. I'm going to overrule your
10 objection. So it's in over the Defendant's objection.

11 (Plaintiff's Exhibit Number 5 admitted into evidence.)

12 MR. FEW: Okay. It's in. Thank you. And I'm going to
13 go to the Telestrator here --

14 THE COURT: Is those turned on up there?

15 THE CLERK: Yeah.

16 THE COURT: Because sometimes (inaudible) the other
17 courtroom, they'll go off at lunch.

18 MR. FEW: I'm going to use highlighting (inaudible).

19 BY MR. FEW:

20 Q. Do you see Section 6, exclusivity requirements?

21 A. Yes, sir.

22 Q. Okay. And that's similar to the agreement with
23 Sealevel, right?

24 A. I would disagree with that statement.

25 Q. Well, Sealevel had exclusive -- an exclusive

1 agreement for everything that's defined in the scope of work
2 in Exhibit 4, right?

3 A. We had an agreement with Sealevel. It was a
4 development agreement to produce a finished product sometime
5 in the future. In this case, a finished product had already
6 been developed.

7 Q. Okay. And it says "CVM agrees to purchase 100
8 percent of its internal balloon-component requirements from
9 ATEX, including any future component additions and/or line
10 extensions." Do you see that?

11 A. I do.

12 Q. Okay. Did anybody at ATEX ever take the position
13 with you as far as you know, or with CreatiVasc, or
14 Brookhaven, or Diaxamed when they took over, that they had
15 the exclusive rights to make all products related to the
16 hemo-access device?

17 A. Not at all.

18 Q. Okay. That they -- but they did do that when they
19 bought the company and chose not to take the assignment of
20 the Sealevel contract, right?

21 A. I'm not sure I understand your question.

22 Q. When -- were you aware on January the first of
23 2017 that ATEX and whatever holding company they used to buy
24 -- make Diaxamed to take all the CreatiVasc technology,
25 because that's what happened, right? Were you aware that

1 they intentionally -- according to them, excluded the
2 Sealevel contract from being assigned to them?

3 A. I was not aware of that, because at that point my
4 position was basically being phased out, and I -- while I was
5 the president and CEO of CreatiVasc and later Brookhaven
6 Vascular, I really had no (inaudible) position within
7 Diaxamed, and I was later terminated at the end of March. So
8 I was not aware of any kind of agreements that went on or
9 back and forth after January 1.

10 Q. Well, you remained employed until March the 30th,
11 right?

12 A. Three months.

13 Q. So is it your testimony now that you knew you were
14 not -- that you were going to be terminated in three months?

15 A. I was not absolutely sure, but there were signals
16 because most of the decisions were me -- being made by Brian
17 McMurray at ATex, and not me.

18 Q. You signed a new agreement with Diaxamed on
19 January 6, 2017, didn't you?

20 A. Correct.

21 Q. And that agreement had a non-disparagement
22 provision in it, didn't it?

23 A. That's correct.

24 Q. Okay. And when you were deposed, you didn't
25 believe you could talk about what had happened, because you

1 were afraid you were going to violate the non-disparagement,
2 right?

3 MR. SHEALY: Objection. Relevance.

4 THE COURT: I will allow it. Overruled.

5 THE WITNESS: Again, I did not want to be seen in any
6 way as being contrary to what the understanding was in the
7 non-disparagement agreement. So when you took my deposition,
8 I was cautious and concerned about anything I've said about
9 the merger.

10 MR. FEW: Because you didn't want to be sued for saying
11 something that they didn't like, right?

12 MR. SHEALY: Objection. Argumentative.

13 THE COURT: Yes, sustained.

14 BY MR. FEW:

15 Q. Were you concerned that you might be -- have legal
16 action brought against you pursuant to that non-disparagement
17 agreement if you said something that -- that Diaxamed people
18 didn't like the way you said it?

19 A. Again, I was cautious to say things that I thought
20 were supportive of understanding what the new relationship
21 was, but I was also careful not to say anything negative
22 about the parties.

23 Q. Because of the existence of a non-disparagement
24 agreement in the Asset Protection Agreement that you signed
25 on January 6th?

1 A. Correct.

2 Q. Had you ever -- to your knowledge, had you ever
3 been subject to a non-disparagement agreement prior to that
4 date?

5 A. I have not.

6 Q. I'm going to hand you what's marked as Exhibit 16
7 and present to you. This is called the Asset Protection
8 Agreement that you signed on January 6. Do you recognize
9 that document, Mr. Johnson?

10 A. Yes, sir, I do.

11 MR. FEW: Okay. Your Honor, before I publish, I'd like
12 to move this into evidence.

13 MR. SHEALY: Objection. Relevance.

14 THE COURT: Mr. Few?

15 MR. FEW: Well, your Honor, the witness has already
16 testified that he altered his testimony during discovery in
17 this case and then subsequent to that because of fear of --
18 of what might happen pursuant to this non-disparagement
19 agreement.

20 MR. SHEALY: Your Honor, respectfully, I do not believe
21 the witness ever said he altered his testimony, as I
22 understand it.

23 THE COURT: Not sure. That's what I heard either, Mr.
24 Few.

25 MR. FEW: Your Honor, it's in the deposition

1 transcript. That's what Mr. Shealy said --

2 THE COURT: That has not been presented yet.

3 MR. FEW: Okay.

4 THE COURT: You're talking -- you just said what he
5 said, and that is not -- what particular provisions do we --
6 do I need to look at?

7 MR. FEW: Page 6, at the bottom-left side, paragraph 5,
8 non-disparagement.

9 THE COURT: Okay. I'll allow for limited purposes of
10 that, or that has to his testimony.

11 MR. FEW: Your Honor, if the Court is ruling out, I can
12 just publish it or -- or just that one page?

13 THE COURT: Just that one page.

14 MR. FEW: Okay. So this -- so Exhibit 16 will be just
15 one page?

16 THE COURT: Right.

17 BY MR. FEW:

18 Q. Did you see the non-disparagement provision right
19 there?

20 A. Yes, sir.

21 Q. Is that -- is that what you were referring to in
22 your testimony just a minute ago?

23 A. Yes.

24 Q. Okay. And in fact, you were specifically reminded
25 of that when you got your termination letter from

1 Mr. McMurray on March 30, 2017, weren't you?

2 A. I would imagine so.

3 Q. Do you remember any -- remember any discussion
4 with anybody about that?

5 A. No.

6 Q. But you -- you knew it was in there, and you --
7 you -- you knew that you needed to comply with it, right?

8 A. Correct.

9 MR. FEW: Now --

10 THE COURT: Just so we can keep the record clear, let's
11 mark that as 16, just as -- just as one page. 16, that's
12 right?

13 (Plaintiff's Exhibit Number 16 marked for identification.)

14 BY MR. FEW:

15 Q. Mr. Johnson, the agreement with ATEX also has a
16 provision, paragraph 17, it says "The successor entity" --
17 can you all see that? "Or licensee of CreatiVasc or -- will
18 its parents expressly assumes all obligations of CreatiVasc
19 ask set forth in this agreement, including the purchase 100
20 percent of requirements from ATEX, pursuant to Section 6
21 thereof." Right?

22 A. Yes -- yes, sir.

23 Q. Did -- do you recall negotiations with respect to
24 this agreement or was it just presented to you by ATEX?

25 A. I don't recall negotiation because it was limited

1 totally to the balloon-valve development.

2 Q. And ATEX -- had they already produced those
3 before?

4 A. Yes.

5 Q. But later on December 16th, ATEX effectively took
6 over everything that CreatiVasc was doing, didn't they?

7 A. Yes.

8 Q. I'm going to show you Exhibit 2, this is the email
9 chain between you and Tom O'Hanlan, you see that?

10 A. Yes, sir.

11 Q. And that's in evidence already, I believe. Can
12 you say -- is it?

13 THE COURT: Exhibit 2?

14 MR. FEW: On the table, I think so.

15 THE COURT: I think I have it. There is no objection
16 to that?

17 MR. SHEALY: Yeah, there's no objection.

18 (Plaintiff's Exhibit Number 2 admitted into evidence.)

19 MR. FEW: You're right.

20 THE COURT: Okay.

21 MR. FEW: Very sorry.

22 BY MR. FEW:

23 Q. You see in here you're -- you're -- in the middle
24 of the page, you're talking about a Non-Disclosure Agreement,
25 do you see that?

1 A. Yeah. Yes, sir.

2 Q. Do you think -- do you know if you all executed a
3 Non-Disclosure Agreement?

4 A. This document here and these emails basically
5 introduce me to Sealevel. And we were already doing work --
6 as you can see here with Tri-Tech, which is nearby Sealevel.
7 And through an introduction from Matt Gaymar, I was
8 introduced to Tom O'Hanlan and Sealevel, and because we were
9 already working on, and had prototypes of a -- what we called
10 a "Second Generation Device," which was the magnetic handheld
11 actuator from work that we had had previously done at --
12 first at the Southeastern Institute for Manufacturing and
13 Technology in Florence. And then, with Screwomatics, and then
14 with Tri-Tech, because a lot of work had already been done, I
15 had requested a Non-Disclosure Agreement be executed between
16 CreatiVasc and Sealevel before we met for that first
17 discussion. Whether that was ever executed or not, I don't
18 recall.

19 Q. You recall the confidentiality provision that was
20 in the customer supply agreement that's been gone over
21 before, right?

22 A. Correct.

23 Q. Those are -- pretty much go toward the same
24 substance, don't they?

25 A. They do.

1 Q. And to move quickly along, there's an email that
2 you sent to Tom on October 13th, and you said "I would like
3 to link you up with Brian McMurray at ATEX Technologies in
4 Pinehurst, because I can see the two of you coming up with a
5 dozen applications where your two areas of technical
6 expertise intersect." Do you remember that?

7 A. I do.

8 Q. So you were already working with ATEX in October,
9 but you don't know if you had any contracts with them?

10 A. We were -- they had already been working and
11 likely developed the balloon valves. And knowing what a very
12 intelligent, smart engineer Brian McMurray was, knowing what
13 a great engineer and thinker that Tom O'Hanlan was, that's
14 where my comment was that, "You guys should get together,
15 I'll be glad to make the introduction because I believe that
16 a good thing could happen between ATEX and Sealevel totally
17 independent of CreatiVasc"

18 Q. Do you have Exhibit 4 out there?

19 A. No.

20 Q. If you would take a look at paragraph 24 down
21 there at the bottom. This says that "Neither party shall
22 assign this agreement for any of its rights thereunder, nor
23 shall a customer subcontract any substantial portion of this
24 agreement without the prior written consent of the other
25 party, provided however, that any party may without such

1 consent assign this agreement in connection with the transfer
2 or sale of all -- or substantially all of its business, or in
3 the event of its merger consolidation, change in control, or
4 other similar transaction." Do you see that?

5 A. Yes, sir.

6 Q. Okay. And is it your understanding that
7 Brookhaven Vascular took an assignment of the obligations of
8 CreatiVasc to Sealevel?

9 A. I would answer that by saying Brookhaven bought
10 everything that CreatiVasc owned.

11 Q. Which included the Sealevel contract, right?

12 A. That continued under Brookhaven.

13 Q. And that would be -- that would be an asset of the
14 company that you have an exclusive arrangement with-- whether
15 it be Sealevel or anybody else, that you have that
16 arrangement in place, and -- whether it's an R&D or existing
17 product, it's an asset of the company.

18 A. Yes, sir.

19 Q. And that's why it would've been listed in that
20 Secretary of State document that was 68 pages long, that was
21 filed in March of 2015.

22 A. I would assume it would be listed.

23 MR. FEW: But -- and I want to go to the assignment and
24 assumption agreement, I'll have to hand it to you. This is
25 marked as Exhibit 14, it's called a "Contribution Agreement."

1 Tell me -- take a look at that and tell me if you recognize
2 it.

3 (Plaintiff's Exhibit Number 14 marked for identification.)

4 BY MR. FEW:

5 Q. You recognize that document, Mr. Johnson?

6 A. Yes, sir. My signature is on it.

7 Q. Your signature is on page 7, and the date of this
8 document -- on page -- December 30, 2016, that's consistent
9 with your memory, right?

10 A. Correct.

11 Q. Okay. Look at the Exhibit A "Contributed Assets,"
12 and I'm just going to publish this for the moment. And it
13 says "Assigned contracts agreement between contributor and
14 ATEX Technologies dated February 18, 2015." Do you see that?

15 A. I do, yes.

16 Q. So did -- now that you look at this, you -- you
17 could've -- you would've known if you studied it carefully
18 that the Sealevel contract was not being assigned, right?

19 MR. SHEALY: Your Honor, I -- I have an objection.
20 Just -- I don't believe this has been moved into evidence
21 yet.

22 THE COURT: I don't have any either.

23 MR. SHEALY: I don't.

24 MR. FEW: I'll move it into evidence.

25 THE COURT: Any objection?

1 MR. SHEALY: I don't have any objection at this point.

2 THE COURT: All right -- all right. I'll keep it for
3 the purpose -- you know, or I have it either.

4 (Plaintiff's Exhibit Number 14 admitted into evidence.)

5 BY MR. FEW:

6 Q. Now, all these other things are mentioned, right?
7 Every patent application, every issue, patent?

8 A. Those list -- that listing is of all the
9 intellectual property owned by the company, which was being
10 signed over to ATEX.

11 Q. And all the trademarks on the next page?

12 A. Correct.

13 Q. So -- but it's your testimony that you weren't
14 aware that the Sealevel contract was not being assigned at
15 that time?

16 A. I can only see here that this relates to the
17 intellectual property, the patents and trademarks.

18 Q. Okay. But it -- it -- it lists all the contracts
19 and the only one that's listed is the one with ATEX, right?

20 A. That's what it shows, yes.

21 Q. There was nothing in the contract preventing it
22 being assigned by CreatiVasc, was it? In fact, the --
23 paragraph 24 that we just went over specifically says "You
24 can't assign it, but if you are giving away everything else,
25 then you can," but here CreatiVasc gave away everything else,

1 but Diaxamed didn't want the Sealevel contract?

2 A. I would ask legal counsel to provide input to me
3 on section 1.3, because I have not seen this document in 10
4 years. Where it says the -- "No one assumed liabilities, the
5 company shall neither assume nor become liable for the
6 payment or performance of any debts, obligations,
7 responsibilities, contracts, and liabilities of the
8 contributor."

9 Q. Do you -- what's your -- I don't understand your
10 testimony. You don't know what that means, or you --?

11 A. Well, you have stated that in this transaction we
12 were not assuming any liabilities. This says that we did not
13 assume any liabilities.

14 Q. Where are you're referring to?

15 A. I would assume that would be that ATEX would not
16 be assuming any liability from Brookhaven Vascular, which
17 included us.

18 Q. Okay. That's what their lawyers put in the
19 document, right?

20 A. It's here, yes.

21 MR. FEW: I'm going to show you what's been marked as
22 Plaintiff's Exhibit 25.

23 (Plaintiff's Exhibit Number 25 marked for identification.)

24 BY MR. FEW:

25 Q. Do you see that document?

1 A. I do.

2 Q. Do you recognize the names of any of those people
3 there?

4 A. I believe that Fred Hutchinson is Brian McMurray's
5 attorney, as well as John Campbell. I do not know who Nicole
6 Hayden is, although I see she is with Nelson Mullen's law
7 firm.

8 Q. That's the firm that was representing Sealevel,
9 right?

10 A. Again, I was not involved in that transaction. I
11 was -- I had been gone from the company --

12 Q. Well, you --

13 A. -- six months.

14 Q. -- we just went over it. You signed the document?

15 A. I signed the document, I -- are you referring --
16 is it referring to that document?

17 Q. Well, this is an email inquiry from Sealevel's
18 counsel and a response from Fred Hutchinson, and -- and Fred
19 Hutchison is the attorney for Brian McMurray and ATEX and all
20 his companies, right?

21 A. Again, this inquiry in this email happened months
22 after I left, I'm not sure what this is about.

23 Q. Well, you know who these people are though, right?

24 A. I know of them; I never met them.

25 Q. You see where Mr. Hutchinson says --

1 MR. SHEALY: Your Honor?

2 THE COURT: Yeah.

3 MR. SHEALY: (Inaudible) something what base do you
4 have to ask this witness?

5 MR. FEW: It -- it's admission of a party opponent.
6 He's -- he said -- read the first sentence there.

7 THE COURT: This happened after he --

8 MR. FEW: No -- no, he's -- it's referring to the --

9 THE COURT: It is not even -- and then his name is
10 nowhere on it.

11 MR. FEW: His name is not on there, but it's -- it's
12 the client -- it's the -- let me use the other one.

13 THE COURT: All right. I'm going to sustain the
14 objection.

15 MR. SHEALY: Thank you.

16 MR. FEW: Well, it's 21, which is already in evidence,
17 which is relevant to that one we were just looking at, can
18 you see -- this one comes up?

19 THE COURT: You turn it off because you keep it on in
20 your papers for laying over there.

21 MR. FEW: I'm sorry.

22 BY MR. FEW:

23 Q. Do you have Exhibit 21?

24 A. No.

25 Q. That's the letter from Mr. Achenbach, right?

1 A. Yes.

2 Q. Okay. And he references a discussion with you.
3 Do you remember speaking with him at any point in time in
4 June of 2017?

5 A. I believe I -- I do remember that he contacted me
6 and the question was -- as you see it here.

7 Q. What was the conversation about?

8 A. It was about the -- after I had left, Sealevel
9 sent an invoice to -- I assume to Brookhaven and/or ATEX or
10 Diaxamed, for the hours that they calculated, which he asked
11 me what I thought of that. And what I told him was there was
12 nothing in the main -- the -- the only agreement that we had
13 was Sealevel, which was the product supply agreement, and
14 that product supply agreement said "Sealevel would be
15 guaranteed that they would be the manufacturer of the
16 finished working manufactured marketed in the market device."

17 It did not reference anything about hours, because as
18 we had talked over the years, this was seen as a speculative
19 project where they were investing hours in time up front in
20 the hopes that down the road when it went to the market, they
21 would be the exclusive and sole provider of the finished
22 product, and that is when they would make their money back.

23 Q. Well, let's talk about this letter, because it
24 says -- he says "CreatiVasc does not have a copy of any
25 purported supply agreement supporting the invoice." From

1 what you just testified to, that's not what you told him, you
2 told him there was an agreement and -- and then even though
3 he's the attorney, you told him what was in the agreement and
4 he wrote this letter after -- based on what you told him
5 without ever having an agreement to look at it?

6 A. Okay, Mr. Few, you have to divide this in two
7 parts. I didn't confirm that there was a supply agreement
8 between CreatiVasc, which passed on to ATEX and everybody
9 else, a supply agreement with Sealevel for the finished
10 manufactured product. What -- I did not say that. I said
11 there was no evidence in the supply agreement justifying a
12 billing of hours and a sum, which I've never seen that
13 invoice, because again, this came after I left. I never saw
14 that invoice.

15 Q. You couldn't send him a copy of the supply
16 agreement because you didn't have it because ATEX took it
17 when they took everything that was on your computer on March
18 30, 2017, right?

19 A. Correct.

20 Q. Now, did you tell him that Sealevel was unable to
21 produce a working device?

22 A. Yes.

23 Q. Okay. But you -- you never sent a notice of
24 breach to Sealevel pursuant to the customer supply agreement,
25 did you?

1 A. Everyone continued to work on this device.

2 Q. I -- I need to just answer that question, because
3 the -- the agreement -- I can show it to you, it has a
4 specific notice provision that you got to provide notice of
5 breach. And my question to you, did -- did you ever extend a
6 notice of breach to Sealevel under the customer supply
7 agreement --

8 A. No.

9 Q. -- as far as you know? Okay.

10 A. No.

11 Q. Did -- did you ever -- as far as you know,
12 terminate the customer supply agreement with Sealevel?

13 A. No.

14 Q. Okay. And I believe I heard your attorney tell
15 the Court that it's still in effect at the start of this
16 case?

17 A. I would assume it's not.

18 Q. The second amendment to the supply agreement,
19 which is Exhibit 13, do you recall executing that, or do you
20 remember there being amendments to the supply agreement?

21 A. There were two -- I do not -- what -- which
22 document is that?

23 Q. I don't think it's in evidence, I'll have to hand
24 you the -- the --

25 THE COURT: By the way, he's not the keeper of the

1 exhibits.

2 MR. FEW: I know, your Honor, I...

3 THE COURT: Just -- just reminding you,

4 MR. FEW: I'm not a very good keeper, apparently.

5 BY MR. FEW:

6 Q. Take a look at that and tell me if you recognize
7 what that is.

8 A. Yes -- yes, sir.

9 Q. The March 9, 2016?

10 A. That's correct.

11 Q. Okay. At that point in time, the CreatiVasc had
12 become Brookhaven Vascular, right?

13 A. Correct.

14 Q. Okay. But that's not reflected on this amendment,
15 is it?

16 A. During that time --

17 MR. SHEALY: Your Honor, this is not in evidence yet.

18 MR. FEW: It's being --

19 THE COURT: Yes. That's true, it's not in evidence.

20 MR. FEW: I -- I'll move this into evidence.

21 THE COURT: Any objection?

22 MR. SHEALY: Your Honor, I've objected on the basis of
23 relevance, because this amendment doesn't have anything to do
24 with this lawsuit, but --

25 THE COURT: I'll allow that over your objection.

1 (Plaintiff's Exhibit Number 13 admitted into evidence.)

2 THE CLERK: I'm sorry, what number is that?

3 MR. FEW: This is 13, I do believe, and that -- is it
4 13 on that one? That's 13.

5 THE COURT: You have another exhibit? On mine, it has
6 another Exhibit on here too.

7 MR. FEW: That's the deposition.

8 THE COURT: Yeah. We don't -- yeah, you all should
9 have taken that off before you put it into evidence. All
10 right. Go ahead. You all need to work -- you all need to
11 take care of that, just so -- I'm confused.

12 BY MR. FEW:

13 Q. Do -- do you know why this was not in the name of
14 -- of Brookhaven Vascular?

15 A. There was a period of time that after Brookhaven
16 acquired CreatiVasc that the board of Brookhaven had not
17 decided what the names of the entities would be. For
18 instance, they bought Future Matrix, the company in Texas,
19 and they also bought CreatiVasc Medical, but there was a
20 period of time where the name "Brookhaven Vascular" had not
21 come along, and it could have been made under the name of
22 either CreatiVasc or Brookhaven Vascular.

23 It wasn't any kind of -- you know, games being played,
24 it was just that the legal entity names had not -- perhaps
25 not been changed over.

1 Q. Did someone explain it to you that way?

2 A. That was my own recollection.

3 Q. Your own recollection that you could represent
4 yourself as being CreatiVasc Medical Inc. or Brookhaven
5 Vascular Inc., just whichever one you chose?

6 MR. SHEALY: Objection. Argumentative.

7 THE COURT: Yes. Sustained.

8 MR. FEW: I'll ask it another way.

9 BY MR. FEW:

10 Q. Is it your understanding that you could have told
11 people that you were the CEO of Brookhaven Vascular on or
12 after February 5, 2015, or CreatiVasc Medical Incorporated?

13 MR. FEW: Same objection.

14 THE COURT: I'll allow it.

15 THE WITNESS: No, I was on the board of CreatiVasc --
16 excuse me, Brookhaven Medical. It was during the discussions
17 among the board as to when the name was to be changed, and
18 what it was to be changed to.

19 I abide by what the board had cited whenever that date
20 was. I don't recall when the official name changed from
21 CreatiVasc Medical to Brookhaven Vascular, but I would not
22 have independently on my own selected one or the other.
23 Again, I sat on the board of -- of Brookhaven Medical and I
24 went by what the board decided what the names would be on
25 what dates.

1 MR. FEW: Just one second. That's all the questions I
2 have at this time, Mr. Johnson. Thank you.

3 THE COURT: Cross-examination?

4 MR. SHEALY: May it please the Court?

5 CROSS-EXAMINATION

6 BY MR. SHEALY:

7 Q. Mr. Johnson, I don't want -- I don't want to go
8 over any other ground that's already been gone over, but I do
9 want to try to give this jury a -- a coherent narrative of
10 the history of this thing, because it's been -- I -- I'm
11 worried about the disjointed nature of some of the evidence.
12 So first, introduce yourself a little bit to the jury. Where
13 are you from, where -- how far did you go to school, what do
14 you do for a living? That kind of stuff.

15 A. Sure. My name is Steve Johnson. I grew up in an
16 old town called Chester, South Carolina, between here and the
17 beach. I went to Furman University. After I graduated, I
18 went to work for Scott Paper Company, eventually wound up at
19 their headquarters in Philadelphia.

20 My wife and I -- after a couple winters in
21 Philadelphia, did not want to spend anymore winters in the
22 north. So we had an opportunity, I came back to work for a
23 company in Greenwood called "Tech Size." Tech Size, made a
24 variety of consumer products. That company was eventually
25 acquired by Dow Chemical.

1 Dow -- then I became vice president of new product
2 development for Dow Chemical and moved to Indianapolis,
3 Indiana. That was fortunate because my in-laws lived there,
4 and so we had built-in babysitters nearby.

5 After a couple of years in Indianapolis, we also wanted
6 to return -- to return back to Greenville, and I was
7 approached by a company that wanted to form a new division,
8 which we call "Creative Technologies," and the company was
9 started in Greenville.

10 I started the company in 1990, and it was the first
11 technology transfer company in South Carolina. Meaning, we
12 were getting technologies from one company to another. We
13 had clients that included my first employer, Scott Paper, it
14 also included Kimberly-Clark -- four divisions of Kimberly-
15 Clark. We worked with Eastman Chemical in Kingsport, and the
16 whole time we were either scouting for technologies for them,
17 or we were helping them to divest products or technologies
18 that they only wanted to pursue.

19 And while were doing that, we were approached by a
20 company out of -- near Pittsburgh called "Concurrent
21 Technologies." They were primarily a defense contractor and
22 they wanted us to do the same thing for them that we'd been
23 doing for a variety of other companies in scouting for
24 technologies. And one of the first projects that I helped
25 manage was a -- a medical device: A chest tube and insertion

1 simulator, which was being developed by Concurrent
2 Technologies and a consortium (inaudible) of Harvard, MIT,
3 and Draper Labs.

4 Q. So -- and I'm sorry to stop you, Mr. Johnson, but
5 is that -- is that -- was that your introduction into the
6 medical device world?

7 A. It was -- it was.

8 Q. And what was the -- what year was that?

9 A. That would've been in the 1997 time frame.

10 Q. Okay. So -- so let's fast-forward. That's --
11 that's your introduction into this world of medical devices.
12 You got involved with CreatiVasc in about 2007; is that
13 right?

14 A. I had early discussions with Dr. Cole about the
15 hemo-access valve late in 2006. He was looking for direction
16 on, "How do I engage with the FDA? How do I get approval?
17 How -- what process do I go through?" But I actually helped
18 him form the company in March of -- of -- I guess would be
19 2007.

20 Q. So just to be clear, you're not a technical guy,
21 right?

22 A. My degree is not in technology, no.

23 Q. What's your degree in?

24 A. Business administrative and economics.

25 Q. Okay. So -- but -- so you're not an engineer --

1 A. Right.

2 Q. -- like a lot of these people that have testified,
3 but you're a business guy? Okay. So -- so you get started
4 with CreatiVasc, and you mentioned earlier the Gen One
5 device, and I just want to make sure that we -- and -- and
6 Dr. Cole -- this is the device that Dr. Cole invented, right?

7 A. Correct.

8 Q. Okay. And this is the thing that is fully
9 implanted in the human body, correct?

10 A. Correct.

11 Q. All right. And the Gen One device to -- to work
12 involved needles?

13 A. Correct.

14 Q. Okay. And do you have a -- do you have a -- a
15 backup of the device

16 A. Right over there.

17 Q. Okay.

18 A. You heard a lot about it, you finally get to see
19 it.

20 Q. And we won't spend a lot of time on this, but --

21 MR. FEW: May the witness come down from the witness
22 stand?

23 THE COURT: Okay.

24 MR. FEW: So if you show it to the jury Mr. Johnson --
25 so -- all right -- so everything that is on that board gets

1 implanted -- if -- if this were actually in use would get
2 implanted in the human body?

3 A. Let's begin first with just that first tube. You
4 heard Dr. Cole mention a graft, the teflon tube that you see
5 just right there, is -- was a state of the art. It was
6 implanted between an artery and a vein. That is a connection
7 in the body that the body does not like.

8 So what happens in this Arteriovenous graft, is that
9 'cause you're making blood flow and the direction that it
10 doesn't normally go, you get clots forming within this tube,
11 and they -- and these patient -- again, go to dialysis three
12 days a week, four hours a day, and they have two very large
13 needles. If you've ever given blood, you know how large
14 those needles are. The blood -- the needles for dialysis are
15 much larger than those. One is placed on one side -- and
16 again, this is underneath the skin. One is placed on one
17 side to withdraw the blood and it then goes through the
18 dialysis machine, and then it's returned on the other side to
19 go back to the body, and this is done again three times a
20 week.

21 What Dr. Cole wanted to do, was to create a valve
22 device that would turn on the blood only when he needed it
23 for dialysis, and then flush it afterwards so that only
24 saline would be in the ground so it couldn't fly. And then,
25 when you went backward dialysis, you would open it back up,

1 that's what this device and these two valves do.

2 So when a patient comes with this device implanted in
3 them, and we implanted this device in, I believe five or six
4 patients, the blood would be flowing through the glass and
5 this would be a tendency syringe that would have a very -- I
6 did not put a needle on this, a very tiny -- tiny needle, a
7 light-angled needle, that they would place in -- you could
8 feel this device right underneath the skin, you could feel
9 exactly where the needle is to go in.

10 He would place the needle in the septum here and then
11 inject the saline. The saline would go through these two
12 tubes, it would go to the cuffs on the end. And on the
13 inside of those cuffs are two balloons, so that when those
14 balloons expand, what happens is the graft is here and the
15 balloon is around it, and it causes the graft to close off on
16 both ends.

17 So after the graft is closed off, you still have the
18 dialysis needles in graft. While they are still connected,
19 you flush this with sterile saline so that there is nothing
20 -- and then you pull the dialysis needles out. So when the
21 patient goes home, there is nothing left in this graft, but
22 sterile saline. It cannot clot. That was the whole concept
23 behind the Generation One device, we call it Gen One because
24 it required a needle to activate it.

25 Q. Okay, thank you very much.

1 A. Sure.

2 Q. You put that -- put that down and -- and go back
3 to the stand, and we'll -- we'll keep this moving.
4 Appreciate you giving that explanation. So Mr. Johnson --
5 then -- so that's the Gen One -- that's what you were working
6 on starting in 2007, then Gen Two is a -- is the second
7 generation of this device, when do you start working on that?

8 A. That was probably in the 2010, 2011 time frame.

9 Q. All right. And is the Gen Two device uses this an
10 external actuator to activate the valves instead of using a
11 needle, right? Is that correct?

12 A. That's correct. The idea was if you could have a
13 handheld that had rotating magnets, and you had an
14 implantable device that had a pump that had the same type of
15 magnets, they could couple through the skin, so that when the
16 magnets turned in the handheld, they would also turn
17 underneath the skin, pumping the saline into those balloon
18 valves without a needle.

19 Q. Okay. So -- so we get 2014, and -- and you all
20 have been thinking this -- of this concept working on it now
21 for several years before Sealevel gets involved, right?

22 A. That's correct. We had been working -- again, as
23 I mentioned earlier, with the Southeastern Institute for
24 Manufacturing and Technology in Florence to actually create a
25 prototype of what the device would look like, including a

1 charging cradle that it would sit in and charge it in between
2 dialysis sessions.

3 Q. Okay. So all you've done -- all of that work
4 before Sealevel got involved?

5 A. Correct.

6 Q. Okay. So -- so you all enter into that customer
7 supply agreement in 2014, right?

8 A. Correct.

9 Q. Okay. And Sealevel is brought on board because of
10 its expertise in electronics, right?

11 A. Correct.

12 Q. All right. And it was -- ultimately it was going
13 to work on the electronics controlling that handheld device,
14 right?

15 A. Correct.

16 Q. And then --

17 A. And also sensing the pressure within the balloons.

18 Q. Okay. So it was also in -- in charge of figuring
19 out the -- the -- the sensor that needed to be inside so that
20 the actuator would read the sensors, and know when to stop
21 pumping, right?

22 A. Yes.

23 Q. Okay. All of that was what your understanding was
24 -- was what Sealevel's role was, right?

25 A. Yeah. I -- I would clarify a little bit in that

1 we were responsible for developing the internal device, but
2 they would be supplying the sensors that their handheld would
3 read on the inside of the body.

4 Q. Okay. Now this project involved other -- other
5 parties, right?

6 A. Yes.

7 Q. Okay. And you had -- you had -- I think
8 Screwomatics is -- somebody that was involved, that's another
9 company?

10 A. Correct.

11 Q. And did you have some sort of an agreement with
12 Screwomatics?

13 A. They were working on the gears, if you will, in
14 the handheld device that we eventually turned over to
15 Sealevel.

16 Q. Okay. The magnets, was there a -- a whole
17 different supplier for the magnets that had to be in the
18 handheld and in the internal pump?

19 A. There was, and -- and we discovered them -- funny
20 name for a company, but SuperMagnetMan in Birmingham,
21 Alabama, but they are actually a very large -- very strong
22 magnet company in Birmingham that supplies -- if you have a
23 computer and your power cord magnetically connects to your
24 computer, they likely make the magnets in that. So they made
25 the magnets for the handheld and for the implantable.

1 Q. Okay. Now I know all of what we're talking about
2 takes money, right?

3 A. Correct.

4 Q. And you -- you raised some money initially?

5 A. Correct.

6 Q. But -- you know, you're having people showing up
7 for work every day, you got to pay them, and you got to pay
8 the various suppliers, so you're -- you're spending money
9 along the (inaudible), right?

10 A. Correct.

11 Q. And eventually you started running out of money,
12 right?

13 A. Correct.

14 Q. When did this company, Brookhaven, get involved?

15 A. This would've been -- I would say about 2014, 2015
16 time range. We had raised the initial amount of money to get
17 the company started, and that was raised from local investors
18 here in Greenville.

19 And the commitment to them was we would keep them
20 informed about everything that we were doing. They were able
21 to log into a secure website every month to see the progress
22 that we had made, the amount of money that they were
23 spending. I wanted to be completely transparent with them
24 with how their funding -- what their funding was going for,
25 and that included like FDA advisors, reimbursement --

1 Medicare reimbursement advisors for this device, because we
2 were looking ahead down the road in the hopes that when it
3 would go to market, we would have all that in place.

4 Q. Okay. So Brookhaven gets involved and there --
5 because you all are running out of money and they provided an
6 infusion of -- of cash, now we keep going?

7 A. Correct.

8 Q. Okay. And -- so they're involved -- the juries
9 heard about ATEX -- was ATEX and Brian McMurray -- when did
10 they get involved?

11 A. They were involved early on because we were -- we
12 connected to them to make the balloon valves for the device.

13 Q. Okay.

14 A. And that was for the original Gen One device.

15 Q. Okay. And did ATEX or Brian McMurray, did they --
16 did -- did either of them provide an infusion of cash -- did
17 they become an investor at some point?

18 A. No.

19 Q. Okay. Were they an investor in Brookhaven?

20 A. No, they were not an investor in Brookhaven, no.

21 Q. Okay. All right. So -- so they just -- they got
22 involved because of they -- they already knew how to
23 manufacture the balloons themselves?

24 A. Correct.

25 Q. Okay. So you enter into this agreement with

1 Sealevel in October of 2014, and let's talk about, like, over
2 the ensuing months, how that relationship went -- I mean, was
3 it -- was it -- was it all successful, was it all problems,
4 was it a mixture -- I mean, what was that like over that
5 period of time?

6 A. I think Tom O'Hanlan said it earlier, this is a
7 research and development project -- I mean, there are things
8 that went right, there are things that went wrong.

9 Q. Uh-huh.

10 A. There are discoveries that you make all along the
11 way. For instance, we discovered even with the Gen One
12 device, that after the balloon had pressed down on that graft
13 for two days, that graft would not spring back open, we
14 thought it would.

15 So what you see in there -- and another component that
16 Sealevel made was a stint or a -- an end of that graph that
17 had a -- a spring in it, so that when you let the balloon
18 off, it would automatically spring back up. That was just
19 part of the iterative learning as you went through the
20 process.

21 Q. Right. But there were setbacks?

22 A. Of course.

23 Q. And we've alluded to a couple of these -- in the
24 fall of 2015, there were issues with the -- the -- some sort
25 of a power drain that so that the handheld wouldn't hold a

1 charge?

2 A. Correct.

3 Q. One we haven't talked about that -- but
4 Mr. O'Hanlon talked about -- you know, this concept of near
5 field technology of the -- the way that the handheld would
6 communicate with a valve in inside the body. Was there a
7 problem with that signal somehow shorting out or getting
8 grounded because of the material that -- that the -- that the
9 internal pump was made of?

10 A. We had to be careful with the kind of material and
11 the thickness of the material that we used in both the
12 handheld and the implantable device, because they had the
13 (inaudible) and they had to send the signal.

14 Q. Right.

15 A. To Sealevel's credit, they were the ones that came
16 up with the concept of using a Near-Field Communication chip
17 in the device, to send that signal.

18 Q. But did -- were there issues with the signal --
19 with -- with the device and the -- and the pump uncoupling at
20 times?

21 A. The magnets were strong enough that they -- if you
22 coupled them together, they were coupled. However, the
23 problem that we had on at least two occasions when we had
24 very big meetings coming up, and they've both been discussed
25 earlier, one was with SC Launch, which is a an organization

1 in South Carolina that I actually work for now, that helps
2 start-up companies get up and running -- provide funding. I
3 had a meeting with SC Launch, they had invested already, as
4 Tom said in CreatiVasc.

5 We also had a meeting with FDA. And in -- in two
6 occasions -- and they were months apart that the handheld
7 simply would not hold a charge. And literally for the FDA
8 meeting, I -- I went into a drugstore, found a 9-volt
9 battery, and held it to the very minute before he went into
10 the meeting and plugged it in. So I knew it would work
11 because the power would drain out of that handheld in a very
12 -- very short period of time in a matter of hours.

13 Q. Okay. So and the jury has seen a -- a
14 specification that Lindsey Sanders Calcutt issued in -- in
15 early 2016, in which the -- there was a request to change it
16 just to -- so there wasn't a rechargeable system. Do you
17 remember that?

18 A. Yes.

19 Q. Okay. And the -- was there -- also -- was there
20 ever a -- a -- a discussion between you and Mr. O'Hanlan
21 about the -- the sensors and who was -- who should have been
22 responsible for the sensors?

23 A. Well, I think the -- as we interpreted the supply
24 agreement, it mentioned the communication between the devices
25 and that is covered -- in our -- in our mind, it was covered

1 under the supply agreement. We had -- we had both early on,
2 Mr. O'Hanlan and myself, we had looked into a company called
3 Sensor Tech, we had looked at several different types of
4 sensors. But again, one of the major issues that has been
5 mentioned is that, again, you have those sensors potentially
6 are being exposed to saline because you're injecting saline
7 or pumping saline in there. So sensors had to survive a
8 sailing environment, and we all know that that's a tough
9 environment to work in.

10 Q. And -- were you ever able to find during this
11 period of 2015, '16 a sensor that would work?

12 A. We never had a handheld that had sensors that gave
13 us a reading on that handheld as to what the pressure was in
14 the device.

15 Q. Okay. So ultimately, you never had a -- a working
16 device that -- that you could continue producing Gen Two?

17 A. Correct.

18 Q. Okay. But your -- you had communications with
19 practitioners -- with people like Dr. Cole, right?

20 A. Correct.

21 Q. And they wanted the -- they wanted this -- the Gen
22 Two device, didn't they?

23 A. You heard from Dr. Cole yesterday, and that was
24 reinforced by local principal investigator at what was it in
25 GHS and now Prisma, Chris Carson. We also heard it from our

1 surgeon and John Hopkins, Dr. Hugh Trout saying, "Hey, these
2 patients come in three times a week and already have two very
3 large needles put in that graft. Is there any way you can
4 make this to where we don't have to stick them two more times
5 at each dialysis session to activate it by injecting saline?"
6 They all wanted a non-needle alternative.

7 Q. Okay. Now, we've already talked about Brookhaven
8 eventually buys or -- or merges with CreatiVasc, and is there
9 some additional funding when that happens?

10 A. There was.

11 Q. Okay. But you all -- you know, time passes and
12 you're still in development and you're still burning through
13 money, right?

14 A. Correct.

15 Q. And eventually, you burned through what Brookhaven
16 was willing to support, correct?

17 A. Correct.

18 Q. All right. And so, ultimately, the fellow Brian
19 McMurray and ATEX end up forming this Diaxamed to buy the --
20 the assets of the Brookhaven Vascular entity?

21 A. Correct.

22 Q. Okay. And -- you -- this is -- and -- and you
23 stayed with Diaxamed for three months, this has already been
24 talked about --

25 A. Correct.

1 Q. -- and then you were -- then you left or you were
2 terminated?

3 A. Correct.

4 Q. And your understanding, at the time that you were
5 terminated, was that Diaxamed was going to focus on the
6 internal implanted device -- that Gen One device, which was
7 still being developed even then, right?

8 A. Correct.

9 Q. Okay. And we've heard from other witnesses about
10 -- about that process, which went on after you left?

11 A. Correct.

12 MR. SHEALY: Okay. All right. Mr. Johnson, I have no
13 further questions. Thank you very much.

14 THE WITNESS: Sure.

15 THE COURT: Re-direct?

16 RE-DIRECT EXAMINATION

17 BY MR. FEW:

18 Q. Did -- did -- did CreatiVasc have any financial
19 obligations on December 30, 2017 -- '16?

20 A. You mean debts?

21 Q. Rent, payroll, insurance?

22 A. Sure.

23 Q. Yeah.

24 A. Sure.

25 Q. Who paid those?

1 A. They were taken over by Brian McMurray and ATEX
2 after December 30th or December 31st.

3 Q. So they took those liabilities?

4 A. Correct.

5 Q. Did you ever have an implant -- a working implant
6 that you could show to Sealevel and say "Make your device
7 work on this"?

8 A. Yes, but I'd like to clarify that. We had a
9 device that would couple and that we could take to the FDA
10 and prove that with the handheld could inflate the balloons.
11 However, it was not to the level of reliability, neither
12 component was, to where we felt comfortable in recommending
13 that we go to either animal trials, certainly not to humans.

14 Q. That was -- I -- I understand that Sealevel had to
15 make a handheld that could communicate and power the internal
16 portion, and there's debate, or their contract says "pressure
17 sensor." So they -- they had, you know, but then you recall
18 Lindsey sent an email in February of 2016 in which she said
19 no more pressure sensor.

20 A. I recall that we had ordered five handhelds for
21 the purpose of testing whether or not they coupled and worked
22 with the implantable device.

23 Q. Do you want me to show you that email?

24 A. Sure.

25 Q. Exhibit 12, you see that?

1 MR. FEW: Can we put that on the screen, please?

2 THE CLERK: Yes.

3 BY MR. FEW:

4 Q. She emails and says "No pressure sensor," and then
5 Sealevel responds back wanting to know why not, don't they?

6 A. Yes.

7 Q. So that was a decision that was made by
8 CreatiVasc?

9 A. That was from Lindsey Sanders to Sealevel.

10 THE COURT: That one there never got published, because
11 you don't have your device there.

12 MR. FEW: It's in evidence, let's publish it real
13 quick.

14 THE COURT: Okay. Turn your device on there right now.

15 BY MR. FEW:

16 Q. So this is where Sealevel is being told that, "You
17 got to do it with no pressure sensor," which Mr. O'Hanlan,
18 who is the technical person, has testified at the stand that
19 -- that it needed a pressure sensor, right?

20 A. Yes. If you look at that total email and you look
21 at points one through nine, it was trying to -- as I can see
22 it here, this was trying to outline what was needed to move
23 the project forward, because at this point, I think there was
24 frustration on the part of both Sealevel and CreatiVasc that
25 it was -- we were not moving forward.

1 It -- it could not charge, we talked about sensors,
2 those sensors weren't working -- and so at this point, I
3 think Lindsey was attempting to simply -- simplify the work
4 which was do -- which Sealevel was doing and concentrate on a
5 -- and a lot a magnetic coupling device that works, and not
6 worry about other -- the other add-on things like the NFC
7 chip and all that.

8 Q. Defendant's Exhibit 8, this is an email from you
9 at the bottom, to Tom. You -- you sent this to Steve Johnson
10 -- well, from Steve Johnson, you say "I sent this to Frank"
11 and you say "It appears we we're nearing the finish line
12 except for a couple of hurdles." Right?

13 A. Uh-huh.

14 Q. You believe that you all are close to getting it
15 done, right?

16 A. Well, it -- look at what's been highlighted, I
17 just --

18 Q. I want to know -- I'm asking you -- you believe --
19 that's what you said right there on February 9, 2016, you
20 said "We believe we're close to the finish line"?

21 A. That was stated there, yes.

22 Q. What you said, and you were still -- this is years
23 after the FDA -- this is the FDA-battery thing that you all
24 keep talking about, that was in November of 2015, wasn't it?

25 A. Correct.

1 Q. Okay. So this is over a year later and you're
2 still having conversations with -- with Tom because you
3 believe that Sealevel can do what they're required to do
4 under the contract, don't you?

5 A. We were hoping that.

6 Q. You believe that up until January the 12th, when
7 you emailed them after Diaxamed took over, didn't you?

8 A. Yes.

9 MR. FEW: That's all the questions I got.

10 THE COURT: Do you have any more?

11 MR. SHEALY: No, this is --

12 THE COURT: I know it is a little different since it
13 was -- so I'll give you some leverage if you need it, but you
14 don't --

15 MR. SHEALY: I'm -- I'm good.

16 THE COURT: Okay. All right. Mr. Johnson, you may
17 step down.

18 THE WITNESS: Okay.

19 THE COURT: All right. Ladies and gentlemen, I think
20 it's time for an afternoon break. So I'm going to let you go
21 back to the jury room, do not discuss the case, I will bring
22 you back out in just a few minutes.

23 (Jury exits room.)

24 THE COURT: All right. 10-minute break.

25 MR. SHEALY: Thank you, your Honor.

1 (Off the record.)

2 (On the record.)

3 THE COURT: Now, just for planning purposes -- you
4 know, we did put on the record? All right. And I -- this is
5 just housekeeping, after we went off the record, we did get
6 the note about that I marked as Court's Exhibit Number 3 that
7 said "Requesting the attorneys to speak louder." I just
8 wanted to put that on the record since we got it, we've
9 marked it as an Exhibit, so -- I think you've done well.

10 (Court's Exhibit 3 marked for identification.)

11 MR. FEW: Thank you, your Honor.

12 THE COURT: They didn't ask me to speak louder, I don't
13 think I've ever had that request. We do and I have a
14 volunteer to be the witness. You have volunteered it all.
15 They like to do those little mock trials where they have
16 these people that get real dramatic and the reading and stuff
17 and I'm getting -- listen, I got courthouse coffee. That's
18 how desperate I get.

19 But in -- in law school, I took -- someone said "You
20 got to take criminal trial practice with John Delgado." And
21 that really was -- you understand that was one of my favorite
22 classes, because every week we have to be prepared to do a
23 real cross. And he -- he didn't -- he -- he held you to it
24 and then you could also be the witness so you could mess with
25 your credit and stuff. It was far. All right. No, he just

1 reacted to the coffee.

2 UNIDENTIFIED SPEAKER: Should I start over with one down
3 here, Judge?

4 THE COURT: A Starbucks sign on the door.

5 UNIDENTIFIED SPEAKER: Well, here's the Starbucks.

6 THE COURT: Yeah, that's right. All right, so we're ready.
7 Did you buy that? I look -- well, I think don't we need to,
8 I need to my copy unless you have, I -- we have one that had
9 -- all right, you do. Just let me just, I -- I've got --
10 I've got it off right now, so...

11 All right, so we state -- and I'll just tell them a
12 little bit about depositions and -- and I'm going to tell
13 them that -- that -- that this is -- I mean, it's pretty
14 lengthy I think when you all said done on this fairly, and
15 yeah, I want to prepare them and let them know that even
16 though this may not be the most entertaining thing and it is
17 very important for both sides.

18 UNIDENTIFIED SPEAKER: Should we put it on the elbow?
19 That way we're both reading about the same thing and then --

20 THE COURT: No, I was just saying for exhibit purposes.

21 UNIDENTIFIED SPEAKER: Yeah, no.

22 THE COURT: All right.

23 UNIDENTIFIED SPEAKER: Be trying to read the part.

24 THE COURT: Right. All right. Bring the jury in.

25 (Jury enters room.)

1 THE CLERK: You all just reading excerpts from the
2 deposition.

3 MR. FEW: Ma'am?

4 THE CLERK: Are you just reading excerpts from the --

5 MR. FEW: Yeah.

6 THE CLERK: -- okay, and who's your first one?

7 MR. FEW: So who do you want to go first?

8 MR. SHEALY: Feldamn.

9 MR. FEW: Okay. John Feldman.

10 THE CLERK: Thank you.

11 MR. SHEALY: So -- and for your purposes -- I mean, I
12 have a copy, hand-marked -- I mean, has my designations
13 highlighted, and then I have hand-marked -- the Plaintiff's
14 and once we're finished I can give it to you just as a
15 Court's Exhibit, does that help you? This is the Plaintiff's
16 case, but I -- I volunteered to do this as a professional
17 courtesy to Mr. Few, I don't even need to tell the jury that.

18 THE COURT: I'll -- I'll tell -- I'll tell him a little
19 bit, but I -- I'll come clear, and that one lady can laugh at
20 everything I say. Yeah, the alternate, she laughed -- so we
21 kind of explained a little bit what's going to -- going to
22 happen now.

23 One of the things that parties do, especially in civil
24 cases, is they take due depositions, and those are sworn
25 statements that are taking -- and you've seen some reference

1 to these already. And those are depositions that they're
2 statements taken with a court reporter both sides are there,
3 and there's -- there's questions asked, and they're under
4 oath just like they would be under oath if they were here.

5 Now, what happens, too, is at some point, parties have
6 the right to present those portions of depositions to the
7 jury, and -- and that's what's going to happen now. But in
8 presenting that, you have to figure out ways to do that.
9 Sometimes it's by way of video, sometimes it is the parties
10 -- the attorney's reading the deposition to you and sometimes
11 -- which is what they've agreed to do here, is they kind of
12 act -- even though, they kind of act out the fact that one
13 person is a -- is the witness and one the -- the attorney's
14 asking the questions.

15 So -- which is going to be a little bit odd about this
16 is -- this is Mr. Few's case, and he'll be the one asking
17 questions and Mr. Shealy has agreed to sit and read the
18 answers, and these are all -- and there may be a little bit
19 of jumping around, because one of the things during our
20 breaks is we -- we try to determine exactly what was
21 relevant, what wasn't -- and -- and -- so that the whole
22 deposition doesn't come, it'll be excerpts.

23 And so, there may be -- seem like some jumping around,
24 that's because we've agreed what we present to you all is the
25 relevant information. So it is like I said, it's going to be

1 a little bit -- that's why it's going to be a little bit odd
2 that you have a -- the lawyer actually reading the answer,
3 but these are -- he's just reading the answers from a
4 transcript and a deposition.

5 And for your purposes, though, a deposition is sworn
6 testimony and is taken under our rules of evidence and our
7 rules of civil procedure that apply to this Court. So for
8 your purposes, you're to treat this testimony the same as if
9 that witness were sitting in this witness box and sworn, so
10 that's kind of like a preface.

11 And I will also tell you that sometimes when you have
12 these kind of readings, it's a little drier than normal lie
13 testimony, and I just -- I just tell you that a little in
14 advance, but I also want to let you know this is very
15 important for both sides, but I did kind of want to warn you
16 on that. So with that being said --

17 MR. FEW: Your Honor, can I make a little introductory
18 to my questioning as well?

19 THE COURT: Yes.

20 MR. SHEALY: (Inaudible) you go on there, this is
21 Feldman, right?

22 MR. FEW: Correct.

23 MR. SHEALY: Mr. Feldman, let's get you sworn.

24 THE COURT: What you would do is you need to -- I
25 guess, reference the swearing-in at the -- at the --

1 MR. FEW: Okay.

2 THE COURT: If you want to reference that as the -- the
3 date it was taken, and then I have to redo this form.

4 MR. FEW: All right. So -- and before we go into it, I
5 want you all to understand that the two of us designate these
6 not knowing everything else that's coming into evidence, so
7 some of this is going be stuff you've already heard, please
8 don't hold that against either one of us, but it's just
9 easier than -- than taking it out.

10 (Read testimony starts.)

11 DIRECT EXAMINATION

12 BY MR. FEW:

13 Q. Mr. Feldman, do you recall having your deposition
14 taken --

15 MR. SHEALY: So Mr. Few, I -- I think as I understood
16 the judge's instruction, we need to just let them know this
17 was -- this deposition was taken June 1, 2023, and the -- and
18 Mr. Feldman was sworn before he began testifying.

19 MR. FEW: Got it.

20 MR. SHEALY: Okay.

21 BY MR. FEW:

22 Q. All right. Good morning, Mr. Feldman. Wesley
23 Few, we've never met before, I don't believe, have we?

24 A. We have not, Mr. Few.

25 Q. And thank you for being here with us by way of

1 Zoom. It's always better to do it in person, but I
2 understand you are in Florida, I believe.

3 A. I am.

4 Q. All right. What part of Florida are you in now?

5 A. I live in North Palm Beach.

6 MR. SHEALY: I'll give you page 9.

7 MR. FEW: Page 9, line 8.

8 BY MR. FEW:

9 Q. I'm sorry, what did you do when you graduated high
10 school?

11 A. I went to the University of Georgia.

12 Q. And did you get -- get a degree from Georgia?

13 A. I'm about 25 hours short.

14 Q. How long were you -- during what period of time
15 were you a student at Georgia?

16 A. I started in the fall of '66, I was there until
17 probably '71, then I left for a while, went to Atlanta with
18 the work, and then I came back in 1979 for a year, and so two
19 different periods of time.

20 Q. So tell me about your professional life -- work
21 life, after 1971, roughly to say '79, just trying to break
22 things up a little bit.

23 A. I went to work in the early '70's as a commercial
24 real estate broker, and then I got into real estate
25 development.

1 Q. And so, you got some type of licensing credential
2 from the state of Georgia related to real estate, correct?

3 A. I have a real estate agent license.

4 Q. Do you still hold any type of real estate license?

5 A. No.

6 Q. During what period of time did you hold a real
7 estate license?

8 A. In the early '70's.

9 Q. And where were you living in the '70's?

10 A. In Atlanta.

11 Q. Who were you working for?

12 A. I started out working for a man named "Harvey
13 Lewis" who had a commercial brokerage firm, and after about a
14 year there, I went out on my own and started putting together
15 some real estate partnerships and doing some development.

16 MR. FEW: Now, I've got -- it's going to page 14, line
17 5?

18 MR. SHEALY: Correct.

19 BY MR. FEW:

20 Q. Okay. How long did you stay in Atlanta from the
21 early 70s going forward?

22 A. Atlanta was my home base until two years ago.

23 Q. Okay. 2021, you left sometime after COVID hit?

24 A. Correct.

25 Q. And are you still working in the field that you

1 were in over the last 10 years or so?

2 A. Well, the last 26 years, I have been mainly
3 involved in health care, and, yes, I am still active in that
4 space.

5 Q. Okay. 26 years ago then you got into health care,
6 that would've been, what, 1997 sometime?

7 A. The first transaction I did was in 1996.

8 Q. Okay. And tell me just a little bit about that.

9 A. I had been working prior to that as an investment
10 banker, and I had resigned from that position, and I was
11 looking for a project to get involved in. And a friend of
12 mine in Texas introduced me to a small medical
13 device-manufacturing business, and I met the founder of that
14 company and he and I hit it off. Business-wise, he was doing
15 some very interesting work, so he needed some help, so I
16 helped him raise some capital, and that was the transaction
17 that actually got me into the medical device business.

18 Q. Is it fair to say that your specialty or what you
19 have been doing for the last 26 years is primarily --
20 primarily related to identifying opportunities and raising
21 capital?

22 A. And building and running companies in several
23 instances. I built four businesses during that time frame.

24 Q. Health care businesses?

25 A. Yes.

1 Q. What were the names of those?

2 A. Well, the first one was the company in Texas, it
3 was called "Future Matrix Interventional." I did several
4 rounds of capital raising for that company, including an
5 institutional round in 1999. And when we closed that
6 funding, the CEO/founder of the company invited me to join
7 his board, which I did. He then introduced me to a doctor in
8 Germany who had done a lot of consulting work with him.

9 And with that gentleman, I then started a company
10 called -- that still exists, that became a company called
11 "Celonova Biosciences," and we started that company to
12 acquire rights to -- and to develop a polymer coating for
13 implantable medical devices. And then, I wound up selling
14 control of that company in the spring of '04.

15 I then started another company, this was an orthopedic
16 medical device company called AOI Medical, which later became
17 -- what did we change the name of it to? Well, it was AOI,
18 and we were developing a new -- we had learned a lot about
19 balloon technology from the company in Texas, which did a lot
20 of proprietary balloons. So I had an idea to adapt one of
21 those balloon technologies to treating a condition called
22 kyphosis, which is osteoporotic spinal fractures. And so, we
23 did the R&D in that company, took it all the way through FDA
24 approval and then moved on there.

25 Then I ultimately -- through all of that time, I was on

1 the board of the Texas company, the manufacturing business,
2 and had developed a very close friendship with the founder,
3 and I had a sense that he was looking toward retirement. So
4 -- you know, on a handshake, I made a deal with him to
5 acquire that business, and I went out and created Brookhaven
6 Medical, as a vehicle to acquire that business and putting
7 the capital together to do that acquisition.

8 Q. That was in -- what time period did that begin,
9 the acquisition of Future Matrix?

10 A. It was literally a handshake deal. He wasn't
11 willing to sign a contract until I had the capital assembled,
12 which took me the better part of a year, but I trusted him,
13 so I undertook the project anyhow. And then, when I did, we
14 entered into a contract and consummated the deal, but that
15 would've been about -- I think it was 2014 when we started
16 that -- it might have been 2013.

17 MR. SHEALY: And Mr. Few you continue on -- continue on
18 until at the top.

19 BY MR. FEW:

20 Q. So when you say "capital raise," did you have a
21 law firm prepare all of the necessary disclosures related to
22 this one?

23 A. Yes.

24 Q. And that would consist of primarily a Private
25 Placement Memorandum would be the ultimate need; is that

1 right?

2 A. Yes.

3 Q. And who did that work for you to raise the money
4 for the Future Matrix capital in the 2014 time period?

5 A. That would've been Bob Achenbach -- Robert
6 Achenbach was my attorney during that time.

7 MR. FEW: And is it --

8 MR. SHEALY: Page 19, line 2 through 5.

9 BY MR. FEW:

10 Q. And what was this gentleman's name again?

11 A. The founder of Future Matrix?

12 Q. Yes.

13 A. His name was Jim Passmore.

14 MR. FEW: And that was 26, 14?

15 MR. SHEALY: Yes, sir.

16 BY MR. FEW:

17 Q. Okay. Who is -- there was some fellow named
18 Hutchins that sent some documents that were produced,

19 A. I think you're referring to Fred Hutchison.

20 Q. Yeah. What was his role in the matter?

21 A. When I first met Fred, he was counsel for our
22 largest investor in Brookhaven Medical.

23 Q. Who was that?

24 A. That gentleman was named Brian McMurray.

25 Q. When did you get to know Mr. McMurray?

1 A. Around 2015.

2 Q. All right. His name came up yesterday, he's the
3 fellow that owned Diaxamed; is that right?

4 A. I believe that's correct.

5 Q. And what's his background, if you know?

6 A. Brian owns a company up in -- I think it's
7 Pinebluff, North Carolina, not far from Pinehurst. He owns a
8 company called ATEX, A-T-E-X, Technologies.

9 Q. And what does that company do?

10 A. He develops and manufactures pretty advanced
11 textile components of medical devices.

12 MR. SHEALY: So page 28?

13 MR. FEW: 28, line 8?

14 MR. SHEALY: Correct.

15 BY MR. FEW:

16 Q. Okay. So 2015 -- '14 and '15, you're working on
17 raising the money to effectuate the handshake deal that you
18 have with Jim Passmore; is that right?

19 A. Correct.

20 Q. Okay. So what were the legal documents that were
21 prepared and used in order to handle the equity side of that?

22 A. As I recall, we ultimately wound up having a PPM
23 prepared.

24 Q. Was that by Achenbach?

25 A. It would've been, yes.

1 MR. FEW: And then, page 30, line 12?

2 MR. SHEALY: Correct.

3 BY MR. FEW:

4 Q. Now what about -- what role, if any, did McMurray
5 play in that transaction?

6 A. In which -- in the original acquisition?

7 Q. No, the 2015 -- the one that we've been talking
8 about just most recently that you just said involved equity
9 and there was a PPM, and then 17 million was provided from
10 SunTrust.

11 A. We issued new equity to our investors, as I
12 recall, I think we did a Series A Preferred, and McMurray was
13 an investor in that offering, that was part of the capital
14 stock stack that we put together to do the transaction.

15 MR. FEW: Can we keep going?

16 MR. SHEALY: We do.

17 MR. FEW: For all the way to the bottom?

18 MR. SHEALY: Yes.

19 MR. FEW: Okay.

20 BY MR. FEW:

21 Q. And approximately -- so there was a Series A, what
22 were the other options available to investors?

23 A. The new money came in, the Series A Preferred. We
24 also had common stock, all of my stock was common stock as
25 founder stock, and if I recall correctly, the existing Future

1 Matrix investors who stayed in the deal, I think, we -- the
2 -- the offer we made them was to exchange their stock for
3 common stock. And then, as we were putting the transaction
4 together along the way, I had met Steve Johnson and we liked
5 -- we were intrigued by what he was doing in CreatiVasc.

6 So we wound up -- he needed some support, and we were
7 intrigued by the work he was doing, so we wound up doing a
8 transaction to acquire CreatiVasc. And for the CreatiVasc
9 acquisition, we made a commitment to fund their R&D work for
10 a period of time to their shareholders, and we acquired the
11 old equity -- we acquired the equity of CreatiVasc, their
12 shareholders in exchange for a Series B Preferred, which was
13 junior to the series A.

14 Q. So the money -- I'm trying to put all of this
15 together. The money that you raised since it was Series B, I
16 guess it was part and parcel of the same opportunity as the
17 Series A, is that a fair statement?

18 A. Well, it was an opportunity. I think it's a fair
19 statement to say that the owners of CreatiVasc had made a
20 significant investment in CreatiVasc, but they had basically
21 run out of gas -- CreatiVasc had.

22 At the time we met them, they needed funding, we agreed
23 to provide funding to them for -- I think we made a
24 commitment to fund it for three years, which we did. But in
25 exchange for that, we wanted to own it. So a condition of

1 the transaction was that they had to agree to -- you know,
2 exchange their CreatiVasc equity for new series B equity in
3 Brookhaven, and that was all part and parcel.

4 When we wound up having to closing and acquire Future
5 Matrix, we simultaneously acquired CreatiVasc as well, it was
6 all tied up in one transaction.

7 MR. FEW: And we'll keep going to --

8 MR. SHEALY: Page 33, line 13.

9 BY MR. FEW:

10 Q. Okay, so there was one Private Placement
11 Memorandum done for all of that fundraise?

12 A. That's my recollection, yes.

13 Q. And McMurray was on the consumption side of that
14 one, is that a fair statement? Or were his people involved
15 in preparing the PPM, or was he just someone that was putting
16 his money into it?

17 A. He was just someone putting his money into it.

18 Q. So what happened to CreatiVasc?

19 A. After the closing?

20 Q. Yes.

21 A. We kept our commitment to CreatiVasc to -- I think
22 over the three-year period, we had agreed to fund about \$5
23 million, and I think ultimately at the end of the day, we
24 funded a bit more -- a little bit more than that, but you
25 know, CreatiVasc was an R&D project at that point and we --

1 you know, we gave Steve pretty free rein -- you know, to run
2 his business.

3 MR. SHEALY: Page 36.

4 MR. FEW: 36, line 7?

5 MR. SHEALY: Yes, sir.

6 BY MR. FEW:

7 Q. So what remains of Brookhaven Medical?

8 A. The only thing remaining is Brookhaven Medical
9 Inc. itself, which we have kept. We wound up shutting down
10 CreatiVasc -- well, we stopped funding it. We wound up
11 selling the contract manufacturing business, and then
12 Mr. McMurray had certain rights to acquire our rights
13 remaining at CreatiVasc, which he exercised.

14 So that left us -- the -- the only thing he had
15 remaining as an asset was two different notes payable to us
16 over time from the company that acquired the contract
17 manufacturing business, and we have kept the legal entity
18 alive for the sole purpose of receiving those note payments,
19 which have about another two years to run. And I'm sure that
20 once we finally receive final payoff on those notes, we'll
21 probably shut down Brookhaven Medical Inc.

22 MR. FEW: Go down to 37, 24.

23 MR. SHEALY: Actually --

24 MR. FEW: That's (inaudible).

25 MR. SHEALY: Yeah, so it's -- it's 39 line 14.

1 MR. FEW: Okay. Thank you.

2 BY MR. FEW:

3 Q. So what were the basic terms of the handshake deal
4 you had with Passmore to come up with 27 million?

5 A. No, we had an agreement. We had put a price on
6 the deal and it was actually a multiple of EBITDA, and I
7 think if memory serves, we were acquiring the company for six
8 times EBITDA.

9 Q. And what did that quantify to, if you can recall?

10 A. It was close to 30 million.

11 MR. FEW: And I think we're at --

12 MR. SHEALY: Page 46.

13 MR. FEW: 46, line 7?

14 MR. SHEALY: Yes.

15 BY MR. FEW:

16 Q. What about any of the -- so that everybody that
17 was an owner of CreatiVasc stock got series B preferred in
18 Brookhaven Medical; is that right?

19 A. The shareholders of CreatiVasc when we made the
20 acquisition exchanged their CreatiVasc stock or Series B
21 Preferred in Brookhaven Medical, correct.

22 Q. What was the value of those Series B shares in
23 Brookhaven Medical?

24 A. Zero.

25 MR. SHEALY: And then, we go to page 49.

1 MR. FEW: 24.

2 MR. SHEALY: Correct.

3 BY MR. FEW:

4 Q. So tell me about how you first met Steve Johnson
5 and then what do you recall about the lead up to March 5,
6 2015 closing when you all became the owners of CreatiVasc?

7 A. Steve and I met at a medical device conference in
8 Atlanta, where he was making a presentation, and he was
9 looking for capital, and I was in the audience and I was
10 impressed and intrigued by what he was working on. And it
11 involved some pretty advanced balloon technology, and our
12 company in Texas was not just a contract manufacturer, but we
13 also were very -- we had a great bunch of engineers that were
14 really good at developing some very advanced proprietary
15 balloon technologies, and I felt like there was a good chance
16 that we could have added value to that.

17 So I met Steve, we chatted and I think two days later,
18 I drove up to Greenville and -- you know, spent a half a day
19 with him, and -- you know, consulted with a couple of my
20 advisors after that, and everybody thought it was an
21 interesting project. And -- so we then fairly quickly
22 proceeded to get into serious discussions and made that part
23 of our deal.

24 MR. SHEALY: April on page 57?

25 MR. FEW: 57, 7?

1 MR. SHEALY: Yes, sir.

2 BY MR. FEW:

3 Q. Okay. What involvement -- let's talk about your
4 involvement in CreatiVasc once Brookhaven got involved in
5 March of 2015. You -- you met with Steve Johnson, right?

6 A. Yeah, I met with Steve. We -- you know, I kept
7 him frequent touch with Steve, but I kept him on a pretty
8 loose leash for probably the first 18 months or so. He
9 appeared to be making progress, but you know, I was not
10 involved in the day-to-day operations of what he was doing.
11 I might have seen him maybe once every month or two. He did
12 sit on our board at Brookhaven Medical, that was part of the
13 transaction that we did with a CreatiVasc shareholders. We
14 agreed to give them a board seat on Brookhaven's board, and
15 so he did attend our quarterly -- but you know, I sort of let
16 him do his thing.

17 Q. You met Tom O'Hanlan at some point in time, right?

18 A. To the best of my knowledge, I'm not sure I ever
19 met Mr. O'Hanlan, I don't have any recollection of ever
20 meeting him.

21 Q. You became aware of Sealevel's involvement and
22 their contractual relationship with CreatiVasc at some point,
23 right?

24 Q. Steve shared with me, at some point, that he told
25 me a little bit about Sealevel, that they had approached him,

1 that they wanted to be involved in our project and felt like
2 they could create a product that could help us with what we
3 were doing. To -- as I recall, their device was being
4 developed to help us open and close a CreatiVasc graft using
5 magnets, and that -- there was -- it was my understanding --
6 and again, to be candid, I don't think I ever actually saw
7 the -- in fact, I know I never saw the document, never
8 reviewed the document, I was letting Steve handle this.

9 But it was communicated to me by him that -- you know,
10 they had volunteered and wanted to be involved and they felt
11 they could develop the product, but -- and the deal was that
12 if they -- if they developed a product that worked, that --
13 then there would be further negotiations to discuss what the
14 pricing would be, but the reality was they never developed a
15 product that worked, so...

16 MR. FEW: Keep going for the next 9, 11?

17 MR. SHEALY: Correct.

18 BY MR. FEW:

19 Q. When would Steve have started working with
20 Mr. Achenbach?

21 A. Well, after we acquired CreatiVasc, I'm sure Steve
22 had some interaction with Bob, but not a lot. I mean, again,
23 as I recall, I think Steve was continuing to use a Greenville
24 law firm -- and I know he was using a Greenville patent
25 attorney for his IP work. So -- you know, we were -- again,

1 we were giving Steve free rein to -- you know, run his
2 business.

3 MR. SHEALY: Right. So I think we're at page 61, line
4 17.

5 BY MR. FEW:

6 Q. Did there ever arise any concerns over the
7 ownership to the right to practice the hemo-access device
8 that CreatiVasc was developing?

9 A. Not that I recall.

10 MR. SHEALY: On page 72.

11 MR. FEW: 72, 16.

12 MR. SHEALY: Yes, sir.

13 BY MR. FEW:

14 Q. So you had testified that you kind of let Steve
15 run it, and did you ever have any discussions with Steve
16 about the development work being done by my client, Sealevel?

17 A. Only at a very superficial level. Literally -- as
18 I told you earlier, when he shared with me that he had been
19 approached by them that they wanted to be involved in the
20 project, they thought they could create a device to open and
21 close the graft, and that -- you know, basically they -- they
22 wanted to come to the party and Steve was willing to let them
23 work on it. And if they could create a product that worked,
24 we would've been interested in using it, but again, they
25 never successfully created a product that worked.

1 MR. SHEALY: 75 --

2 MR. FEW: 75, 15.

3 MR. SHEALY: Yes, sir.

4 MR. FEW: Is that right?

5 MR. SHEALY: Yes, sir.

6 BY MR. FEW:

7 Q. Tell me what you recall about the decision that
8 Brookhaven -- that would've been you and who else would've
9 been involved in sort of deciding to pull the plug on the
10 CreatiVasc enterprise?

11 A. Well, it was nothing more or less than Steve
12 wasn't hitting his benchmarks either, and it kept getting
13 longer and longer and longer, and to be candid -- you know,
14 we just lost confidence in the project, and -- you know,
15 we're concerned that it just wasn't going to work period.
16 And by that point, when we did pull the plug on it, we had
17 other bigger pressing financial concerns of our own that we
18 were having to deal with. So we didn't have the luxury of
19 continuing the CreatiVasc project even if we had wanted to.

20 MR. SHEALY: So page 79, line 24.

21 BY MR. FEW:

22 Q. So were you ever made aware of my client sending
23 the communication to Brookhaven asking to be reimbursed for
24 the time that they had committed to the project?

25 A. Yes.

1 Q. Okay. What do you recall about that?

2 A. I recall we received an invoice, I don't recall if
3 it was sent first to Steve and then he sent it to us or if it
4 was sent direct to us, but one way or another, we were made
5 aware of an invoice from your client, and that's when I
6 picked up the phone and asked Steve and said "What's this?"
7 And he told me that -- you know, there never -- there had
8 never been -- there was never any agreement to cover your
9 client's R&D expense, that there was an agreement as we
10 understood it, that if they created -- your client created a
11 device that worked that we were interested in using it. But
12 again, it's always been represented to me that they never got
13 a product that worked, so it was all a moot point.

14 So we felt like your client was asking us to pay for
15 their work that failed to create a successful product. And
16 that's why I told Mr. Achenbach to send them a letter saying,
17 "No, we don't think -- we don't think we owe you this," so --
18 and that was the end of it.

19 Q. Well, let me show you the letter that I'm aware
20 of, so I'm going to share my screen, bear with me. I'm going
21 to go with just one page. Tell me if you can see that
22 document, Mr. Feldman?

23 A. Yeah, I see it

24 Q. And try to --

25 A. And I can read it.

1 Q. Okay. It's a letter dated June 28, 2017, and
2 before I even ask you to read it or anything, is this the
3 letter that you -- do you think this is the letter that you
4 were testifying about a minute ago when you told
5 Mr. Achenbach sort of how to respond?

6 A. Yes.

7 MR. SHEALY: And then, we'll go to page 83, line 5.
8 BY MR. FEW:

9 Q. Right, because neither you nor Brookhaven had any
10 interest whatsoever in CreatiVasc or Brookhaven Vascular
11 after December 30, 2016?

12 A. I believe that's correct.

13 Q. And whatever remained of CreatiVasc and Brookhaven
14 Vascular, and their intellectual property and their patent
15 portfolio, trademark portfolio was acquired by Diaxamed?

16 A. To the best of my knowledge, yes.

17 Q. And I believe you said earlier that your belief is
18 Brian McMurray was the 100-percent owner of Diaxamed?

19 A. Again, to the best of my knowledge, yes.

20 Q. He's the 100-percent owner of ATEX, I believe you
21 said that too, right?

22 A. That's correct.

23 MR. SHEALY: And page 90 on 5.

24 BY MR. FEW:

25 Q. So you just relied on what Mr. Johnson told you

1 was the scope and extent in terms of the agreement with
2 Sealevel?

3 A. That's correct.

4 Q. But you knew it wasn't a handshake deal, right?

5 A. Initially I did not. I mean, I -- if there had
6 been any material-binding contract, I think I would've been
7 made aware of it before and probably would've had to have
8 approved it before that was entered into, so...

9 Q. Well the contract that I showed you, we can go
10 back to the screen share, it was executed on October 28,
11 2014, which was several months before Brookhaven took the
12 official legal interest in CreatiVasc on March 5, 2015,
13 right?

14 A. If those dates line up, I would agree with you --
15 with that, yes.

16 MR. SHEALY: And then, page 92, line 8.

17 BY MR. FEW:

18 Q. Well, you seem to recall that he negotiated
19 himself into a position that enabled him to just buy
20 CreatiVasc from Brookhaven for roughly 250,000 in December of
21 16, right?

22 A. Yes. But he did that, I think -- in the context
23 of it, he began to fund the CreatiVasc project when we no
24 longer had the interest or the resources to do it, so --

25 Q. And you believe that he was funding the CreatiVasc

1 project even before he did that closing on December 30, 2016,
2 right?

3 A. I think Diaxamed was created prior to that, yes.

4 Q. Well -- I mean, Diaxamed was just the vehicle for
5 McMurray to take ownership, right?

6 A. That's my understanding, yes.

7 Q. Do you know if the money -- what was provided
8 prior to the closing was pursuant to some type of loan from
9 Diaxamed or was it just provided as, like, a handshake or
10 verbal agreement?

11 A. I don't have any recollection of the specifics of
12 how that was done.

13 Q. Because basically after the two-day conference in
14 Athens, you guys weren't going to pay Johnson and all the
15 salaries anymore, right?

16 A. That's basically correct. I don't recall the
17 specifics of when we cut everything off, but I do remember
18 that -- that being the day that I made the decision myself,
19 that -- you know, "I didn't want to support this going
20 forward."

21 Q. The runway was getting longer and longer, right?

22 A. Correct.

23 Q. Okay. And as far as my client is concerned, you
24 just relied on what Steve Johnson told you?

25 A. That's essentially correct, yes.

1 Q. So you're not really aware of the scope of work
2 that Sealevel was engaged in with CreatiVasc because you
3 never saw the agreement, right?

4 A. That's correct.

5 (Read testimony ends.)

6 MR. SHEALY: I believe that is the end.

7 MR. FEW: Amen.

8 THE CLERK: Who's next?

9 MR. SHEALY: Brian McMurray.

10 THE COURT: All right. Ladies and gentlemen, this is
11 going to be the second deposition. Again, the same things I
12 told you earlier apply to this one this way.

13 MR. FEW: Okay. So for the record, this was a
14 teleconference Zoom deposition of Brian McMurray that
15 occurred on Thursday, November 2, 2023, and we're starting on
16 page 4, line 17; is that right?

17 MR. SHEALY: Actually, yes. That's right.

18 MR. FEW: Correct.

19 (Read testimony starts.)

20 DIRECT EXAMINATION

21 BY MR. FEW:

22 Q. Thank you. Good morning, Mr. McMurray. My name
23 is Wesley Few, I'm a lawyer in Greenville, South Carolina,
24 and I don't think we have ever met before, have we?

25 A. Not that I'm aware of.

1 Q. Do you recall ever meeting Tom O'Hanlan or anybody
2 involved with Sealevel?

3 A. I do not.

4 MR. FEW: And we'll go to 12, line 6.

5 MR. SHEALY: Correct.

6 BY MR. FEW:

7 Q. So, Diaxamed got involved -- I think, according to
8 the documents around December 30, 2016; is that right?

9 A. That sounds correct.

10 Q. Okay. And who is -- or who are the owners of
11 Diaxamed?

12 A. DXM Holdings?

13 Q. Who is that?

14 A. That's an LLC, that's a holding company.

15 Q. Who are the owners of DXM Holdings?

16 A. My family now owns DXM Holdings.

17 Q. And when you say your family, who all does that
18 encompass?

19 A. My wife and I.

20 MR. FEW: Do we do the next one -- the next two lines
21 or we --

22 MR. SHEALY: The next two lines.

23 BY MR. FEW:

24 Q. Okay. Anybody else?

25 A. No.

1 MR. SHEALY: On page 16, line 20.

2 BY MR. FEW:

3 Q. So how long has ATEX been in business?

4 A. Started in '99, 2000 time frame, so what's that?
5 23 years.

6 Q. Was it started by you?

7 A. Yes.

8 MR. SHEALY: And then, page 20, line 7, in the middle
9 of that line.

10 BY MR. FEW:

11 Q. So ATEX at some point in time -- like you've
12 testified, became involved or made -- made contact or was
13 contacted by CreatiVasc at the trade show and you thought --
14 that you thought was in Boston, but you're not sure -- you're
15 pretty sure that was the first contact with CreatiVasc?

16 A. Yes.

17 Q. And it was CreatiVasc at that time, right? It was
18 not under the Brookhaven name or anything like that?

19 A. That's correct.

20 MR. FEW: We go to line 21?

21 MR. SHEALY: Correct.

22 BY MR. FEW:

23 Q. And so, I'm not sure how big or what the chain of
24 command is, but at some point in time, you then became aware
25 of an opportunity to become involved as like a collaborator

1 on product development with CreatiVasc, is that what the
2 initial focus was?

3 A. To collaborate on a component of their device,
4 that's correct.

5 Q. And which component was that?

6 A. It was the actual valve assembly.

7 Q. And what would that be made up of?

8 A. Well, it went through -- you know, different
9 iterations, but kind of the iteration that was landed upon
10 was a balloon inside of the valve assembly. The initial
11 iteration, they were actually collapsing the shunt down and
12 they found out that it wouldn't open back up, but they tried
13 some things to get it to open up, but it didn't work, so they
14 changed the direction.

15 Q. So what was the first work -- were you involved in
16 the decision for ATEX to get involved in that collaborative
17 process?

18 A. Yes.

19 Q. To address the valve assembly?

20 A. Yes.

21 MR. SHEALY: So then we move to page 27, line 19.

22 MR. FEW: 27?

23 MR. SHEALY: I'm sorry, 22.

24 MR. FEW: I think we might skip it.

25 BY MR. FEW:

1 Q. I'll figure that out. And who was the first
2 person that you can recall dealing with that CreatiVasc?

3 A. We dealt with Frank Patterson. I may not have
4 dealt with him -- I met Frank, but my people would have --
5 you know, he was the main contact.

6 Q. When Diaxamed took over on basically December 30,
7 2016, did Frank Patterson stay on?

8 A. Not -- if he did, it wasn't for a long period of
9 time. I -- I don't recall.

10 Q. At some point in time, you met Steve Johnson,
11 right?

12 A. Yes.

13 Q. And he was more of the business contact for
14 CreatiVasc, is that a fair statement?

15 A. Yeah, I would say that characterizes it pretty
16 well.

17 MR. FEW: Line 21?

18 MR. SHEALY: Yes.

19 BY MR. FEW:

20 Q. Okay. And did he -- the relationship between
21 Diaxamed and Johnson was terminated, I believe around March
22 30, 2017, does that sound right?

23 A. Yes.

24 MR. FEW: All right. So then we move to page 31, line
25 3.

1 BY MR. FEW:

2 Q. And then, when Diaxamed -- excuse me, and then
3 when did Diaxamed begin working on the hemo-access device?

4 A. It would've been the January after the
5 transaction, and -- you know --

6 Q. Because Diaxamed was formed for the purpose of
7 acquiring the assets of CreatiVasc and -- or Brookhaven; is
8 that right?

9 A. Yes.

10 Q. And so, the effort to develop the hemo-access
11 device is continuing?

12 A. Yes.

13 Q. Okay. And has Diaxamed generated any revenue from
14 sales?

15 A. No.

16 Q. Has Diaxamed generated any revenue from any source
17 since its inception?

18 A. No.

19 MR. FEW: All right. 32, 2?

20 MR. SHEALY: Yeah.

21 MR. FEW: All the way to 25?

22 MR. SHEALY: Correct.

23 BY MR. FEW:

24 Q. That would be something that would be in the books
25 and records of Diaxamed, though, right?

1 A. Yes.

2 Q. And then, that would be the only -- all the
3 contributions have come from you and your wife by way of DXM
4 holdings, is that a fair statement?

5 A. Yes.

6 Q. And has there been any discussions of
7 discontinuing the effort to develop the hemo-access device?

8 A. Not specifically. We are pursuing the path to --
9 you know, prove out -- you know, will the actual therapy work
10 or not, and you know, we've continued to go down that path,
11 so we want to obtain that answer if it's at all possible.

12 Q. So what -- I want to ask you about what you know
13 about the product -- the hemo-access product that is being
14 developed currently, are you involved in that?

15 A. Yes.

16 Q. And Diaxamed has taken over ownership of all the
17 intellectual property of CreatiVasc?

18 A. That's correct.

19 MR. SHEALY: And we go to page 34, line 9.

20 BY MR. FEW:

21 Q. So generically, how is the device that's being
22 developed now differentiated or different at all from what
23 CreatiVasc was doing -- CreatiVasc, Brookhaven up through the
24 end of 2016?

25 A. Well, the valve assemblies are -- you know, have

1 been completely re-engineered and we have a different
2 cannulation chamber, but -- you know, we're still using a
3 needle and a subcutaneous port to activate the balloons.

4 Q. A needle and a subcutaneous port, so are you
5 familiar with the work that Sealevel had done as part of its
6 customer supply agreement with CreatiVasc?

7 A. Only a cursory knowledge.

8 Q. Are you aware of whether or not I -- whether or
9 not Diaxamed is currently using any of the technology that
10 was developed by Sealevel?

11 A. Diaxamed is not using any of that.

12 Q. Had Diaxamed ever used any of that technology
13 since its inception?

14 A. No.

15 Q. So Diaxamed has been using the -- what's the
16 difference between what Diaxamed is doing now versus what
17 CreatiVasc Brookhaven was doing as it related to Sealevel's
18 development or contributions to the product?

19 A. My cursory understanding was they were working on
20 some sort of pump and some way to connect the pump to be able
21 to pump it up and pump it down. And like I said, our focus
22 has been on using a subcutaneous port, using a needle to fill
23 an empty port.

24 MR. SHEALY: Continue on?

25 MR. FEW: Keep going.

1 MR. SHEALY: Yes.

2 BY MR. FEW:

3 Q. That would be the original thing that Dr. Cole was
4 working on.

5 A. They -- they evolved to a port, that is correct --
6 I mean, I think they tried some other things, but yes.

7 Q. So initially ATEX had a customer supply agreement
8 with CreatiVasc; is that right?

9 A. Yes.

10 MR. SHEALY: All right. So then we're down to page 37
11 line 24.

12 BY MR. FEW:

13 Q. And did they do some due diligence prior to the
14 investment that was made in Brookhaven?

15 A. They did what they would normally do when looking
16 at making an investment.

17 Q. And what's your understanding of what that would
18 be?

19 A. One: We checked to make sure that -- you know, the
20 company was sound, it didn't have -- you know, any legal
21 problems -- you know, check on -- you know, other things that
22 are out there in the -- you know, in the public domain.

23 Q. Wouldn't they also want to review all of the
24 contracts and obligations of the entity that they were
25 investing in?

1 A. Not necessarily.

2 MR. FEW: 39, 19?

3 MR. SHEALY: I think that's right. 39, 19.

4 BY MR. FEW:

5 Q. So your attorneys did the due diligence -- let me
6 go back and make sure I have a better understanding of the
7 timeline. So your attorneys did some due diligence prior to
8 the initial investment that was made in roughly 2015; is that
9 right?

10 A. That's my estimate.

11 MR. SHEALY: And you go to page 40, line 18.

12 BY MR. FEW:

13 Q. And who did you communicate with at Brookhaven in
14 order to become aware of the opportunity to make that
15 investment?

16 A. John Feldman.

17 Q. How did you come to know him?

18 A. I think Steve Johnson introduced him to me.

19 MR. SHEALY: And on to page 42, line 9.

20 BY MR. FEW:

21 Q. This is February 18, 2015, a document between an
22 agreement between ATEX Technologies Inc., and CreatiVasc
23 Medical Inc., did you see that?

24 A. Yes.

25 Q. Is this the supply agreement that you were

1 referring to?

2 A. It does -- I'm sorry, it looks like it, yes.

3 MR. SHEALY: Then page 45, line 11.

4 MR. FEW: Start at 11?

5 MR. SHEALY: Correct.

6 BY MR. FEW:

7 Q. Next I want to show you this document that was
8 Exhibit 11 to some request for admission called a
9 Contribution Agreement dated December 30, 2016, can you see
10 that on the screen, Mr. McMurray?

11 A. Yes.

12 Q. And this is the one that's dated December 30,
13 2016. Brookhaven Vascular is identified as the contributor,
14 Brookhaven Medical is the parent, and then Diaxamed is the
15 company, what was this document intending to effectuate?

16 A. I believe that this was the formation of Diaxamed
17 in putting the assets that Brookhaven had in there. I'd have
18 to take a minute to really read it, but on the surface of it,
19 that's what it looks like.

20 MR. FEW: Line 13 on 46?

21 MR. SHEALY: Correct.

22 BY MR. FEW:

23 Q. What was the difference between Brookhaven
24 Vascular and CreatiVasc?

25 A. I think that they renamed it "Brookhaven Vascular"

1 when Brookhaven took over. I don't know from a
2 corporate-structure standpoint, but I think the business
3 that's being referred to is "CreatiVasc."

4 Q. And then, you've signed on behalf of DXM?

5 A. Correct.

6 MR. SHEALY: All right. So then page 49.

7 MR. FEW: Line 1?

8 MR. SHEALY: Uh-huh.

9 BY MR. FEW:

10 Q. I am now going to show you what was Exhibit A to
11 the request for admission, and ask you if you've ever seen
12 this document before.

13 A. I have not.

14 Q. This is the customer supply agreement between my
15 client Sealevel and CreatiVasc, that was entered into -- on
16 October 28, 2014, have you ever been made aware of the
17 existence of this document at any point in time prior to
18 today?

19 A. Not an executed copy, no.

20 Q. What do you mean by that distinction "Not an
21 executed copy"?

22 A. I had heard at one time that there had been some
23 discussions about a supply agreement. It's something we had
24 no interest in, so I have no working knowledge of this
25 agreement or the technology for that matter.

1 MR. FEW: Line 13 of 50?

2 MR. SHEALY: Correct.

3 BY MR. FEW:

4 Q. Okay. But your testimony was that you weren't
5 aware of an executed version of this document, as I recall
6 you said, right?

7 A. That's correct.

8 Q. Okay. So if Steve Johnson testified that he
9 executed this document on behalf of CreatiVasc as its Chief
10 Executive -- Executive Officer in October of 2014, you don't
11 have any reason to dispute that, do you?

12 A. I have no knowledge of that.

13 MR. FEW: Keep going?

14 MR. SHEALY: Yes.

15 BY MR. FEW:

16 Q. When did you first become -- you testified a
17 minute ago that you didn't want the technology that Sealevel
18 had been working on, when did that decision-making process
19 first arise?

20 A. So the core therapy to treat a patient is to be
21 able to turn the blood flow on and to turn the blood flow
22 off. And have that functionality be able to be executed at
23 least three times a week without creating thrombosis --
24 without creating damage to the person's vasculature and
25 everything, that is the therapy. And the way that the

1 balloons get activated is -- you know, not a key part of the
2 therapy. You know, our assessment was people are getting
3 large needles put in their arms for dialysis, the dialysis
4 techs are very familiar with using needles and having another
5 needle in the mix to inflate and deflate a port in somebody's
6 body -- you know, was something that would fit into their
7 workflow, and that's what we've always pursued.

8 MR. SHEALY: So page 53.

9 MR. FEW: Line 12?

10 MR. SHEALY: Yes.

11 BY MR. FEW:

12 Q. And so, the customer supply agreement that we were
13 looking at a minute ago that my client had, this was Exhibit
14 4 to the deposition, it's October 20, 2014, it actually
15 predates the supply agreement that ATEX had with CreatiVasc,
16 right?

17 A. 2014 is before 2015.

18 MR. FEW: On page 76, line 21.

19 MR. SHEALY: Or -- actually those are all -- that's all
20 out.

21 MR. FEW: Okay.

22 MR. SHEALY: So it's page 8, line 17.

23 MR. FEW: Okay.

24 BY MR. FEW:

25 Q. Because Diaxamed took affirmative steps not to

1 assume the Sealevel contract, right?

2 A. No -- no, Diaxamed assumed the things that they
3 needed to move the business forward. And as I stated before,
4 that's what they were focused on. There's no interest in
5 that other technology and it wasn't even looked at.

6 Q. And that would've been communicated to Steve
7 Johnson and others, correct?

8 A. Well, that was the direction that we were going
9 in, so Steve was aware of that, yes.

10 Q. Steve was aware of it, he would've been aware of
11 it even before the transaction occurred on December 30, 2016,
12 right? Because it was specifically not included in that --?

13 A. I can't say when -- when he became aware of it.

14 Q. Well, who all was involved in the negotiations
15 leading up to the December 16th, Contribution Agreement?

16 A. John Feldman, their legal counsel, Bob Achenbach,
17 and Steve, to some extent.

18 Q. It's signed by Feldman and Johnson?

19 A. Correct.

20 Q. So is it your testimony that they knew that the
21 Sealevel contract was not being assumed by Diaxamed?

22 A. I don't know what they knew or didn't know.

23 Q. Well, they knew what was in Exhibit A, presumably,
24 right? Do I need to go into that?

25 A. I don't know. I've seen people sign documents

1 that they haven't read. I can't tell you what they knew or
2 what they didn't do or -- you need to talk to them.

3 (Read testimony ends.)

4 MR. FEW: I think that's it. Plaintiff rests.

5 THE COURT: You may step down.

6 MR. SHEALY: Thank you, your Honor.

7 THE COURT: All right. You say Plaintiff has rested.
8 All right. Ladies and gentlemen, the Plaintiff has rested
9 their case-in-chief. So at this time, I -- there's some
10 things I have to go over with the attorneys, so do not
11 discuss this in any way, and I'll bring it back down as soon
12 as possible.

13 (Jury exits room.)

14 MR. FEW: Let's take a short break.

15 THE COURT: You've been to the (inaudible), obviously
16 we don't want the jury to just hang in here. This is kind of
17 my thought process is, tell the jury the Plaintiff is rested,
18 we have things to go over, and if you want me to, I can say
19 -- just so I can kind of give them an idea of what their
20 tomorrow looking like. The Defense has indicated that they
21 may not present any testimony, of course they can, that --
22 that could change overnight, but that's where they're --
23 that's what they've indicated to me. So when you all come
24 back in, we're at the final stage of the trial and charge you
25 with the law and have closing arguments. You know, and I

1 anticipate that I'm going to need to do careful consideration
2 for your motions, and I expect that I will -- would like to
3 probably consider at least a portion of them overnight.

4 So then we got to figure out -- so in the morning, I've
5 come back in and give you my ruling, and then we'll have to
6 discuss the charge and the verdict. So I don't want to feel
7 like we're rushed on that because I feel it's going to be
8 involved regardless of what's on there. So I'm actually
9 looking at 10:30 -- have the jury come back at 10:30, us
10 coming back at 9:00. So -- because I think we have a lot of
11 stuff to -- we're going to have a lot of stuff to do.

12 MR. FEW: That does make sense.

13 THE COURT: You know, and if for some reason, again,
14 you're not bound, if you decide that you are going to present
15 some testimony, if you -- you know, that -- that would be
16 your prerogative that I will not have ruled on your motion
17 direct. You just need to let us know that in the -- in the
18 middle of the night. And also I'll need you all -- depending
19 on what happens here to -- you know, I need to -- I don't
20 know if you all -- have you all worked up any verdict form?

21 MR. SHEALY: No, but -- I mean, that -- that is what
22 tonight is for.

23 THE COURT: Yeah. And the -- any charges or just
24 anything that you can get to my law clerk, so -- I mean, we
25 plan to spend a bit of time on this tonight, so -- all right.

1 I'm going to bring the jury in, and just tell them what I
2 said, is that all right with you Mr. Few?

3 MR. FEW: Yeah, that's fine.

4 THE COURT: Okay. Bring them in.

5 (Jury enters room.)

6 THE COURT: All right. Let me tell you kind of where we
7 are as you -- we will call when you took the break, the State
8 (sic) has -- has rested. At this point, there's pretty
9 involved process of things we have to go through. So there's
10 no reason to keep you all sitting in your jury room, when you
11 could go out in that lovely rain that we've got going on
12 there. But -- and I -- and also, let me kind of tell you
13 where I think we'll be tomorrow, but not 100 percent sure.
14 The State has rested, the Defense has indicated --

15 MR. FEW: Your Honor?

16 THE COURT: I'm sorry?

17 MR. FEW: The Plaintiff.

18 THE COURT: The Plaintiff has rested. Thank you for
19 that, it's been a long day. The Plaintiff has rested, the
20 Defense has indicated to me that most likely they will not be
21 presenting additional evidence, the -- the evidence presented
22 will be what you will have to consider in your deliberation.

23 Again, he has the right to make a change on that if he
24 -- if he feels like appropriate. But that -- I think that's
25 where we're probably, so if that's the case, then when we

1 bring you in, we'll have -- we're at the final stages of the
2 trial, and that is closing arguments by the attorneys, and
3 then I'll charge you the law and then you will begin your
4 deliberation.

5 So for planning purposes tomorrow -- and that's the way
6 it goes, then we will be providing you with lunch, so you
7 won't have the lunch break, so you need to -- you know, make
8 arrangements accordingly. But we'll have you -- we'll, when
9 you come in in the morning, they'll give you a little menu
10 that you can check what you need to -- to what you want for
11 your lunch. So that's kind of just for planning purposes,
12 and I -- and -- and anticipate, there's some other things
13 that we're going to have to go over with the attorneys in the
14 morning, so I'm going to -- again, have a little bit of delay
15 for you all coming in to make sure that we don't bring you
16 here and you sit in your jury room and wait for us to finish
17 that.

18 So I'm going to ask that you be in your jury room at
19 10:30 in the morning, okay? Sleep in. But I can tell you we
20 will not be. So with that being said -- so that's what it
21 looks like the plan is, so you all make your plans
22 accordingly, okay?

23 Now here's again, the four rules: Don't discuss the
24 case, and I know that's tough, you're going home every
25 evening, your friends and family want to know what you've

1 been doing. So you tell them you're -- you're down the hall
2 from a really big case coming that's going on, it's all over
3 the news.

4 Don't pay any attention to any news coverage running
5 this, there's not any that I'm aware of, any social media,
6 again, I'm not aware of that, but if there is something out
7 there, please do not take -- pay any attention to it. Also,
8 do not Google anything, any kind of -- you know, or look in
9 your Encyclopedia Britannica, anything about this case.

10 And then, finally, if anybody contacts you -- other
11 than somebody from the clerk's office -- and I never -- I
12 don't expect that, but I always just throw that out, because
13 it did happen one time, a long time ago in a case, and I --
14 since then, I've always thrown in like -- if someone contacts
15 you other than somebody from the clerk's office, then let the
16 bailiff know in the morning.

17 With that being said, I hope you brought your raincoat
18 and your umbrellas, because last time I looked out the
19 window, it was not looking very pretty. So with that -- all
20 right, so you all have a good evening, at 10:30 be in the
21 jury room. All right. Thank you.

22 (Jury exits room.)

23 THE COURT: All right. Anything else from the
24 Plaintiff at this point?

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

1 THE COURT: From the Defense?

2 MR. SHEALY: Your Honor, at this time, we have a motion
3 for directed verdict.

4 THE COURT: Let me get (inaudible) situation here a
5 little bit.

6 MR. FEW: Your Honor, actually, may I retract my
7 (inaudible) claim, and -- I do have one little thing to be
8 brief?

9 THE COURT: Okay.

10 MR. FEW: So I was thinking about this coming into the
11 trial. On the declaratory judgment action, it's my belief
12 that if the Court -- based on the facts that were laid out,
13 if the Court finds that there's no disputed issue of fact,
14 which I don't believe there is a disputed issue of fact as
15 Mr. Shealy even acknowledged that the contract still has not
16 been terminated, then we're entitled to have our rights
17 declared under the contract which is continuing to this day.

18 So with -- with that in mind, that's a motion for
19 directed verdict in favor of the Plaintiff on the declaratory
20 judgment that the contract exists, and it's still ongoing.

21 MR. SHEALY: Your Honor, I'm not sure that there's a
22 case or controversy before the Court with respect to that --
23 that requires a declaratory judgment because the -- the
24 contract has been admitted, and it has never been terminated.
25 That is in the Court's record. I'm not sure there's anything

1 for the Court to declare.

2 THE COURT: Okay. And -- and I'll look at that. I
3 kind of think that -- yeah, I -- I'm -- I think I'm leaning
4 your way, but I'm not going to tell you that (inaudible) or
5 -- no, I don't think they did -- I'm not sure it's right, I
6 mean, I'm going to look at it and see. All right. Anything
7 else from the Plaintiff?

8 MR. FEW: Nothing other than that, your Honor. Thank
9 you.

10 THE COURT: All right.

11 THE CLERK: Just a second.

12 MR. SHEALY: May it please the Court, your Honor?

13 THE CLERK: Just a second. My (inaudible). Thank you.

14 MR. SHEALY: Your Honor, at this time, Defendants would
15 move for a directed verdict as to all causes of action
16 alleged in the Plaintiff's complaint, and I'm going to walk
17 through those one at a time.

18 So the -- the first one I want to talk about is
19 Sealevel's claim for breach of a contract. We believe it
20 fails as a matter of law because there was no meeting of the
21 mines as to the essential terms or the formation of a
22 contract. The contract -- the Court looks at Exhibit 4, the
23 contract is the classic agreement to agree the price, the
24 specifications of the product, all are -- are not agreed upon
25 at the time, and the product itself has not even been

1 developed at the time that the customer supply agreement is
2 entered into.

3 And in particular, I would direct the Court's attention
4 to the case of Stevens & Wilkinson of South Carolina versus
5 City of Columbia, that's a 2014 opinion of the South Carolina
6 Supreme Court. Very similar.

7 THE COURT: What's the file on that?

8 MR. SHEALY: 409 South Carolina 568.

9 THE COURT: Okay.

10 MR. SHEALY: And this was a -- a -- an opinion
11 reversing the Court of Appeals, but this involved a
12 development agreement between the City of Columbia and
13 Stevens & Wilkinson about building a hotel in Columbia, and
14 the -- the Supreme Court goes to great pains to say "This is
15 not an enforceable contract because there -- in similar
16 fashion, the key terms are yet to be agreed on in the
17 future."

18 And so -- and -- and a domino effect is created here if
19 you find that this is not an enforceable contract, which we
20 believe it is not, because the -- the rest of the causes of
21 action fall from -- and are dependent upon the breach of --
22 of a contract. So -- so that case, we think is -- is if not
23 on all fours, pretty close to what we're dealing with here.

24 We'd also move for a directed verdict as to the --
25 well, on the breach of a contract, even if there is a -- an

1 enforceable contract, there's no breach. There is absolutely
2 zero evidence that CreatiVasc or any entity standing in its
3 shoes has gone to some other supplier to supply a handheld
4 device to -- and -- and is purchasing those and selling this
5 product on the market.

6 That is what a breach of this customer supply agreement
7 would look like. There's no evidence of that behavior
8 whatsoever. And finally, that -- that breach of a contract
9 cause of action is -- fails because there's no evidence of
10 damages. There's been no lost opportunity by Sealevel, no
11 lost profits, which would be the only damages recoverable if
12 there were a breach, like what is -- like what I've
13 described, and the only way that -- that -- that -- that
14 could happen.

15 So it fails with all elements of -- of breach of a
16 contract for a -- for a -- I mean, I'm -- I'm not going to
17 restate the elements of a contract, but -- in any great
18 detail, but we -- we acquire an offer acceptance, valuable
19 consideration, but there must be a meeting of the minds as to
20 all the essential and material terms of the agreement, they
21 aren't here.

22 And because -- because of that, we don't have -- we --
23 we don't have a contract to start with, but even if we did,
24 there must be a breach, of course, we don't have that here,
25 and there must be damages, we don't have those.

1 We would also move for a directed verdict on
2 intentional interference with the contract. Again, you can't
3 have intentional interference with a contract that doesn't
4 exist from the first instance. The elements of that are: The
5 existence of a valid contract, the wrongdoers' knowledge of
6 thereof, his intentional procurement of its breach, the
7 absence of justification and resulting damages, that's from
8 Camp v. Springs Mortgage, Court 310 South Carolina 5.

9 And the case law is clear where there is no breach of
10 the contract that could be no recovery, there's no breach
11 here. But I would also note that there is no evidence of the
12 intentional procurement of its breach by anyone. And the --
13 to the extent that we -- we have to get into the -- the -- a
14 contract that actually exists, there's no element of --
15 there's no evidence of the absence of justification that the
16 evidence before the Court is that the -- the handheld and the
17 device itself never worked, never could be marketed.

18 And so, even if there was a valid enforceable contract
19 between these parties, there's -- the -- the -- the
20 obligation on Sealevel's part was to provide a workable
21 handheld device that worked with a workable device that
22 CreatiVasc was developing, and there's just no evidence that
23 -- that they were ever able to develop the things that
24 worked.

25 That was the anticipation at the beginning, that was

1 the hope, but that -- that hope never materialized. So --
2 and I'm going to go back to the absence of damages because we
3 -- over the Defendant's objection, the Court has allowed
4 evidence of the Sealevel's quantification of its development
5 time of its engineering time to come into evidence. If you
6 look at the supply agreement itself, it says that, "Sealevel
7 sole remedy under the -- in the event of a breach by
8 Sealevel, is that -- or termination by Sealevel," I'm sorry,
9 a breach by CreatiVasc --

10 THE COURT: Where are you?

11 MR. SHEALY: It's --

12 THE COURT: You're on number four?

13 MR. SHEALY: -- it's -- I'm sorry, it's -- yes, Exhibit
14 4, section 12 of the supply agreement says "CreatiVasc must
15 take delivery of and pay the full price for the remainder of
16 open-purchase orders, if any. If the customer terminates for
17 convenience and no termination has happened, but if it --
18 they terminate for convenience, the customer will take
19 delivery of and pay the full price for the remainder of
20 open-purchase orders, if any."

21 THE COURT: But have they -- but hasn't the evidence
22 been consistent that it has not been terminated?

23 MR. SHEALY: That's correct. But what I'm saying is --
24 just to show you that -- you know, if -- if -- if there had
25 been a -- some sort of termination or breach, that's what --

1 that's what we have to do, is we got to fulfill the
2 open-purchase orders. They're in the first purchase order
3 that is open.

4 And because the -- because of the way this agreement is
5 put together, and the -- the consideration is -- for the
6 agreement, is that Sealevel will be the exclusive supplier,
7 the only measure of its damages is what its lost profits
8 would've been. There's been no evidence used in this record
9 of any measurement of lost profits. It's impossible to do so
10 because everything was speculative.

11 All right. I want to talk about the alternative claims
12 for promissory estoppel and quantum meruit, we talk about
13 quantum meruit first. So the elements of quantum meruit are
14 a benefit conferred upon the Defendant by the Plaintiff,
15 realization of that benefit by the Defendant, retention by
16 the Defendant of the benefit under conditions that make it
17 unjust for him to retain it without paying its value, that's
18 Earthscapes Unlimited v. Ulbrich, 390 South Carolina 609, and
19 that's South Carolina law.

20 Where the -- where the Plaintiff fails most
21 spectacularly in this cause of action is there is the -- the
22 absence of evidence of a realization of any benefit by the
23 Defendant, any of them. All of the evidence is that money
24 was poured into this -- money and time was poured into this
25 by all parties, and it has not borne any fruit to anyone.

1 Promissory estoppel, the elements of that cause of
2 action are one: An unambiguous promise by the promisor. Two:
3 Reasonable reliance on the promise by the promisee. Three:
4 Reliance by the promisee he was expected by and foreseeable to
5 the promise rule, and four, injury caused to the promisee by
6 his reasonable reliance, that is North American Rescue
7 Products v. Richardson, 769 S.E.2d 237. And it -- the case
8 law says: "The applicability of the doctrine depends on
9 whether the refusal to apply it would be virtually to
10 sanction the perpetuation of a fraud, or would result in
11 another injustice.

12 However, the presence of either an -- of an ambiguous
13 promise or an entry not arising out of the inconsistent
14 disposition precludes promissory estoppel's application."
15 Your Honor, there's no evidence here of some unambiguous
16 promise by the promisor. Everyone hoped. No one promised
17 that they would produce a marketable product. Everyone
18 hoped, but the -- it didn't work, they ran out of money, and
19 so, there's just -- there's -- there's no evidence in this
20 record to justify application of this equitable document.
21 And I think I've covered everything that the -- that the
22 Plaintiffs have alleged, and if I've left anything else --

23 THE COURT: I think that's the one -- that's the list
24 that I have.

25 MR. SHEALY: That's what I've got. So, your Honor, now

1 let -- let me quickly also say, in the event that our -- that
2 our motion is denied in whole or in part, I do want to say
3 that -- you know, I didn't -- my level best to keep a lot of
4 evidence out to try to simplify things for the jury, but the
5 Plaintiff has itself proved that it has no cause of action in
6 any respect against Diaxamed, because it -- Diaxamed is
7 certainly not a party to the customer supply agreement.

8 It -- what it -- what the Plaintiff did prove is that
9 Brookhaven merged with the Diaxamed, stood in the shoe -- I'm
10 sorry, stood in the -- merge with CreatiVasc, stood in its
11 shoes, but that Diaxamed merely purchased assets. And -- by
12 virtue of the evidence put in the record by the Plaintiff
13 itself, it has shown that the customer supply agreement was
14 not purchased or otherwise assumed by Diaxamed. So even if
15 our motion fails on all other grounds, Diaxamed should be
16 dismissed, because it had -- it never had any obligation
17 whatsoever to the Plaintiff. And in addition, Brian McMurray
18 has been named individually, he's not a party to any contract
19 with the Plaintiff, there's been no evidence of an -- any
20 intentional conduct on his part to interfere with any
21 contract.

22 THE COURT: The caption that I'm looking at, I think it
23 was --

24 MR. SHEALY: I'm sorry, you -- you're right, McMurray
25 is not a defendant.

1 THE COURT: Okay -- okay. I think so, maybe I missed
2 that.

3 MR. SHEALY: No, I'm sorry. Okay.

4 THE COURT: All right. Motion granted.

5 MR. SHEALY: Sorry, I wrote McMurray down, but Feldman
6 is who I'm talking about. John Feldman is a Defendant, I got
7 the wrong person in my mind, but John Feldman was never a
8 party to any agreement with Sealevel, there's been no
9 evidence used of -- of anything that he did to procure the
10 breach of any agreement between the Plaintiff and anyone
11 else, and so he should be dismissed from the lawsuit.

12 Likewise, Steve Johnson is not a party, in his
13 individual capacity, to any agreement with Sealevel, and
14 there has been absolutely zero evidence that Steve Johnson
15 did anything to procure the breach of any agreement with
16 anybody. In fact, Steve Johnson -- the -- the -- the
17 testimony is that Steve Johnson worked and worked and worked
18 with Sealevel to try to get this thing to work, and they all
19 -- they all failed, but there's -- there's no evidence that
20 -- that he procured a breach, notwithstanding the fact that
21 there's no evidence of a breach whatsoever. But -- but if --
22 if all else fails, we believe that Diaxamed, John Feldman,
23 and Steve Johnson should be dismissed from the case.

24 THE COURT: Which of these is still an ongoing concern?

25 MR. SHEALY: Diaxamed.

1 THE COURT: All right. Because they're the successor
2 interest to the other ones.

3 MR. SHEALY: So -- well -- so Diaxamed again, didn't
4 merge --

5 THE COURT: Right.

6 MR. SHEALY: -- it's an asset purchase, which is
7 important. The merger -- I -- you know, I will -- I will
8 stipulate that Brookhaven, when it merged with CreatiVasc, it
9 stands in the -- in the same position as CreatiVasc, and so
10 to the extent that it's --

11 THE COURT: Brookhaven Vascular or Brookhaven Merger
12 Corp.

13 MR. SHEALY: That is a good question. It's -- it's the
14 -- I believe it's Brookhaven Vascular.

15 THE COURT: And I'll let you look at that.

16 MR. SHEALY: Yeah.

17 THE COURT: Okay. All right. Anything else?

18 MR. SHEALY: I think that's it.

19 THE COURT: Mr. Few?

20 MR. FEW: Thank you, your Honor. May it please the
21 Court? The same argument was made in a summary judgment
22 motion, for what it's worth, but I'm going to address it
23 anyway, that this is an agreement to agree, and I would --
24 before I get into my arguments on the specific elements and
25 the -- and the facts from a policy standpoint, Opposing

1 Counsel's arguments would create a -- a great situation for
2 someone to enter into a contract and somebody into providing
3 them with tremendous value. There's no doubt about that,
4 it's been described as winning the war a great day, we've
5 done all this -- you know, there's no -- and -- and yet --
6 but according to the argument that's just been made, it's
7 just once again, too bad, so sad, you -- you got
8 outmaneuvered by some lawyers. Well, the issue of Diaxamed's
9 liability pursuant to those documents has not been put before
10 the Court by -- as a defense by the Defendants, okay?

11 So the -- the propriety of a company taking over
12 everything, and -- and saying what it's not taking over, is
13 just not allowed under the law, without leaving some way of
14 securing liability. Auto companies can't do this. If this --
15 if this could be done, then people would just shut companies
16 down all the time and start a new company and say "We didn't
17 assume that all liability," it -- it -- that's not what is
18 allowed under the law, and I can provide law on that.

19 So -- so the argument that there's no enforceable
20 contract, I was -- was surprised to hear, again, considering
21 that they've said in front of the jury and in opening
22 statements that there was a contract, okay? So that's
23 confusing. And we maintained that -- that the -- again, as
24 we've (inaudible) before Exhibit 21, I believe it is, or 17,
25 when Achenbach writes back and says "We don't even think you

1 have a contract, and if you do -- you know, we don't owe you
2 anything."

3 So -- but if in fact there is no agreement to agree, if
4 the Court were to find that, then that just plays right into
5 the hands and -- and Mr. Shealy used to -- made the comment
6 when giving -- oftentimes the case law will lay out the
7 elements and it'll have some elaboration on it, but used the
8 words "justice" -- yeah, justice, and so this -- this -- the
9 whole thing, just fraud and justice.

10 Frankly, your Honor, I -- I think it -- these facts
11 would warrant an amendment of our complaint to plead a claim
12 for breach of a contract accompanied by fraudulent act. And
13 -- and I would move the Court to allow us to do that at this
14 time, not because we need to --

15 THE COURT: I'm going to deny that in response to a
16 motion for directed verdict. So that was your -- that's what
17 you should have done in closing your evidence, so motion
18 denied for that.

19 MR. SHEALY: Okay. Well, your Honor -- so they just
20 simply can't have it both ways. Now, their -- their lawyers
21 made up their mind, the -- the -- the Hutchinson, the people
22 that were representing Diaxamed, that we were going to take
23 this technology and -- and keep in mind Steve Johnson's
24 testimony, what happened to your computer? What -- what was
25 on your computer? The stuff that was on your computer was

1 everything that Sealevel had contributed. "They took it --
2 they took it, they have not given it back." That's a breach
3 of the confidentiality provision in the customer supply
4 agreement, independent of the other aspects of -- of the
5 agreement.

6 So, your Honor, there -- I -- I don't understand how a
7 party can say there -- there was a contract before the jury
8 and then argue to the Court that there is no enforceable
9 contract, but if they -- they just can't have it both ways.
10 If -- if there is no enforceable contract, if the Court were
11 to find that, which I -- I don't think would be a proper
12 finding under this Stevens case, then -- Stevens & Wilkinson,
13 the City of Columbia, then that gets right into the value
14 that we conferred upon them, and that's been set forth in the
15 invoice, and Mr. O'Hanlan's testified about the value of
16 that.

17 They didn't even -- they didn't even question him on
18 that, when -- when -- when the invoice came in, he wasn't
19 asked a single question about, "Did you really do this many
20 hours, was this an appropriate rate?" That's uncontested --
21 that's evidence that is uncontested.

22 THE COURT: Well, are you -- okay, when are you, I
23 mean, we into the quantum meruit argument now?

24 MR. FEW: Well, I'm -- I'm on -- I'm -- I'm going in
25 order of the breach of a contract --

1 THE COURT: Okay.

2 MR. FEW: -- and then -- but I'm -- it -- it leads into
3 the quantum meruit, because it isn't a claim in the
4 alternative. If there is no contract, then -- then equity
5 steps in -- if there is no contract, there's no legal remedy.

6 All right. Your Honor, then with respect to
7 interference with the contract, we've proven that they knew
8 about it, there's tons of evidence for the jury to conclude
9 that they knew about it, including that 68-page Exhibit 29,
10 that I introduced that Mr. Johnson signed, that was
11 subsequent to my client's contract, it had legal bond and
12 Greenville Charter --

13 THE COURT: I -- I don't think he questioned that, but
14 how about the intentional procurement of his breach and
15 absence of justification? What evidence do you have of that?

16 MR. FEW: Well, that's -- that's what they did, they --
17 they -- they -- CreatiVasc has breached -- Brookhaven has
18 breached. They -- they have a duty of good faith, and they
19 just walked away from the contract and never did anything,
20 they just quit on us.

21 THE COURT: Ain't that a breach of a contract?

22 MR. FEW: That is a breach of the contract. It's
23 particularly when --

24 THE COURT: But we're not -- but we're talking about an
25 intentional interference, it'd have to be somebody other than

1 CreatiVasc and their successors, wouldn't it?

2 MR. FEW: Right. It -- no, it -- not be a successor,
3 because -- because again -- once again, they can't have it
4 both ways. Diaxamed is formed for the purpose of taking all
5 the assets. Mr. Johnson, one of the last things I asked him
6 on the stand was, "You believed that -- you said in an
7 email," that I asked him about "That we're -- we're getting
8 close." And then, you said -- I -- I asked him -- I said
9 "And on January the 12, 2017, when you emailed Tom O'Hanlan
10 and -- and Ben O'Hanlan, you thought you were still working
11 with them?" He didn't even know. And so, that's why
12 CreatiVasc breached because they were just left sitting on
13 the curb.

14 Now, it's interesting that all their other liabilities
15 were paid. The -- the rent was paid -- he said everything
16 else was assumed by ATEX, or -- I mean, Diaxamed -- and also
17 your Honor, Chad Clark and -- testified that we just
18 continued working in the same office space, it was the exact
19 same business in all space, except -- they think that their
20 lawyers -- and -- and that issue's not before the Court, that
21 would've been a motion for summary judgment that as a matter
22 of law, this -- and they would've had to put all those
23 agreements, and all those PPMs, and everything about the
24 disclosures --

25 THE COURT: But we're talking about the intentional

1 interference by the parties other than the party to the
2 contract.

3 MR. FEW: Right. And so, their position is that
4 Diaxamed --

5 THE COURT: I'm not caring about their position, I want
6 you to tell me what evidence there is of intentional
7 interference and absence of justification.

8 MR. FEW: That's what Diaxamed did. They -- they took
9 over --

10 THE COURT: What's the evidence?

11 MR. FEW: The evidence? The evidence that we were not
12 included, the evidence that -- that's when the breach
13 occurred, Steve Johnson still wanted to work, he still
14 thought he was working with my people. The -- the ghosting
15 occurred from the day that the December 30, 2016 contract was
16 executed. That very time that -- it probably was coming into
17 play before that, there's testimony on the record that
18 Feldman had -- had a decision and they had a meeting in
19 Athens and he had decided that they were out, that Brookhaven
20 (inaudible) got put any more money into it.

21 So that was one decision that was going to result in a
22 breach, but that's when ATEX comes in and says "Well, we're
23 -- we already have a relationship," an exclusive supply
24 agreement that we've shown -- we believe that they probably
25 thought was in conflict with our agreement. They didn't want

1 to have to take the burden of the exclusive supply agreement
2 with my client, but yet they took everything that we gave
3 them and never gave it back, and so they're the reason that
4 the breach occurred -- ATEX -- ATEX and Diaxamed are the
5 reason that the breach occurred.

6 Diaxamed was formed with the purpose of making this
7 contract go into breach, and that's when it went into breach
8 was in 2017 when they just quit communicating with you. Good
9 faith and fair dealing? Ghosting someone that you have a
10 contractual relationship with that's not good faith and fair
11 dealing. Telling them that, "We don't owe you anything" --

12 THE COURT: Good faith and fair dealing is not the same
13 as intentional procurement and absence of justification.

14 MR. FEW: No. But good faith and fair dealing is the
15 breach by CreatiVasc, we're --

16 THE COURT: We are not talking about that, we moved on
17 to the next --

18 MR. FEW: Well, but I'm --

19 THE COURT: I am trying to figure out your -- your
20 argument on intentional interference.

21 MR. FEW: I -- I don't know -- or that I could really
22 argue, your Honor, that the crime --

23 THE COURT: I mean, isn't it basically that's what you
24 all speculated, but you never really got that in any
25 discovery to -- to the -- the smoking gun that you needed,

1 which you thought was there.

2 MR. FEW: I don't need a smoking gun because the jury
3 is allowed to make inferences for --

4 THE COURT: Am I allowed to get to the jury?

5 MR. FEW: Well, the -- the -- there's evidence in the
6 record from which a reasonable jury could infer that the
7 purpose of ATEX -- of -- excuse me, Diaxamed be informed in
8 December of 2016, was to take over these assets and to scrub
9 my client out of the equation, and that's exactly what they
10 did.

11 And they think that they did it by some clever
12 lawyering, so that Diaxamed says "We're not liable," we don't
13 agree with that. We think they are liable, we think Diaxamed
14 is obligated to us under the ongoing contract, but the
15 breach, your Honor -- Steve Johnson was the CEO up until
16 December 30th. He still thinks he's working with my client
17 on January the 12th.

18 He said he could see it coming, hindsight's 2020, he
19 didn't expect to get fired on -- on the 30th, but he did, he
20 got terminated, and that's when he was representing
21 CreatiVasc, which then became Brookhaven Vascular, and
22 according to Diaxamed's position, that's the only party that
23 had an obligation to us, and that's -- and they -- they
24 breached, they -- they -- they breached the contract when
25 they decided that, "We're not going to communicate with you

1 anymore." The proper thing to do would've been to have
2 terminated the agreement pursuant to the agreement, they
3 never did that. They still haven't done it to this day.
4 They -- they've admitted that the contract is still valid.

5 And so, the issue before the Court is: Can Diaxamed
6 pick and choose what assets it wants to take while knowingly
7 leaving other parties with no leave -- with no remedy,
8 because the carcass that they left is bankrupt, and that's
9 pretty much what was in the record. Feldman said "Well, we
10 kept it open until we could get paid back, and -- and there's
11 no evidence that CreatiVasc is an ongoing concern." But
12 there's absolutely evidence that Diaxamed is still going.
13 They still have employees, they have not abandoned this
14 technology. If they had abandoned this technology, they
15 would've told us in -- in discovery, they would've said "You
16 know, we -- we made a go of it, we've abandoned it, and you
17 can have it because we don't want it anymore."

18 But -- but -- also your Honor too, the -- the benefit
19 that they have -- and I've talked about this before, is they
20 have all of our work. And if you're solving a problem every
21 time that you figure out something that doesn't work, that's
22 valuable, because then you're getting closer to what does
23 work.

24 And they have all the work that Tom did, Steve read
25 about it. He said -- you know, Ben testified, he said he

1 left for joy. So, your Honor, the -- they knew the contract,
2 they intentionally procured its breach which occurred after
3 Diaxamed became involved, there was no justification for it
4 -- and -- and also, your Honor, in the damages treatise, this
5 is -- and I'll provide sight on this, the -- this is the bar
6 book on damages and under intention or interference with
7 contract relations.

8 And also, your Honor, if they take the position that --
9 which I was not aware of that until there is no contract,
10 because they told the jury that there was a contract. If
11 there is no contract, then we also have a cause of action for
12 intentional interference with prospective relations, which
13 would be actionable. But under the damages that are
14 available under an intentional interference with an existing
15 or prospective contract are tort, not contract claims, the
16 damages recoverable under these causes of action are not
17 limited to traditional contract damages. So the -- the
18 damages for the tort claim can be different from the damages
19 for the contract claims.

20 As for the contract claims, your Honor, Minter v. --
21 Minter v. GOCT Inc., 473 S.E.2d 67 1996, Court of Appeals
22 "The purpose of an award of damages for a breach of a
23 contract is to put the Plaintiff in as good a position as he
24 would have been in if the contract had been performed. While
25 proof of mathematical certainty is not required, the amount

1 of damages cannot be left to conjecture, guess, or
2 speculation." That -- they made no challenge to the -- the
3 -- the invoice that we put in.

4 Additionally, your Honor, in *Bensch, B-E-N-S-C-H, v.*
5 *Davidson*, 580 S.E2nd 128, looks like Supreme Court 2003.
6 "The trial court charge that after partially performing a
7 contract, one who was wrongfully prevented from completing
8 the contract may recover actual expenditures and damages for
9 lost profits." I -- I don't know, I -- if I had been -- had
10 the opportunity to draft that opinion, I couldn't have done
11 it any better than that for what's happened here.

12 So, your Honor, we -- we -- we are -- we have damages
13 remedies under either one, and -- and I think it's the jury
14 -- based on the evidence that's in the record, should have --
15 they can make their factual findings. The Court I think can
16 maybe put some guardrails on some of their factual findings
17 if your Honor finds that -- like I'd argued before that
18 they've admitted the contract, or they admitted the existence
19 of contract, but then now they're arguing that it's -- it's
20 unenforceable because it's not a meeting of the minds.

21 And -- and I think it's -- it's a little -- and -- and
22 no offense to Kirby, because I (inaudible) Kirby, but it's a
23 little disingenuous for the jury to hear you say "There's a
24 contract, we admit the contract, it hadn't even been
25 terminated," and then -- and these arguments argue that it --

1 it doesn't -- that it's not enforceable.

2 THE COURT: Okay. You've plowed that road a couple of
3 times. Let's go on.

4 MR. FEW: Okay.

5 THE COURT: Yeah.

6 MR. FEW: And, your Honor, on the -- the -- we've met
7 the elements of the -- of the equitable claims as well. They
8 have a benefit, they have all of our -- our technology, it's
9 well-known nowadays when people do valuations of companies
10 that your -- the -- the data that you have has value, the
11 research that you have has value, the things that you've
12 learned have value, and they have all of our information.
13 They definitely retained it and they won't give it back,
14 because their strategy was, "We're going to do this and we're
15 just going to leave them in the dust," and I guess they never
16 thought that -- that Sealevel would file a lawsuit and -- but
17 we did, and we're here.

18 THE COURT: Well, let me ask you this, talking about --
19 let's talk about damages under quantum meruit. What do you
20 say about the Stringer and basic form book law, which says
21 "The value for purposes of quantum meruit remedy means the
22 value to the owner rather than the cost to the workmen of
23 producing the result." The only thing you've got in the
24 record is the cost of producing this result based on an
25 invoice.

1 MR. FEW: Well --

2 THE COURT: So how is that the value to the Defendant?

3 MR. FEW: I'd have to look at the -- the facts of that
4 case, your Honor.

5 THE COURT: That's what I mean -- that's what I argued
6 with you before on, was quantum meruit is not what your --
7 the cost to your clients or how much time they spent, it's
8 the value conferred on the Defendant, and by way of an expert
9 or something like that, but there's no -- no evidence of it
10 -- of what that value is to the Defendant.

11 MR. FEW: Well, your Honor, I -- I would distinguish it
12 by saying that -- and I'll read the case, if --

13 THE COURT: I mean, all the cases -- you can read any
14 case on quantum meruit, it's going to tell you that.

15 MR. FEW: Well, I believe that what that case is saying
16 is that if a guy goes and spends \$500,000 putting a roof on a
17 house and it was worth \$50,000, then you have a \$50,000
18 claim. So there may be instances when -- when the -- the
19 cost incurred by somebody is not synced up with the value
20 that's conveyed to the party, but here, they haven't
21 contested that. Again, they haven't contested it, and --

22 THE COURT: But it's your proof, and your proof is not
23 what the case law says.

24 MR. FEW: Well, those cases are -- those cases.

25 THE COURT: I would bet --

1 MR. FEW: They don't involve this factual situation
2 involving intellectual property. We're talking about
3 intellectual property and -- and, your Honor, what --

4 THE COURT: I mean, your own witness said that wasn't
5 really the value, it was just some conservative figure they
6 invoiced their time.

7 MR. FEW: The --

8 THE COURT: I mean, normally, you would have in a case
9 like this, an expert coming in and saying, "This is the value
10 of that which they receive for whatever future projects they
11 may have."

12 MR. FEW: It's a case that requires expert testimony.
13 It's Rule 701, he knows what the value is --

14 THE COURT: He didn't testify to the value, he
15 testified what he invoiced them for.

16 MR. FEW: Right. And that's what he said the value was
17 --

18 THE COURT: I got you.

19 MR. FEW: -- and that's what's in the evidence, and
20 they -- and they didn't challenge it. I -- I understand what
21 you're saying, your Honor, that it -- it could have been
22 attacked is not a proper measure, but if -- if the facts were
23 such that someone spent \$10,000 putting a new air filter on a
24 car, then that's what that case I believe is saying is that
25 it's not what you -- what you may have charged or the fact

1 that you took too long to do it, it's the value. They had
2 value, no one on their side took the stand and said "Sealevel
3 did not provide us value." They -- they did not touch the
4 issue of the amount of time that we put into it, and that
5 invoice lays out the number of hours, it also lays out the
6 out-of-pocket expenditures that they had, which was about
7 \$23,000, and -- and -- and it calculates, and it comes up to
8 a number of \$320,000.

9 If they felt that it was a different number, that's --
10 that's the number that's in evidence, it was up to the
11 Defendants to say "Do you think it was really worth this
12 much?" But they didn't -- they didn't -- they didn't want to
13 go there, because they -- they didn't want to deal with it.
14 Steve Johnson --

15 THE COURT: No, because they -- they read the law.

16 MR. FEW: -- Steve Johnson didn't say "It wasn't worth
17 that," he -- he didn't say it wasn't worth anything, we
18 conferred a benefit to them. There's --

19 THE COURT: I don't think there's any question about
20 that. The question is, do you have evidence what the value
21 of that benefit is?

22 MR. FEW: Yes, your Honor. And you -- you may not say
23 that you like it, but that's what's on record.

24 THE COURT: I don't -- it's not whether I like it or
25 not, I'm just -- I'm trying to apply the law that applies to

1 South Carolina, and that's the way I've always understood
2 quantum meruit back from law school. It's not what your
3 client spent, or the time they spent, or the cost to them,
4 it's the value that's conferred on the Defendant.

5 MR. FEW: Well respectfully, that's the -- that -- our
6 evidence is on the record, and the -- the reason that they
7 sent the letter, and the reason that it was put in evidence
8 here, is that that's what we say the value -- that -- that's
9 a way of saying this is what it's worth, and they have not
10 challenged it. So I -- I don't know what more I can -- I can
11 say on that, your Honor. And then, the elements of -- you
12 know, they're -- they're very similar claims.

13 A promise -- I mean, they -- they -- the basic -- if --
14 if there's no contract, then the promise is, "Hey, we'll --
15 we'll -- we're going to do this together, we're -- we're
16 going to get this thing going, we're going to" -- and Tom
17 jumps in with two feet on behalf of Sealevel in reliance of
18 -- of -- of the promise.

19 I mean, he didn't go knocking on their door and say
20 "Hey -- you know, let me do this." This was not a gift, and
21 -- and certainly -- you know, they knew that -- that if they
22 walked away, then he's left high and dry with nothing to do.
23 And, your Honor, just as I said before, from a policy
24 standpoint, the facts that have been put before this Court
25 cannot be left without a -- without a remedy, whether it be

1 legal or equitable.

2 THE COURT: All right. How about the -- you got other
3 parts that he said were specifically as claiming as Diaxamed,
4 John Feldman to Steve Johnson.

5 MR. FEW: Feldman is no longer involved, so -- you
6 know, I -- I don't -- I -- I -- we tend to agree that he's
7 not on the hook for --

8 THE COURT: All right.

9 MR. FEW: -- intentional interference, and...

10 THE COURT: You mean striking him as a party?

11 MR. FEW: Yes.

12 THE COURT: Okay.

13 MR. FEW: And -- but Diaxamed is a completely different
14 situation, and I don't think Steve Johnson is in any
15 difference -- no, hold on. (Inaudible) and Feldman as a
16 party on intentional interference with a contract only, your
17 Honor. And --

18 THE COURT: How would he be on the other ones?

19 MR. FEW: The -- the promissory estoppel? He sold --
20 they ultimately sold -- you know, they didn't give it away,
21 the testimony was that McMurray paid \$250,000 and I think he
22 owed them on a note, and he also took over all of the
23 liabilities. So they -- there was value that Sealevel put
24 into that, that -- that was part of the sale, but they --
25 they -- they're trying to say that it's not part of the sale

1 by carving it out, but yet they took all of our stuff.

2 THE COURT: I mean, it was Feldman --

3 MR. FEW: Feldman was the owner of -- well if -- if
4 there's no contract, the benefit was conferred upon
5 Brookhaven, so -- yeah -- I -- I would agree Feldman can be
6 out for -- for everything personally.

7 THE COURT: Yeah.

8 MR. FEW: And same with Steve Johnson?

9 THE COURT: All right -- all right. Anything else?

10 MR. FEW: That's it from the Plaintiff.

11 THE COURT: Response?

12 MR. SHEALY: Your Honor, the only thing -- just
13 briefly. If -- Mr. Few has said over and over and over --
14 you know, "They have our stuff," it was evidence that
15 Mr. Johnson turned in his computer when he was fired, no
16 evidence what was on that computer. The only -- the only --
17 there's been no evidence actually of a retention of anything
18 by anybody, that has been said by Mr. Few multiple times that
19 there actually isn't any evidence of that. I just -- I
20 wanted to point out that particular thing, but we stand by
21 our --

22 THE COURT: Yeah, why don't you respond to that.

23 MR. FEW: Well, your Honor, everything Johnson had was
24 on his computer, and -- and that's what they took -- and they
25 took all his flash drives and everything -- and -- so --

1 THE COURT: Do you have evidence to show that all that
2 -- I mean, what I mean, where is it or what's the -- I mean,
3 what's the benefit that has been retained then?

4 MR. FEW: To have all of our confidential information
5 --

6 THE COURT: Well, mean --

7 MR. FEW: -- that's the point of the NDA --

8 THE COURT: What's the -- okay, what's the evidence
9 that they have it -- that anybody has it?

10 MR. FEW: They have it.

11 THE COURT: What's the evidence?

12 MR. FEW: Steve Johnson's testified --

13 THE COURT: Says, "I had it -- I have -- my computers
14 gone." Where's the computer?

15 MR. FEW: He testified -- he testified -- and I asked
16 him, "You couldn't -- they took everything you had and you
17 couldn't produce any documents." That's what he sent his
18 deposition to --

19 THE COURT: Yeah.

20 MR. FEW: -- but he said on the stand, "They took
21 everything I had, I didn't have anything else," that's
22 probably why they -- so that's the evidence they took it. We
23 -- we don't have to go and show and do a forensic examination
24 of their computers to find our stuff on there. They have it,
25 they've known about the lawsuit, they knew about the

1 confidentiality provision, there was an NDA that was involved
2 as well, that -- that I think was subsumed by the
3 confidentiality provision in the contract. And that's where
4 another breach is involved, your Honor.

5 Opposing counsel wants to say "Well, there was no
6 profits and so you -- you just lose," but that -- ignore you
7 -- you have to look at what's in the contract. The contract
8 has a confidentiality provision, and if that's breached --
9 when -- when there's a breach, there has to be a remedy, and
10 when the -- and the remedy is the value of what we lost. And
11 the value of what we lost is what's in the record. That
12 there's all that time, all the thing -- everything that they
13 know.

14 They -- they knew -- and they even said -- their even
15 testimony was, "Well, we knew what they were doing, but --
16 but we didn't want to go in that direction." Well, maybe
17 they didn't want to go in that direction for a couple
18 reasons, because they didn't want to have to deal with
19 Sealevel having a piece of the pie on the exclusive rights to
20 do the wand, but they also knew what the drawbacks were with
21 the wand, if there were any, which frankly -- you know, for
22 what it's worth, the testimony is that the wand was ready to
23 go and that the implantables is where the thing didn't work.

24 But again, inducing somebody into doing this type of
25 work -- and -- and that's goes back to the limitation of

1 liability that's in the contract, that -- that's one way
2 towards Sealevel, but it also -- it says "This is a material
3 inducement." Sealevel was induced into doing these things,
4 and they wanted that limitation of liability, and -- because
5 that was -- they got from us, we didn't get paid for
6 anything.

7 We -- we came in and agreed to provide value which
8 they've acknowledged, and the way things worked out, another
9 party that just happened to be buying the company out ended
10 up getting everything, and as a result of it, they
11 orchestrated the means by which Sealevel was -- was ghosted
12 and left in the dark.

13 THE COURT: Okay. Well, I'm going to look at all this
14 tonight, and let you know what I come up with. In the
15 meantime, you all need to -- you know, and I realize you're
16 kind of doing that in the -- the dark a little bit, but I
17 know what my decision is, but -- you know, send me what
18 charges that you have as soon as possible so that we can be
19 looking at them, I don't want to get them at 9:00 in the
20 morning, okay?

21 MR. FEW: Understood.

22 THE COURT: I mean, even if you -- if it's a draft form
23 or something just so I can be looking at them, and -- and
24 also any kind of verdict form that you could have.

25 MR. FEW: Your Honor, in terms of Diaxamed's argument

1 that we're -- we're not liable, how's the Court going to
2 treat that? It's a jury issue?

3 THE COURT: I don't know -- well, that's what I'm going
4 to look at. This will be an interesting verdict form. All
5 right. See you, you all be here at 9:00.

6 MR. FEW: Yes, your Honor. Thank you.

7

8 (THERE BEING NOTHING FURTHER, THIS HEARING CONCLUDED)

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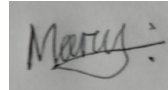
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CERTIFICATE OF TRANSCRIBER

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 12, 2025.

I do further certify that I am neither of kin, Counsel, nor interest to any party hereto.

September 22, 2025.

A rectangular box containing a handwritten signature in dark ink. The signature appears to be 'Mary' followed by a stylized flourish or initial.

MARY RAGSDALE

Transcriber

1 CONTINUATION OF PROCEEDINGS - FEBRUARY 13, 2025.

2 THE COURT: (Inaudible) comments about Feldman and
3 Johnson, I will -- just so that we can keep the record
4 straight, I'll issue a form for that says "At the directed
5 verdict stage, claims against them withdrawn. They're
6 dismissed with prejudice." All right.

7 MR. FEW: That's fine.

8 THE COURT: Okay.

9 MR. SHEALY: Defense's 5 was not -- not introduced.

10 THE CLERK: It was not?

11 MR. SHEALY: Okay.

12 THE CLERK: Are we done now?

13 THE COURT: We're done.

14 (Off the record.)

15 (On the record.)

16 THE COURT: There ain't going to be no arguing.

17 MR. FEW: All right. I'm ready, your Honor.

18 THE COURT: All right. I got a couple of questions,
19 but I'm going with my rulings. Let's talk about the
20 declaratory judgment. I know that's not a matter for the
21 jury, but that's one it brought up yesterday.

22 In looking at this -- what you're saying is that --
23 blank, hold on, thought I had -- I thought I was organized,
24 basically you're asking for in the declaratory judgment
25 portion for -- an order from the Court declaring its right

1 under the supply agreement, including -- but not limited to
2 the right to be exclusive supplier for the thing.

3 I -- in looking at this, I think that based on your
4 other causes of action, I'm not sure that there's a just
5 (inaudible) controversy at this point, that it's just -- it
6 -- it appears to be kind of an advisory for some part in the
7 future, in the event that this product is -- becomes sellable
8 or finished and gets actually distributed. So I'm going to
9 deny any relief as far as making any rulings on declaratory
10 judgment.

11 MR. FEW: Your Honor, could I ask a point of
12 clarification on that?

13 THE COURT: I'm just denying your relief.

14 MR. FEW: The -- so as I understand it, the -- because
15 they agree that the contract is still in effect, then there's
16 no issue, but I think the issue that's before the Court, I
17 believe Mr. Shealy would say the same thing, is to what
18 extent is Diaxamed bound by the customer supply agreement,
19 and then --

20 THE COURT: Well, I've denied -- I've denied your
21 relief on that, and you can we'll go forward on your other
22 clients.

23 MR. FEW: You -- and -- and I just want to make sure I
24 understand, you've denied it based on the fact that -- that
25 it's -- it's not ripe yet, basically?

1 THE COURT: It's not ripe, but not just physical
2 controversy

3 MR. FEW: Because they've conceded that --

4 THE COURT: Because that's why -- no, I just -- just
5 because I don't think there's statistical controversy, and
6 that it's for something in the future in the event that this
7 device becomes marketable. That's on the record, so let's go
8 on.

9 MR. FEW: I understood.

10 THE COURT: As the breach of a contract -- let me ask
11 you this. What is the basis for your breach of a contract
12 against Diaxamed? What's the evidence that they are --?

13 MR. FEW: Our -- our contention is that -- that you
14 can't selectively purchase assets really as a matter of
15 public policy and just pick and choose what you're not going
16 to take. They took all the rest of the liabilities, not
17 without making a provision to deal with that other liability,
18 and they hadn't done that here. They've just said "We're
19 taking what we want and we're going to run with it, and if we
20 get away with it, we get away with it, and if we don't -- we
21 don't." And so, our belief is that when you take the -- you
22 know, the baby in the bathwater, you take it off, and -- and
23 that's -- that's our contention for Diaxamed, that they're --
24 and that's why, your Honor, not to go back to your previous
25 ruling, I'm not challenging --

1 THE COURT: Yeah, no.

2 MR. FEW: -- that's why we believe that we need the
3 declaratory rights in the contract so that Diaxamed and
4 Sealevel will know going forward that if they -- when they do
5 get to a commercialization, we -- we still have our rights
6 under the customer supply agreement.

7 THE COURT: Well, let me ask you this. Can -- if you
8 find -- if they're -- if they're a party to the agreement
9 based on your theory, then how can you go to your next call
10 of action for intentional interference? How can you
11 intentionally interfere with a -- a contract that you're
12 claiming they're party to?

13 MR. FEW: Well --

14 THE COURT: And it doesn't have to be a third party and
15 under your theory, they're not a third party.

16 MR. FEW: Well, it's -- we have alternative theories,
17 your Honor, and the -- and the -- and the Court and the jury
18 can make the findings on it because -- you know, it's like
19 we're playing whack-a-mole, we're trying to chase a contract,
20 and then they say "Well there is no contract, and the person
21 that took over everything that used to be what -- who you
22 dealt with, they don't owe you anything that they're not --
23 they don't have any legal responsibility to you." I say
24 "Okay, well then we're going to sue them for intentional
25 interference with a contract."

1 So -- I think it's a question of fact for the jury to
2 decide, and that's why our verdict form sets them aside,
3 which is a little bit inconsistent with what I was just
4 saying to your Honor, but I think that based on the evidence
5 and the testimony that the party that breached is -- well,
6 their -- their position is that they never had it, and that
7 -- it ended with CreatiVasc/Brookhaven Vascular, Brookhaven
8 Merger Corporation, and so I think we can go forward on that
9 theory, and --

10 THE COURT: But is there any evidence in the record
11 that says Diaxamed took over this contract or any of the
12 documents that say they assumed this contract?

13 MR. FEW: Of the -- the documents say the opposite --

14 THE COURT: Okay.

15 MR. FEW: -- and then, but --

16 THE COURT: Do you have any evidence that says that
17 they're a part of this contract? I know what you believe,
18 and I know I understand your -- your dilemma, but -- I mean,
19 you're trying -- it sounds like you're trying to -- you try
20 to say whack-a-mole, I think it's more trying to put the
21 square peg in a round hole.

22 MR. FEW: Well, your Honor, I think that it's a matter
23 of law as to whether or not --

24 THE COURT: I do too.

25 MR. FEW: -- whether or not they can do that, whether

1 or not they can lead -- and -- and that issue has not --

2 THE COURT: But that's not a breach of a contract like
3 -- I think -- I think you got -- it's another type of claim,
4 but it's not breach of a contract, if you don't have some
5 evidence that they're party to the contract, they assume --
6 and we're just talking about the breach of a contract.

7 MR. FEW: Understood.

8 THE COURT: They have to have assumed somewhere.

9 MR. FEW: Well -- and you're right, your Honor. It --
10 it -- it -- it can't be both ways. We don't want it both
11 ways, but we want it one of the two ways. So I guess where
12 we are is that Diaxamed -- if -- if there's a finding that
13 they have not taken over, but it seems like that, that's a
14 matter of law, I believe.

15 THE COURT: I mean, I think -- I think what you're
16 saying supports enlightenment is favorable to you -- your
17 intentional interference, but I just don't see any evidence
18 that they -- like I said, the evidence is actually contrary
19 to them on the breach of a contract claim.

20 MR. FEW: Well, that's certainly the position they took
21 according to that -- the -- yeah, that they take the position
22 that they took -- that they did not take Sealevel, so...

23 THE COURT: And I realize, I mean, I -- I understand
24 the dilemma that puts you all in, I'm just trying to -- I
25 mean, I spent a lot of time looking at this last night --

1 MR. FEW: And, your Honor --

2 THE COURT: -- every case that there's out there.

3 MR. FEW: Don't have any evidence to the contrary other
4 than the argument, and so I guess to the extent that it was
5 something that they were in control of, they chose to
6 (inaudible) on a limb, they (inaudible) that, "We don't have
7 any obligation to you, it stays with Brookhaven," then I
8 think we're stuck with that, I really do.

9 THE COURT: I mean, I just -- in looking at it from
10 every way I can, I just think that -- that they are not
11 involved in the breach of a contract, and I'm -- does that --
12 and I'm a little bit confused. Does that -- who does that
13 leave? It's leaves CreatiVasc -- and I realize that these
14 companies -- I'm not sure how viable they are, but you got
15 Brookhaven Vascular and Brookhaven Merger. I mean...

16 MR. FEW: Well -- and that's what gets also into the --
17 the equitable claims because the -- the evidence is -- is
18 that Diaxamed has all of our stuff, but if we have a legal
19 claim, then we don't -- I guess we don't get to that. So if
20 -- and that -- and our verdict form, I think bears that out,
21 that if -- if -- if we -- if they rule on the legal claims,
22 then --

23 THE COURT: What is your position on the -- on who are
24 this? Okay. If I -- if a Diaxamed is not in the breach of a
25 contract, are the other three still in?

1 MR. FEW: So, your Honor, I -- I -- I looked at that
2 too, and the -- the documents are confusing. CreatiVasc
3 merges with Brookhaven Merger, and then after that,
4 CreatiVasc changes its name to Brookhaven Vascular.

5 THE COURT: Okay.

6 MR. FEW: And -- you know, I think ultimately, it's
7 Brookhaven Vascular that is the -- the entity that where --
8 that -- that stands in the shoes of CreatiVasc, but the --
9 and I have to go back and look at John Feldman's testimony a
10 little bit more closely than I did as to how that was
11 structured. But the -- it -- it didn't make any sense to me
12 that you would change the name of CreatiVasc to Brookhaven
13 Vascular after a merger that folds into Brookhaven Merger.

14 THE COURT: So I think that -- yeah, because I think
15 that it's appropriate then to keep all three of them in at --
16 on that part of the verdict form, and then if there's a
17 verdict, then would that -- that's just something that has to
18 be hashed out afterwards, which one's the actual file, but I
19 think to protect the Plaintiff, all three of those need to be
20 named as a Defendant on that part of the verdict.

21 MR. FEW: I can't -- I can't argue with that.

22 THE COURT: Okay. All right. So the intentional
23 interference with a contract, again, the only person that is
24 really a viable Defense here is Diaxamed, because the other
25 parties are -- are parties to the contract, but they're --

1 they're the only third party here.

2 MR. FEW: I -- we agree with that.

3 THE COURT: Okay. Yeah, I looked at that -- I -- I --
4 Mr. Shealy, it's a close call, but I believe in light most
5 favorable to the Plaintiff and the evidence that I think that
6 that is something that should go to the jury.

7 MR. SHEALY: Okay.

8 THE COURT: I'm going to deny your motions there.
9 Quantum meruit. I went back and looked at quite a few cases
10 again on that. I quote from Stringer and basic form book law
11 "Although the Plaintiff's cost to performance might represent
12 some evidence of value, they do not represent a recoverable
13 item of restitution themselves."

14 That's basically what we have here. I do not believe
15 that there is any -- there has been evidence of value of that
16 product actually that was conferred on the Defendants -- and
17 the Defendants, so I'm going to direct a verdict as to
18 quantum meruit.

19 Also -- I think there's also a question -- I know your
20 position, but I think looking at the evidence, I'm not sure
21 there is evidence of any retention by any of the Defendants.
22 You have some -- from my perspective, some loose -- you know,
23 product out there that is not being used by anybody.

24 You have all of the information on a computer that the
25 evidence says "He doesn't have it anymore, it was taken from

1 him," but there's been no evidence, like, it's sitting over
2 here in a safe or they've been using or anything like that.
3 So I think there -- there really hasn't been any evidence of
4 retention in addition to no evidence of the -- the value to
5 the Defendant, so I'm going to direct the verdict as to
6 quantum meruit.

7 Promissory estoppel: Looking at that as clearly an
8 equitable claim, of course the Court has a couple options
9 there. One of the things I was thinking about possibly is,
10 do we do an inter-special interrogatory to the jury to help
11 advise me or just don't send it to the jury and make a
12 decision on my own, but that's just -- any comments on that?
13 I mean, it's clearly an equitable claim and not a -- not
14 necessarily related to a jury, but...

15 MR. FEW: Yeah, your Honor. On behalf of the
16 Plaintiff, I -- I've looked at the law on that and I don't
17 know that I really understand, it's probably within your
18 discretion to choose how to do it.

19 THE COURT: I was hoping that -- that a young law
20 school -- law student would -- fresh out of law school, but
21 nobody even understood that law except those professors.

22 MR. FEW: Well -- you know, when you couple that with
23 all those cases out there where it's a foreclosure, and it's
24 a counterclaim -- I mean, it's just goes over my head, I
25 don't understand it. Now, that's not what's before the Court

1 here, but I think -- from what I read, to the extent that
2 it's a factual issue in dispute, it can go to the jury, so I
3 think that would be grounds to make it proper for them to
4 determine any factual issues that are there, but it could be
5 left with the Court as well, I believe.

6 THE COURT: I mean, I think you can go back to some old
7 -- really old cases, and they talk about the Court of
8 Chancery and -- and presenting it to jury to give an advisory
9 opinion basically to the judge, the judge, can he accept it
10 or not? but -- I think that may just be more confusing than
11 --

12 MR. FEW: Which is --

13 THE COURT: -- not --

14 MR. FEW: -- really consistent with -- you know, the --
15 the posttrial motion practice --

16 THE COURT: Yeah.

17 MR. FEW: -- anyway, so it seems like -- I think that's
18 -- it does seem like there's some issues that -- that could
19 be left to the jury for fact-finding. In terms of the relief
20 for the promissory estoppel being the reliance, they could
21 determine what the -- there could be a dispute as to what the
22 reliance damages are, but I think the only evidence in --
23 well, the evidence in the record is the -- the -- the
24 invoice.

25 THE COURT: Right. And I mean, I can still make the --

1 I can -- I -- I can still serve as the fact finder of those
2 issues. So -- so the ruling of the Court is, on the breach
3 of a contract, Diaxamed is out, intentional interference of
4 the contract is only against Diaxamed, quantum meruit is out,
5 promissory estoppel will be held in advance to be -- as an
6 equitable matter to be determined by the Court, and the
7 declaratory judgment has been denied as far as any ruling.
8 Does that cover everything?

9 MR. SHEALY: Your Honor, you did not make a ruling
10 actually on the breach of a contract as to the other --

11 THE COURT: I'm -- I'm going to let that in, I believe
12 that there's -- there's enough in there, and I think
13 incidental damages is what I -- I know your argument there.

14 Again, I think that's a close call of the way that all
15 these facts fall out, but I think that there is a -- a basis
16 for that to go to the jury. Especially given (inaudible)
17 most favorable to the Plaintiff. All right. Did I cover
18 everything?

19 MR. FEW: Yeah, your Honor, just for clarification.

20 THE COURT: Yes.

21 MR. FEW: So when you say in advance, then the
22 equitable claimant will not be on the verdict form.

23 THE COURT: That's where my feeling is right this far.

24 MR. FEW: Okay. Just -- just making sure I --

25 THE COURT: No, that's kind of -- that's where I'm

1 headed.

2 MR. FEW: Okay.

3 THE COURT: All right. So now let me -- let's kind of
4 -- now that we've -- I think I've covered everything.
5 Anything else from the Defendant at this point Defendants?

6 MR. SHEALY: No, your Honor.

7 THE COURT: The Plaintiff, anything else from you right
8 now?

9 MR. FEW: No, your Honor.

10 THE COURT: All right. Now let me --

11 MR. FEW: Just -- just -- whatever we do on the verdict
12 form.

13 THE COURT: Right. Let me go -- now that I need -- now
14 that we've kind of gotten to this point, let me kind of get
15 my head around the verdict form and the charges --

16 MR. FEW: Okay.

17 THE COURT: -- and -- you beat -- you beat my deadline
18 of "Don't send them to me by 9:00," by 40 minutes, I'm fine.
19 No, they were -- they were -- they were pretty basic, it was
20 -- it was easy to pull together, there is no problem. I'm
21 just -- I had rational --

22 MR. FEW: I -- well, I was out. I mean, I was out.

23 THE COURT: Now, this is -- yeah, these are -- these
24 are taxing counter of trials, so...

25 MR. SHEALY: From -- from all sides, so...

1 MR. FEW: I told Kirby in the bathroom, the difference
2 between now and 10 years ago is that I -- I get about five or
3 six hours of sleep at night when I'm in trial instead of 2:00
4 to 4:00.

5 THE COURT: Yeah. All right. Well, we'll be -- I may
6 -- what I'll probably do is get out my thoughts together and
7 then maybe have you back here and then kind of discuss, then
8 we put everything on the record, so -- all right.

9 (Off the record.)

10 (On the record.)

11 THE COURT: Did she tell him?

12 MR. SHEALY: Yeah -- yeah, I told her.

13 THE COURT: Okay.

14 MR. SHEALY: The witness.

15 MR. FEW: Yeah, I'm sorry. I can't (inaudible) your
16 Honor.

17 THE COURT: All right. And I'm just going to bring her
18 -- I'm going to stand right here because I don't want -- and
19 I -- and just ask her -- you know, because she could be fair
20 -- you know, just kind of give some information, and I
21 believe we -- we pretty much agreed that regardless of her
22 comments that we will go ahead and remove her.

23 MR. FEW: Yes, your Honor.

24 THE COURT: (Inaudible) Plaintiff. Well you -- I'll
25 let you make that decision afterwards.

1 MR. FEW: Yeah. We'll hear comments --

2 THE COURT: Yeah.

3 MR. FEW: -- first, I guess.

4 THE COURT: All right. It is?

5 THE CLERK: What's her name?

6 MR. FEW: Megan --

7 MR. SHEALY: Cook.

8 MR. FEW: -- Cook, yeah -- yeah.

9 THE COURT: Megan Cook.

10 MR. FEW: 210.

11 THE CLERK: Megan Cook.

12 THE COURT: Yes.

13 MR. FEW: 220?

14 MR. SHEALY: 220?

15 THE COURT: I always feel like it. They're pretty
16 intimidated, normally that's always kind of (inaudible). All
17 right. First of all, you're not in trouble, okay. Janine
18 from the jury coordinator told me that somewhere in this you
19 realized, "Oh, my gosh, I have had some connections with one
20 of the parties." Tell me what you --

21 JUROR NUMBER 220: Yeah, I realized yesterday that I had
22 applied for a job with Sealevel in 2021.

23 THE COURT: Okay.

24 JUROR NUMBER 220: It was my understanding at that time
25 I had applied for a marketing job, and they were doing black

1 box technology, I believe -- it's the same company group, so
2 I didn't know anything about this --

3 THE COURT: Okay.

4 JUROR NUMBER 220: -- and so I just realized it.

5 THE COURT: All right. Do you believe in light of that
6 you could be still fair and impartial to the trial the case?

7 JUROR NUMBER 220: Yes.

8 THE COURT: Okay. All right. I'm going to -- I'm
9 going to talk with them and I'll let you -- going to let you
10 keep or not -- keep you or not.

11 MR. FEW: Your Honor, Plaintiff's fine to keep the
12 general order based on her comments that she could be fair
13 and impartial, so -- but I'll --

14 MR. SHEALY: Your Honor, I -- I do think it's still
15 safer to replace her with an alternate, because it just seems
16 odd to me that she only realized this yesterday after we've
17 been going for a -- a full day and a half or whatever day
18 today, it just seems odd to me. Actually the safest thing to
19 do is to replace her with one alternate.

20 THE COURT: And I don't know, and I guess I probably
21 should have followed up. I mean, did -- was she not hired,
22 or -- or what -- like that? I -- I just think -- you know,
23 whatever the circumstances were -- and I think since we do
24 have an alternate, my -- my preference is to replace her with
25 the alternate -- I mean, any objection to that from the

1 Plaintiff?

2 MR. FEW: For the record, yes. But...

3 THE COURT: Well -- I mean, I'm -- that's what I'm
4 asking is -- I mean, because she said she could be fair and
5 impartial.

6 MR. FEW: Yeah.

7 THE COURT: It didn't really seem to have much of a --
8 a connection or anything.

9 MR. FEW: Yeah. And -- and I realized -- you know,
10 too, she's very young, so she's probably applied for a lot of
11 jobs in her 20s maybe, so -- but I don't know. I mean, when
12 I go to the restaurant, I order what's on the menu and I just
13 -- they give it to me, and I -- I don't like to pick and
14 choose, but --

15 THE COURT: Your final answer?

16 MR. FEW: Final answer? We'll flip a coin. We'll keep
17 her.

18 THE COURT: Okay. I'm going to keep her then. I mean,
19 you all don't consent, I just feel like that there's not a
20 basis there to -- all right, so, first of all, you all have
21 reviewed the verdict form. Any objection from the Plaintiff?

22 MR. FEW: No objection, your Honor.

23 THE COURT: All right. From the Defendant?

24 MR. SHEALY: No, your Honor.

25 THE COURT: All right. Any objection to the charge we

1 went over in chambers?

2 MR. FEW: No, your Honor. No objection.

3 THE COURT: All right. From the Plaintiff, and from
4 the Defendant?

5 MR. SHEALY: No, your Honor.

6 THE COURT: Well, I guess we are ready for the jury.
7 Well -- okay, so how long do you all think -- and the only
8 reason I'm asking this is we've got a -- we're ordering lunch
9 for the jury, and I just want to -- I'm just trying to figure
10 that out. Do you think you -- if I tell him that -- it -- it
11 should be able to -- it is almost 11:00, we should be able to
12 have till 12:30, what do you think?

13 MR. SHEALY: Certainly, I hope so. I mean, I don't
14 anticipate -- I don't...

15 THE COURT: Okay. Well let's -- tell Tom, Mark,
16 whatever, Paige -- his first name, I just drove off there,
17 12:30 or a little after, so it didn't have to be here before
18 12:30.

19 THE CLERK: Okay.

20 THE COURT: All right -- all right. So ready for the
21 jury. Okay. Bring them in.

22 (Jury enters room.)

23 THE COURT: Do you all use the podium -- you want? And
24 I will --

25 MR. SHEALY: I can come there.

1 THE COURT: Yeah, I can -- and I will use your dock
2 cam, because what I do is when I go through the verdict form
3 with them -- so that they all see it, so...

4 MR. FEW: Okay.

5 THE COURT: Do you all need the dock cam or anything?

6 MR. SHEALY: I may use it one time.

7 THE COURT: All right. Well, let's just go ahead and
8 turn it on, make sure we got it --

9 MR. FEW: Warmed.

10 THE COURT: -- warmed up.

11 THE COURT: Are you ready? Counsel approach. Hey,
12 good morning.

13 THE JURY: Good morning.

14 THE COURT: All right. I'm making -- see I'm already
15 late and now I've got realized there's one other little thing
16 that we've got to deal with. And we -- I -- you will be
17 staying on there. Okay. I just let -- I forgot to tell you
18 that. All right. This will just take a -- just a few
19 minutes and if you step back into your room, but don't
20 discuss your case.

21 (Jury exits room.)

22 THE COURT: All right. As I -- as I indicate, I can
23 tell them that you rested, but you want to officially rest --
24 rest on the record.

25 MR. SHEALY: Yes, your Honor. We have elected not to

1 put up any evidence ourselves, so the effect of that is the
2 "Defense rests," and -- just to protect ourselves
3 procedurally, we would -- at this point, renew the motion for
4 directed verdict made yesterday for the grounds stated
5 yesterday. I know your Honor has ruled and granted that
6 motion in part, but in particular, we believe that there is
7 no meeting of the minds between these parties that gives rise
8 to a breach of a contract cause of action as between anyone.
9 That there's been no breach, even if there is an enforceable
10 contract. Plaintiff has failed also to introduce any
11 evidence of damages.

12 As to the intentional interference with the contract,
13 there's -- the only evidence in the record is that Diaxamed
14 purchased the assets of a company that -- and -- and did not
15 assume any liabilities that pertain to that company's
16 relationship with the Plaintiff. That, we believe is a
17 perfectly valid legal thing for any corporate entity to do,
18 and does not give rise to any liability whatsoever under the
19 common law of South Carolina, and therefore, we believe that
20 we're entitled to a directed verdict on the intentional
21 interference with a contract as to Diaxamed.

22 THE COURT: All right. And I'm going to stand by my
23 ruling as noted previously this morning, and deny your
24 motions. All right. So now are we ready?

25 MR. FEW: Plaintiff's ready, your Honor.

1 THE COURT: And Defense? All right. Bring the jury,
2 please, ma'am.

3 MR. SHEALY: Your Honor, how long --

4 THE COURT: Yes.

5 MR. SHEALY: -- do we -- is there anything in here
6 about nominal damages?

7 THE COURT: Uh-uh.

8 MR. SHEALY: Is that -- is that not part of a standard
9 charge on the breach?

10 THE COURT: Uh-uh.

11 MR. SHEALY: Okay.

12 THE COURT: Not that I've had before. I'll -- I'll
13 tell you, what I'm going to have -- I'll have him look it up
14 and then if we have to break after -- you're closing, we can
15 -- we -- I'll let you discuss it, all right?

16 MR. FEW: We're closing?

17 THE COURT: You're closing and then I'll charge him and
18 we need to take -- if he finds something that we need to
19 address, I'll let you know.

20 MR. FEW: Okay.

21 THE COURT: Was there anything in request? I don't --

22 MR. FEW: Your Honor, I -- I didn't have it in there.

23 THE COURT: Okay. Well -- we'll look -- I'll -- I'll
24 have him look here in the -- you all, your argument and then
25 thank you for address. All right. Now we're all ready, now

1 -- I'm asking, you all are all ready now.

2 (Jury enters room.)

3 THE COURT: All right. Ladies and gentlemen, first of
4 all, I want to thank you for your patience, and I realize
5 that when I've -- had you all go in and out, and sometimes
6 (inaudible) on the side of making sure that the record is
7 just complete and -- as possible. And that's easier done
8 without, of course, you all without the jury -- without you
9 all being in the jury, I mean, in the courtroom. So I do
10 apologize for that, and it's totally my fault in any delay
11 that we had, that's my fault. So don't hold it against
12 either of these parties.

13 As you will recall, when you left yesterday, the
14 Plaintiff arrested, okay? Since then, as I indicated, the
15 Defendant has arrested also on the record. They just --
16 they're -- indicating they're not planning on putting forth
17 any additional testimony or evidence. So therefore, all of
18 the evidence that you will need to make your decision has --
19 has been presented, okay?

20 So we're now to the final stages of the trial, and that
21 is closing statements by the attorneys. The Plaintiff will
22 have the opportunity to go first, then the Defense will have
23 a chance to go to -- to argue, and then the Plaintiff has the
24 opportunity for a brief rebuttal. And then, after that,
25 well, I'll charge you on the law, and what I'm going to tell

1 you is, this is the law which applies to this case. And at
2 that point, you can go back in your jury room where your
3 lunch will be waiting, and you can begin your -- finally
4 begin discussing the case. But at this time, I would ask
5 that you devote your sole attention -- your complete
6 attention to the attorneys for their closing argument.

7 Mr. Few?

8 MR. FEW: Thank you, your Honor. May it please the
9 Court?

10 Good morning, ladies and gentlemen, thank you so much
11 for your time and your attention for this matter. I know
12 we've talked a little bit about other things that are going
13 on in this courtroom, there's two murder trials and --
14 grateful that we're not a part of that.

15 And as you can see, having been down there and seeing
16 people in the hallway, it -- it really gets real in this
17 courthouse, people have -- and there's no family court here,
18 so if there's family court here, we'd be seen even more. But
19 this is also a very important matter. And the reason this is
20 an important matter is because we're either a country of laws
21 or we're not a country of laws.

22 And thank the good Lord that we're a country of laws,
23 and that we need to continue to be. When these folks come to
24 work, court reporter, court staff, bailiff, the judge, we all
25 do our best to do our part to make sure that the justice

1 system works. My colleague, Kirby Shealy, great guy, we used
2 to practice law together, we've known each other for years,
3 we all do our job. And -- and so now you have your job that
4 the judge is going to charge you on, and it's a really --
5 really unique job, because you -- unless you sit on another
6 jury at some other point in time, you get to decide what
7 really happened, okay?

8 You get to look at the facts and say "Well, I know that
9 happened," because there's a document, and then you get to
10 look at the facts and you say "Well, the testimony synced up
11 with what this person did, and my common sense tells me that
12 this is what these people were up to." And the judge is
13 going to charge you on that, he's going to explain the
14 difference between direct and circumstantial evidence, okay?

15 So direct evidence is Exhibit 4, the existence of the
16 customer supply agreement. Opposing counsel said in his
17 opening statement that they don't dispute that the contract
18 is there, it's never been terminated, there's no evidence
19 it's ever been terminated. You can see in that there's a
20 termination provision, there's three ways that it can be
21 terminated, and they never terminated, okay? So it's still
22 in effect.

23 You get to decide if that is a binding contract, I'm
24 not sure if they're going to argue that it's not a binding
25 contract, we believe it's a binding contract, and that that's

1 been admitted on the record. The basis of the Defendant's --
2 Defense is that they just deny our allegations.

3 Well, as I sat here in this courtroom and heard the
4 evidence go up, there's not a lot of facts in dispute, right?
5 Steve Johnson, one of the last things he said when he was on
6 the stand was that he believed in Sealevel. He said -- and I
7 pulled up the Exhibit, he said "We're so close," and then he
8 meets with Sealevel on January the 12th to tell them about
9 the changes, but he never tells them that they're cut out.
10 That's -- that's -- that seems important to me, that -- that
11 -- and -- and that seems to me to be the epitome of bad faith
12 conduct, okay?

13 You -- you meet with somebody, you -- everything's
14 going great, you're having these technology summits, you're
15 bringing people down from North Carolina, you're bringing all
16 your suppliers in, FDA is behind you, you're getting grant
17 money, you're getting venture capital coming in, they're
18 talking about what a great job it is, the one doctor said "If
19 we had gotten these people together, we could have won the
20 Civil War."

21 It's in one of the attachments that you can look at and
22 see, there was a lot of excitement around it, okay? Here's
23 another thing that's in the evidence. This man -- I -- I --
24 I like him, okay? He's very -- very smart, his company
25 succeeds and succeeds -- and succeeds, and they grow -- and

1 -- and they've grown since we filed this lawsuit, and they
2 can do their part on their job. And you've heard the
3 testimony that -- the other side said "Well, the battery
4 didn't work." Well, that was in like November of 2015, okay?
5 That problem was clearly solved. They weren't talking about
6 batteries in 2016 or in 2017 when Steve Johnson came to them
7 and said "I want to tell you about what's changed." And --
8 you know, Steve Johnson was sort of caught in the middle of
9 everything, and then he ended up having his job terminated.

10 And -- and -- and you've heard about what Diaxamed did.
11 And so -- as we come before you today, we have two claims,
12 okay? A lot of cases I take to a jury are a lot more
13 complicated than this, they'll have: a breach of a contract,
14 unfair trade practices, misappropriation, and trade secrets,
15 so we only have two claims, breach of a contract and
16 intentional interference with a contract.

17 Now, the breach of a contract claim is going to be
18 against CreatiVasc and Brookhaven Vascular and also
19 Brookhaven Merger Corporation, and I don't really know the
20 difference between Brookhaven Merger and Brookhaven Vascular,
21 they -- we know from that -- that enormous Exhibit 29 that
22 they took it over, and that's a document that was filed at
23 the Secretary of State's Office, and I pull a lot of stuff
24 off the Secretary of State's Office, and that may be one of
25 the longest things I've ever seen.

1 It's clear that this was a sophisticated transaction,
2 it's a 68-page document that was filed at the Secretary of
3 State's Office to document what happened with that corporate
4 transaction. And as I asked the witness about what was on
5 Schedule 4.8 -- was my client's contract on Schedule 4.8.
6 How can you get a group of attorneys from Atlanta and
7 wherever they're from? Big -- big firms, very sophisticated
8 people with lawyers at their disposal and not -- and prepare
9 that document and not list everybody that's contracted on
10 there?

11 And that goes to show that Brian McMurray, who was the
12 principal person acting behind Diaxamed -- just to refresh
13 your memory, we're not suing Brian McMurray, we're just suing
14 Diaxamed, and -- but the judge is going to charge you about
15 the difference between the persons and corporations, and so
16 -- see if I get this right.

17 A corporation is kind of considered a person under the
18 law in order to be -- but corporations act to their
19 employees, okay? And so, anything that he did, we believe on
20 behalf of ATEX and/or Diaxamed through -- Diaxamed was formed
21 for the purpose of taking over this technology, taking
22 everything that CreatiVasc had except Tom O'Hanlan and
23 Sealevel's efforts, okay?

24 So corporations act through their agents. The
25 testimony and the evidence is -- is that -- as I heard it,

1 and I believe you -- hope you would agree, Brian McMurray was
2 the one that was making the decisions that were driving what
3 was going on with Diaxamed. He formed Diaxamed, they
4 structured the agreement the way they did, you have those
5 documents in there. In fact, it's Exhibit 14 -- and you can
6 look at Exhibit A, that's the December 30, 2016 Contribution
7 Agreement, and that's what I -- I put it up at trial and I --
8 I'm sorry I didn't put a lot of this stuff up on the
9 Telestrator thing when we were going through the trial.

10 The truth of the matter is, you don't need to look at
11 all of that stuff. You certainly can look at all that stuff,
12 and I'm going to go through some of the Exhibits here in a
13 minute that I think that are really important to the case and
14 that we want you to -- to pay special attention to. But
15 Exhibit A lists everything, all the patents, all the
16 trademarks, everything.

17 I think it's important too, and we didn't really talk
18 about this with the witnesses, because the way a trial works
19 is Court brings us in here and they introduce you and kind of
20 tell you what to expect as best they can, and we try to tell
21 you what to expect as best we can, and then the last portion
22 that we're doing, we're just cutting up evidence. We're not
23 really supposed to be arguing about things with witnesses.

24 Occasionally, we argue with witnesses and there was an
25 objection and the judge said "Argumentative." So that -- but

1 that everything that came from that witness stand and
2 everything that's in these documents is now in evidence. So
3 you can consider all of that information, and the judge is
4 going to tell you, that's all you can consider, that's why
5 you can't do outside research.

6 So we've got all this evidence. Frankly, it's more
7 evidence than we need to prove a breach of a contract case,
8 and that you're welcome to look at all of it. But I -- I
9 call attention to that Exhibit A. It's clear that the --
10 the -- the forming of Diaxamed and DXM Holdings and -- was
11 all for the purpose of acquiring -- like I said before,
12 everything that CreatiVasc had -- you heard the testimony,
13 they took over the CreatiVasc space, they paid off the
14 CreatiVasc debts, and when I say -- Brookhaven Vascular at
15 that time.

16 They took over all the other obligations, but yet --
17 and -- and -- and as a result of that, what they did --
18 CreatiVasc had -- or Brookhaven Vascular had no choice but to
19 breach the contract with Sealevel, because they had anything
20 left, they gave it away. They -- they agreed to give away
21 everything -- and this is what's interesting as well. Steve
22 Johnson, who's been the guy behind CreatiVasc going all the
23 way back to 2005, '06 or '07, whatever it was that Dr. Cole
24 said, they -- he started working with him, he didn't even
25 know. He didn't even realize that Diaxamed had structured

1 that transaction so that they -- so that their lawyers can
2 now say "Well, we don't have any obligation to Sealevel."

3 And I just don't think that that is something that is
4 proper. But as a result of that, Diaxamed is not a party to
5 the breach of a contract claim, they're only a party to the
6 intentional interference with a contract claim.

7 And what I need to prove on that -- Judge is going to
8 charge you on the breach of a contract claim. We -- we -- we
9 have to break things down into elements -- you know, that's
10 how the law gets supplied. And so, we -- we try to simplify
11 it and -- and you'll hear -- you know, we read the cases and
12 we quote them and it says, to establish a claim for this
13 Plaintiff must prove 1, 2, 3, 4.

14 So here's what we have to prove for intentional
15 interference with the contract. The existence of a -- of a
16 binding contract, which by my ears they've admitted, the
17 Defendant's knowledge of the contract, okay? They didn't
18 admit to knowing about it, which I find interesting. Steve
19 -- Brian McMurray, whose deposition testimony was read to
20 you, he says "I didn't know Sealevel was."

21 His lawyers didn't know Sealevel was, because they
22 purposefully didn't include them on that contract, okay? So
23 you're going to have to -- I -- I think you're going to have
24 to use your common sense to infer from the evidence that they
25 knew, and -- and -- and let's examine that. 2014 -- excuse

1 me, from the beginning, the -- there was evidence put in the
2 record. I don't want to misstate when exactly when something
3 happened, okay?

4 But from the very beginning, Steve Johnson is -- and he
5 testified to this, "I was so excited to put Brian McMurray's
6 company together with Tom O'Hanlan's company," because great
7 things were going to happen, because they were both so
8 successful and they had great employees, and they -- and they
9 -- and they have a track record of success and this is going
10 to be successful.

11 They had the -- the -- I'll call it the "What A Day"
12 conference, there's two Exhibits, I think it's 8 and 9 where
13 this -- and this is the email that's copied to everybody.
14 You'll see like five people from Diaxamed on there and like
15 three or four people from Sealevel, and they had the meeting
16 in early November of 2015, and that's -- I think the one when
17 the Dr. Trout said "We could have won the war" or something
18 like that.

19 But yet the -- the owner of -- of Diaxamed says "I -- I
20 didn't even know who they were," and -- and they were at all
21 these conferences, these -- planning things together, it's
22 just not plausible to me that they claim they didn't have
23 knowledge of the contract, they had knowledge of the
24 contract. They had knowledge of the contract because they
25 specifically left it out.

1 Now, Mr. Shealy is going to stand up and say "What they
2 did is a perfectly legal thing." Well, it may be, but legal
3 things have consequences, okay? And I want to draw a
4 distinction by pointing to a different type of party, okay?
5 Because I want you to understand this. If we were suing
6 somebody for civil conspiracy, the law of South Carolina says
7 we have to show that they either did an unlawful act or a
8 lawful act by unlawful means. We don't have to do that to
9 prove intentional interference of a contract.

10 We just have to prove that they knew the contract, they
11 intentionally procured the breach -- breach of it, there was
12 no justification for it, and then the damages resulted.
13 Well, the damages had to result because CreatiVasc and
14 Brookhaven Vascular or Brookhaven Merger Corporation -- I
15 believe it was in the testimony of Mr. Feldman, they just
16 left them open there long enough to -- you know, collect
17 payment on a note or something to that effect, okay?

18 So they knew they were leaving those companies in the
19 dark with no employees, and that they were not going to
20 continue to operate. So that they took everything except the
21 Sealevel contract. That was intentional conduct, went out of
22 their way to prove that, okay? Now I hadn't said a word
23 about this yet, okay?

24 In South Carolina, when someone acts intentionally or
25 willfully or wantingly, you'll hear these words used in the

1 judge's charge, Plaintiff has a right to give punitive
2 damages to this, okay? So by my way of thinking, this is
3 despicable, okay? And let me tell you what makes it
4 despicable, the use of a Non-Disparagement Agreement, okay?
5 Who goes around and says "I'm going to give you a severance
6 agreement that you can't talk about me, and if you say
7 something about me that I don't like, I got a lot more money
8 than you," I -- and Steve Johnson was so impacted by that, I
9 think it's the reason he didn't tell Tom O'Hanlan what
10 happened, maybe he really did know what happened, maybe he
11 really did know they were being cut out, but he didn't tell
12 them because he didn't want to be sued.

13 I'm just telling you what he said in his deposition, I
14 mean, what -- what he said is that he -- he was impacted by
15 it. That he was afraid that he couldn't tell the truth about
16 what's happened there, okay?

17 Non-Disparagement Agreements are used in far more
18 despicable ways than this. When somebody's the victim of a
19 heinous crime or a sexual assault, that's when you use a
20 non-disparagement agreement. Rich people use them to tell
21 people, "I'm going to give you money, but you go somewhere
22 and you can't talk about me."

23 You ever heard of Dan Snyder, president of the -- the
24 guy who used to own the Redskins? He did that, he was
25 notorious for this. NFL finally made him sell the company

1 for \$6 billion, okay? So when you're acting in good faith
2 and you intend to do the right thing, you intend to be honest
3 and above board. You don't need a non-disparagement
4 agreement, particularly not for a man like this. If he
5 strike you as somebody that was going to have a ax to grind,
6 never struck me that way. They wanted him to be quiet and
7 they hoped that the whole thing would go away.

8 The breach of a contract claim, the judge is going to
9 charge you on that. He's going to charge you on all the
10 things about forming a contract, okay? And I'm not going to
11 go through the details, Mr. Shealy may do that, but it's
12 enough for me that they signed it, Mr. Johnson affirmed it.
13 We took action under it, and they told you at the beginning
14 of the trial that it was a valid contract, it still hadn't
15 been terminated.

16 So to prevail on the breach of a contract claim -- bear
17 with me just a second, there's -- we have to prove that it
18 was a binding contract, there was a breach or an
19 unjustifiable failure to perform the contract and that the
20 Plaintiff suffered damages, okay? Now, Mr. Shealy, is going
21 to do an excellent job of coming in here and telling you
22 that, "Well, the product never went to market and that's the
23 only way that you could have ever had damages, is if the
24 product went into market, and we chose not to use you to be
25 the exclusive supplier of the handheld device."

1 That's true, we never disputed that, and no evidence to
2 support that. You heard from the young lady, Savannah
3 Forrester and Chad Clark that were hired by Diaxamed, the
4 product hadn't been successful yet, but they're still trying,
5 okay? When we filed this lawsuit, we didn't know -- we had
6 no idea of what Diaxamed did with it, the only thing we got
7 from them is what we had to get through the court system.

8 So they're still working on it, and when they do get
9 there, that obligation could -- should still be -- should
10 still exist to Sealevel, but the way they say they structure
11 the deal is Diaxamed no longer has any responsibility. So
12 you think about that, all the effort that goes into something
13 to get something to a point where it becomes useful, and --
14 and I'll tell you, knowing what doesn't work has a lot of
15 value.

16 You ever do a project around the house and -- and --
17 you know, something doesn't go right and you go on YouTube or
18 something and go, "I should have done it this way," and -- so
19 it's experience. When you're experienced, you're better,
20 okay? You're better in your career when you're 40 than you
21 were when you're 30, because you got more experience, okay?

22 They have the experience of having worked with my
23 client and gotten all the benefit of all that knowledge and
24 they still have it too, okay? Steve Johnson says "When I was
25 terminated, they took my computer and they wouldn't give it

1 back to me, and I was out," okay. So they still have all
2 that?

3 Now, Tom was asked about the -- and I'm -- I'm going to
4 go through some exhibits in here in just a second, I want to
5 go through the witnesses and recap what's important from what
6 they've said as well. Tom was asked about the invoice, and
7 remember the letter that's Exhibit 21 -- I'm pulling this up.

8 June 28th -- see that at the top, 2017, and this is
9 during the time period that you heard the testimony from Tom
10 O'Hanlan and his son, Ben O'Hanlan, who was the president of
11 the company at the time, that -- they was trying to figure
12 out what's going on. "What's going on? What happened? What
13 happened with our deal?" I mean, "Somebody talked to us,
14 somebody tell us something." And so, that's when it gets
15 back to the breach, okay? So -- and the invoice that was
16 sent, because -- if Mr. Shealy's theory of contract
17 interpretation is correct, then CreatiVasc could have just
18 walked away and quit and breached on them, not terminated the
19 contract and never suffered any consequences, and kept the
20 information, okay? Remember -- we didn't put it into
21 evidence, but Mr. Johnson and Mr. O'Hanlan testified about a
22 Non-Disclosure Agreement that they executed from the
23 beginning of their relationship.

24 And the reason that -- that -- that we didn't put that
25 in -- and -- and do you recall -- I want to draw your

1 attention to this too. The -- the lawyer who's been the --
2 the lawyer for Brookhaven's -- Mr. Feldman for 30 years --
3 the in-house lawyer, not their outside counsel, he says they
4 don't have a copy of the purported supply agreement, okay?
5 That's -- that's bad faith behavior. You -- you -- you don't
6 deny something like that. And then, they claim -- after
7 discussions with Steve Johnson, that's after Mr. Johnson had
8 been terminated, okay? Confidential information, "If you
9 breached this provision, you breached the agreement," they
10 breached this provision, they took our confidential
11 information, they wouldn't talk to us, they wouldn't tell us
12 what was going on -- and -- and I won't -- I'm not going to
13 belabor going through that because you can look at it if you
14 want, but the -- the -- the point of it is -- and this is
15 where you get back to just using your common sense -- you
16 know, there's -- there's too many documents here to review.

17 You can do it, you're certainly welcome to go through
18 every bit of it because it's been put into evidence and you
19 can consider it, but each one of those documents has -- has a
20 gist, okay? It has a subject matter, all right? There's an
21 -- there's an agreement that's embodied in those things. And
22 included in that, is that you'll act in good faith, okay? So
23 what changed is when they breached, is when they walked away,
24 and Sealevel left with what to do, okay? And so, Sealevel
25 says "Well, we -- we provided you all this information" and

1 frankly, Exhibit 26, as it was testified by Ben O'Hanlan and
2 Tom O'Hanlan, is a very conservative estimate of the time
3 that was put into it, okay?

4 And you see that this -- the lawyers -- the lawyers
5 were communicating too. They couldn't get answers either.
6 And that's why Ben sends this letter and he acknowledges --
7 I'm not real sure what the 10,000 was, it might have been
8 reimbursement for some expenses (inaudible), but let's look
9 at the -- at the invoice, okay? These are hours, 2,386 hours
10 of labor, they set at the rate of \$125 an hour. \$298,250,
11 \$23,290 of their own out-of-pocket money. Total amount of
12 this invoice, \$321,540. Mr. Shealy did not ask other than
13 one single question about this.

14 They don't test it -- they have no reason to test it.
15 What I think -- I think they didn't ask because they -- they
16 didn't want to hear the answer. They didn't want to know
17 that it was really more than that, they didn't want to know
18 that -- that -- that is a conservative statement of what was
19 given to you and what you took and what you took on our
20 computers.

21 And this is above my head, but -- you know, a lot of
22 things have changed since this breach occurred. We have
23 artificial intelligence or what is -- I'm told is actually
24 called "Learned Language Model." I heard something funny the
25 other day that a guy said "If it was really artificial

1 intelligence, it would tell you that your inquiries are
2 annoying, it would argue with you," okay?

3 But data is important, okay? And there's just hundreds
4 of emails, you see in some of the documents that the number
5 at the bottom on our documents is 2,485 pages, that's mostly
6 like emails that went back and forth between parties.

7 They have all that information, they kept it. Ben
8 O'Hanlan, he testified about the invoice -- what else did he
9 say? He said Steve Johnson said he left for joy, okay?
10 You've heard Mr. Johnson testify, he -- he doesn't -- no one
11 challenges that Sealevel had done what everything that they
12 could do and that they were capable of doing it, but they had
13 to have cooperation on the other side, okay? They -- what
14 they had prepared could only work with so much as what had
15 been done before.

16 And -- and I think it's a little bit important too --
17 and this is why we introduced it, but there's an exhibit --
18 it's like 10, 11, and 12, where Lindsey Calcutt -- San
19 Lindsey -- Sanders Calcutt, she didn't end up testifying --
20 but she's on the emails, she was a PhD from Clemson that
21 worked for the company, younger person. And she writes the
22 email to Tony Martin and says -- you know "These are all the
23 specifications, and by the way, we don't want to use a
24 pressure sensor."

25 And I want to actually show you just briefly -- and I

1 was really struck by this when -- when we saw it in the
2 discovery, and this is the -- the deposition that shouldn't
3 be on there -- let that exhibit -- but you know what this
4 looks like? You can go through it anytime, it's hard to pull
5 it up, but -- this is -- it's like a work order, it's like
6 CreatiVasc saying, "Hey, go do this."

7 So we weren't just doing things, we weren't just trying
8 to make a new fishing rod or something. We were doing what
9 -- we were working with them. Their engineer was in
10 Sealevel's lab anytime he wanted to be, Frank Patterson, he
11 didn't testify. Dr. Cole testified -- and he -- and -- and
12 really the whole purpose of that was for you to understand --
13 and for me to understand -- to learn how revolutionary this
14 could be. That's how excited these people were to be a part
15 of this thing, and -- and you know what? It's still going
16 on, Diaxamed is still working on it, and they have it, and
17 that's their story, that they have it all.

18 Then you heard from Tom O'Hanlan, you heard about his
19 background, which always fascinates me. I have an
20 engineering degree, I couldn't do any of the things he did,
21 mine's in civil engineering, electrical's way too hard for
22 me. The problems that he solved -- you know, he worked for
23 National Cash Register and they put customized software back
24 in the '80's -- I mean, computers weren't that fancy back
25 then, we're talking, like, in the Commodore 64 time period,

1 okay?

2 He did that, it was complicated, he did it. Then when
3 that fell apart, he started his own consulting business and
4 he was going into textile plants and -- and there's no better
5 way to learn. And that gets to the experience that I was
6 talking about earlier, and that's your common sense about
7 what experience is.

8 When you've had experience, that means you're trying to
9 make electric circuits in the '80's work in an environment of
10 vibration, heat, and moisture, that's -- that's
11 problem-solving, okay? That's Tom O'Hanlan, he told you --
12 you know, everything, answered all the questions that they
13 had and they didn't touch the issue of -- of the amount of
14 time that was put into it. They could have asked him that
15 they could have said "Are you sure you really did this much
16 time. Are you sure that your time's really worth this much?"

17 You also heard them testify that while it's not the
18 primary part of their business, that they do do that. They
19 do charge by the hour, if a client comes back and says "Hey -
20 - you know, can you help us do this improvement?" And
21 they'll do a contract where they help them do that and -- and
22 then they make the new product for them, that's the way they
23 do most of their business.

24 Chad Clark and Savannah, the young folks, you called
25 them primarily to show that everything was still going on,

1 and appreciate them being here. You heard from Steve
2 Johnson, I've always liked Mr. Johnson, Mr. O'Hanlan's
3 enjoyed being with him, and -- and I frankly don't think that
4 he is the one that's responsible for where this is, and
5 that's why -- I don't think the judge has told you yet, but
6 we've agreed to dismiss him from a lawsuit in his individual
7 capacity. So our claims are against the -- and I'm going to
8 recap, we have a breach of a contract claim against
9 CreatiVasc, Brookhaven Vascular, and Brookhaven Merger
10 Corporation. And then, the intentional interference claim is
11 against Diaxamed only.

12 Now, on punitive damages, I want to talk a little bit
13 about that. Very -- very few instances like this end up in
14 front of the jury. Most of them go undeterred, untouched,
15 many people aren't willing to commit the resources to fight
16 for what they think is right, so this is unique that you have
17 the opportunity to speak to this issue, that you have the
18 opportunity to send a message that just because you got more
19 money and just because you got more lawyers, and just because
20 you want to take something for yourself and not deal honestly
21 with people, it doesn't make it right. And just because it
22 may be legal and -- you know, judging by the verdict form
23 that you're going to get, it's considered legal, because
24 Diaxamed is not subject to the breach of a contract.

25 They're only subject to the -- to -- because -- because

1 this is the way they orchestrated, this is the way they
2 wanted it. They certainly didn't want to be sued, but this
3 is what they did, and -- in a situation like this, the
4 company -- the people that get ghosted, whether it be an
5 individual run with a small business. I mean, Tom's been
6 successful, or a smaller company, or a bigger company, it's
7 important that the law be applied.

8 And that's why we spent time with the judge trying to
9 get everything right on these jury charges, trying to make
10 sure that we only talk about evidence that's in the record,
11 and that you have the proper things in front of you to help
12 administer justice, okay? So it's a -- it's a big role, but
13 the deterrent effect -- I -- I really can't say enough about
14 it, and I'm not a lawyer who comes in here and tells people
15 -- you know, "You need to hit them with a -- a number."

16 You've heard about that company, you've heard about
17 their resources, we -- we don't have evidence of their net
18 worth, they can put it in if they want to, they can tell you
19 what it is if they want to, but -- and the judge is going to
20 charge you with a bunch of factors. Now to -- to prevail on
21 punitive damages, you have to find that the evidence is clear
22 and convincing, okay? So this is going to get into like a
23 legal thing.

24 Everything else we just have to prove by preponderance
25 of evidence, and you've probably heard it if you watch the

1 legal shows, that means you just got to tip the scales one
2 little bit. So for each element of the breach of a contract,
3 if you find that we've proven that element by 50.1 percent,
4 then that -- then that's the preponderance of evidence, okay?
5 Then at the far end of the scale is what's going on in these
6 murder trials, you have "beyond a reasonable doubt," okay?
7 You have to -- the State has to prove their case beyond a
8 reasonable doubt, okay? I know the judge has referred to me
9 as "the State" a few times, but we're not the State, so we
10 don't have to prove beyond a reasonable doubt. So what is,
11 clear and convincing evidence, okay?

12 Well, the only way we can tell it to you is to try to
13 describe what it is, and I've just given you the low end of
14 what it's not and the high end of what it's not. So it's in
15 between there, and the way it gets phrased -- and the jury
16 charges is as followed -- as soon as I can, all right, you --
17 it's a firm belief, you have to have a -- it's a firm belief
18 in what happened, okay? So it's more than a preponderance --
19 I don't know if that's really helpful, but it's a firm belief
20 -- but also the judge will charge you, it's not proof that is
21 unequivocal, so it's -- it's -- it doesn't have to be -- you
22 just have to be firmly convinced that this is what happened.

23 And in a case like this, all these documents really
24 tell the story. And that's why we structured them the way we
25 did, they should be chronological up through Exhibit 22, so

1 if you're concerned about the timeline in there, you can just
2 grab the documents and they'll be in chronological order.

3 So -- and you guys are not -- this is a note-taking
4 jury, but -- I would ask you to take a look at Exhibit 4,
5 obviously that's the customer supply agreement, you need to
6 look at that to know what the terms are. Exhibit 5 is also
7 important primarily just for the timeline, and I -- I'm not
8 going to put it up on the screen, but it's a -- it's another
9 customer supply agreement. And as you've heard in the -- in
10 the testimony, this was entered into after Sealevel.

11 So that just gets back to what I've already talked
12 about. The whole timeline, Exhibit 29, the -- the big
13 fundraise when -- when Brian McMurray and ATEX became
14 involved, Exhibit 4, Exhibit 5, Exhibit 9, I've mentioned,
15 that's the technology summit, the "What A Day," 11 and 12, I
16 just went over that goes to show the -- that was owed -- well
17 over a year into the effort, and you can see how much time is
18 going on.

19 And the Contribution Agreement, I mentioned that --
20 that's Exhibit 14, I -- I've mentioned it, but I'll call
21 attention to it, again, the -- it's -- it's styled as an
22 asset protection agreement, and I'll say again that -- I -- I
23 don't know if -- why Diaxamed did that, but they -- they had
24 a non-disparagement agreement in the new employment
25 agreement, so it wasn't really part of his severance package

1 when he left.

2 And I'm -- I struggle to find anything meritorious or
3 beneficial to the -- to the world in a Non-Disparagement
4 Agreement, absent like a family-court situation. The letter
5 from Mr. Achenbach and then the invoice. So ladies and
6 gentlemen, I -- I -- I really thank you for this. I -- I --
7 we tried to make it as simple as we could. I cringed a
8 little bit when we were reading those depositions to you
9 yesterday, and I'm sure you cringed a few times when I was
10 probably going too long with the witness, but we've been able
11 to get this case up in two days, and the judge is going to
12 charge you on the law.

13 I'll get a chance to have a brief rebuttal to what
14 Mr. Shealy says to you, but we're going to ask you that when
15 you go in to the -- in to deliberate, the judge has given us
16 a very simple verdict form, you either -- if you find for the
17 Plaintiff, you give the damages, and if you find for the
18 Defendant, and on the second claim versus Diaxamed, you -- if
19 you find for the Plaintiff, you award damages, if you find
20 for the Defendant, then you won't go to the next question.
21 If you find actual damages for the Plaintiff on the
22 intentional interference claim, then you can award punitive
23 damages which I think is important.

24 Again, these things don't go to trial often, and there
25 needs to be a message sent that just because you can outlaw

1 somebody, just because you can outspend somebody, just
2 because you can take it for yourself and run with it, that
3 doesn't come without consequences.

4 When you knew that the consequence was that these
5 people were going to be left holding the bag, having put all
6 this money into it, and you kept all their stuff. You kept
7 all their confidential information, you -- not only do you
8 still have their confidential information on hard copy and
9 digital format that was on Mr. Johnson's computer, but you
10 also have all that information that you can load up on your
11 systems and use it, and -- and they just breached the
12 agreement in that way as well. So, thank you for your time.

13 MR. SHEALY: May it please the Court, your Honor?

14 THE COURT: Yes.

15 MR. SHEALY: Ladies and gentlemen, I've been defending
16 this case now for a number of years, and I've been mystified
17 about the Plaintiff's theory from the beginning. And if you
18 can follow it after what you've heard, you are a better
19 person than I, but I still can't -- I still don't understand
20 the Plaintiff's theories in this case.

21 So I told you at the beginning that my pledge to you
22 was not to waste your time, that's one of the reasons why we
23 didn't put up any additional evidence because we looked at
24 what the Plaintiff's put up and -- they essentially proved
25 the defenses that we've been asserting from the beginning

1 with their own evidence. I'll explain that to you shortly,
2 but there was no real reason for us to add anything to the
3 record, we think the record's complete based on what they put
4 in.

5 So I don't know whether you've served on a jury before,
6 but anytime I have a new job, a new task, I -- I'm always
7 wondering, like, "How do I do this? I've never -- never been
8 on a jury, how do I -- how do I do the job?" And Judge
9 Gravely is going to explain to you that you're the judge of
10 the facts, you're supposed to decide what's true and not
11 true.

12 And I would suggest to you that -- you know, you just
13 -- you bring your God-given common sense with you -- you
14 don't leave that at the courtroom door. And -- think about
15 things that are consistent with each other versus things that
16 are inconsistent, do -- is -- is there a common theme or
17 thread that you can see running from witness to witness are
18 there inconsistencies? And I would submit to all of you that
19 the common theme from multiple witnesses is the parties
20 worked as hard as they could trying to put a product
21 together, ultimately, those efforts failed and there's no
22 product available today.

23 I want to -- I -- I mentioned that because -- you know,
24 the Plaintiff started with Ben O'Hanlan, who signed the
25 customer supply agreement for Sealevel, and I asked Mr.

1 Sealevel about -- Mr. O'Hanlan -- Ben O'Hanlan, whether
2 Sealevel had the right to invoice CreatiVasc, or -- or any of
3 the other entities that came after it, for the engineering
4 time. And he said "Yes." He said "Yes" when -- you know,
5 when we deliver the product, we had the right to invoice for
6 our engineering time, but that is absolutely contrary to what
7 his father said when we put him on the stand. Your Honor,
8 can we have -- and I have my --

9 THE COURT: You got HDMI.

10 MR. FEW: You're right.

11 MR. SHEALY: All right. Let me see if I can zoom in so
12 that you can actually see that. So I asked him -- you know,
13 I asked him this on the stand and then -- and then I got him
14 to read through this with me, "You'd agree with me that
15 Exhibits 2 through 4" -- which we said was that -- that was
16 the customer supply agreement that we were looking at when
17 his deposition was taken -- "don't contain any provisions
18 that require CreatiVasc or any entity that is standing in
19 CreatiVasc's shoes to pay Sealevel for its engineering time?"

20 And he said "I would agree with that as stated," this
21 is a sophisticated businessman -- but the contract does
22 provide for the exclusive rights to manufacture the product,
23 we don't disagree. So that's how a lot of companies make
24 their money, is you forego the front-end cost in exchange for
25 the manufacturing rights in anticipation that it's going to

1 be a high volume -- a profitable venture.

2 That's what the parties hoped when they entered into
3 the customer supply agreement. But when that failed, that
4 doesn't then mean, "Well, it failed, so now we get to send
5 you an invoice for all of our -- our engineering time."
6 Don't you know people were working on it on the CreatiVasc
7 side -- I mean, we -- you heard testimony about how much time
8 and money CreatiVasc was spending to try to develop their
9 part of the project. It just didn't work, despite
10 everybody's hopes and dreams and best intentions.

11 But what was consistent -- you can take that down,
12 thank you. What was consistent, though, was -- you know, the
13 testimony of Steve Johnson, Brian McMurray, John Feldman, Dr.
14 Cole, Chad Clark, Savannah Forrester, they said that -- you
15 know, working all the way through to when Diaxamed bought the
16 assets of the company, they continued working on the -- the
17 implantable part of the product that Dr. Cole had invented,
18 and even that, they have not gotten to work. And what they
19 are working on today has nothing to do with what Sealevel was
20 trying to -- to put together. So that's consistent and
21 that's what we've been saying all along.

22 So -- so I want to talk about the -- the claims that
23 the Plaintiff has left in this case, and one of them is
24 "breach of a contract," and why we believe that that claim
25 has to fail, that you have to find for the Defendants.

1 You're going to hear from Judge Gravely that for contract to
2 be enforceable -- for you to be able to sue on it, there has
3 to have been a meeting of the minds as to all of the material
4 terms of the contract when the parties entered into it.

5 And the contract that -- and that still exists today,
6 is that customer supply agreement. But as we looked at with
7 Ben O'Hanlan, and you can look at it yourself, that contract
8 says "The parties are going to work on developing these two
9 aspects of this product." Sealevel is going to work on
10 developing -- and they tried to describe it, but it says
11 "According to the specifications set forth on Exhibit,
12 whatever it is."

13 Well, they hadn't been developed. I mean, how can --
14 how can there be a meeting of the minds of what the -- the --
15 the product that Sealevel was supposed to be developing is --
16 if they don't know what the specifications are at the time
17 they enter into it? It's -- this is what we call an
18 agreement to agree. It is an agreement, sure, but to sue on
19 it to say "What we -- you -- you've -- you've -- we've got a
20 valid agreement and a breach and damages," you got to have a
21 meeting of the minds to -- to begin with.

22 They don't know at the time they enter into it what the
23 price of these things is going to be, it says it in the
24 agreement that they are going to figure that out in the
25 future. That's not a meeting of the minds, it is not a valid

1 enforceable contract that you can sue on today, and that's
2 just based on the language contained in Exhibit 4.

3 So -- and it says that -- that -- you know, as -- as --
4 as Tom O'Hanlan candidly admitted in his deposition, the
5 whole -- what's in it for them, the whole consideration for
6 entering into a contract like that without knowing how --
7 what -- you know, how they were going to charge for the
8 products when they sold them was that, "Well, we get to be
9 the exclusive supplier. We get to be the exclusive supplier
10 when it goes to market."

11 So how can there be a breach if it's never gone to
12 market? Nobody has said -- not a person, and there's no
13 dispute between the parties. No one says it's gone to market
14 because it doesn't work. So that -- how can there be a
15 breach? So, I mean, stop dead in your tracks there, even if
16 you think -- yeah, it's a valid enforceable contract, there's
17 no breach because it's -- no one is selling this anywhere.

18 And then, they have to have damages, and Judge Gravely
19 is going to tell you that damages can't be based on
20 conjecture or speculation, it's got to be based on something
21 in the record. Well -- so -- you know, as Tom O'Hanlan said
22 in his deposition -- you know, what they were hoping was to
23 make a whole lot of money profits on the sale of these
24 devices. Did you hear anything about a measure of the
25 profits, like a projection of what those profits would be?

1 No, there's no evidence of that.

2 You got no yardstick, no way to measure what their
3 damages would've been had we reached. They have not carried
4 their burden, that's their job to carry their burden to
5 deliver you a case that you can find in their favor, they
6 haven't done it, they haven't met that preponderance of the
7 evidence standard. What they've given you instead is
8 according to their own testimony, the wrong thing. That is
9 not the measure of damages, because they had no right to
10 charge for their engineering time. So I mean, it's that
11 simple, folks. It's that -- the case is that simple.

12 No -- so then we have an intentional interference with
13 a contract claim against Diaxamed, but you don't ever -- you
14 don't ever get there if there is the existence of an
15 enforceable contract, okay? So if -- if we're right about
16 there's no meeting of the minds, then it's not enforceable,
17 then this claim dies on its face right there.

18 The wrongdoer knowledge thereof is intentional
19 procurement of its breach. Well, we've already talked about
20 the fact that there can't be any breach because nobody sells
21 these things anywhere. But what evidence do you have that
22 Diaxamed intended to cause CreatiVasc to breach the contract?
23 What you have -- and despite Mr. Few's sort of creation of
24 this -- this conspiracy theory idea that -- that somehow
25 Diaxamed was doing something nefarious by buying the assets

1 of another company, and he said "That's legal to do, but
2 legal things have consequences too."

3 So -- you know, that's got to be -- that's got to be
4 illegal for you to -- to -- for them to be an intentional
5 interference with a contract. What Diaxamed did is -- the
6 same thing as if you -- if you were having a yard sale and
7 you had a bunch of your things out in the yard and somebody
8 came up and said "I'll take the BarkLounger for \$10, and I'll
9 buy that hedge trimmer over there for five bucks, what about
10 this vacuum cleaner here?" And you know, you look at it, you
11 say "Hmm, doesn't seem to actually work, doesn't suck up any
12 dirt. The only thing it ends up sucking up is the money out
13 of your wallet." I don't think I want that, that's a
14 liability, I don't want that. Mr. Few said in his closing
15 that, "Thank God -- thank the good Lord that this is a nation
16 of laws," and I agree with him 100 percent.

17 It's also a nation of freedom. We have the freedom to
18 contract, the freedom to decide "I'm going to buy that, I'm
19 not going to buy that." We do that every day -- every week
20 we go to the grocery store, we make decisions about things
21 we're going to buy and not buy, that's all that Diaxamed did
22 here. And so, to call that to some nefarious lawyer-
23 generated thing is the biggest bunch of hogwash I've ever
24 heard in my life.

25 And then, too -- I feel audacity to say "And we want

1 punitive damages from the Defendant for that," is an even
2 greater outrage. There is nothing here in this record that
3 should give rise to punitive damages, there's nothing here in
4 this record to give rise to any damages at all.

5 And so, folks, as I told you, I don't want to waste
6 your time, I think it's a simple case and -- for the reasons
7 I've stated, and -- and I -- I appreciate your attention to
8 the -- to the evidence, to the testimony. Please look at the
9 documents, but we'd ask you after you do go through that
10 exercise to bring back a verdict for the Defendant.

11 THE COURT: Rebuttal?

12 MR. FEW: Thank you. If I may backtrack on my policy
13 of not telling you what I think your got to reward damages.
14 The actual damages in the record are what's shown on Exhibit
15 26, \$300,000 and something, okay? What I just heard from my
16 friend and colleague is an old phrase that's known as "heads
17 we win, heads you lose," right? Heads -- you know, they just
18 took it, it's fine, they can do it, we can do these things.

19 I'm astounded, frankly, that they -- that -- the
20 Defendants are going to argue to you after telling you that
21 there was an enforceable contract that now it really wasn't
22 enforceable, because there wasn't a meeting of the minds
23 because the spec sheet wasn't filled out. There's a spec
24 sheet right there. Exhibit -- Exhibit 11. They certainly had
25 a meeting of the minds about what they were trying to do when

1 they got to that point. I was checking to see that this was
2 the second iteration of the document.

3 So that's the Defense's argument is they didn't have a
4 meeting of the minds and the contract's enforceable and
5 therefore you have to render a verdict in their favor. And
6 then, it's also interesting other things that are argued,
7 that -- that the way Diaxamed structured that deal has to be
8 illegal. Well, I just told you that it didn't, he said that
9 it did. I want you to listen to the judge's charge, because
10 he's not going to say anything about anything having to be
11 illegal to be actionable under an intentional interference
12 with a contract claim.

13 Ladies and gentlemen, I want you to think about what
14 type of punitive damages award would make a difference to
15 these people at -- at Diaxamed, okay? What kind of punitive
16 damages award is going to send a signal to other people,
17 other corporate-rater types that are going to do the same
18 thing over and over and over, and they're going to say "Well,
19 we lawyered this thing up, and heads we win and heads you
20 lose?"

21 You don't even have a breach of a contract claim
22 anymore, even though we opened the case by saying you have a
23 valid contract and -- but -- but you have no damages. Now, I
24 want to address one other thing, and I talked about this
25 before, but Mr. Shealy mentioned it. It was foreseen as I

1 mentioned that this product would get where it did, but
2 everything changes when the contract is breached, okay? And
3 that's where you get to decide, okay?

4 So when he says that -- that they can do these things
5 -- and I want to address one other point too about what Ben
6 O'Hanlan said versus what Tom O'Hamnlan said, and -- and let
7 me just do that right now. Ben could have been wrong, Tom
8 could have been wrong, you decide what's right, okay? It
9 happens all the time, that's why people have lawyers. They
10 call their lawyers up and they say "Can I do this?"

11 And the lawyer -- it's called "Right of Opinion Work,"
12 I -- it's intellectual property work. When I first started
13 practicing law -- and you'd have to write somebody an opinion
14 that says that you can go make this product and sell it, you
15 better be right, because if you're not, and they get sued for
16 patent infringement, it's going to be a big number.

17 These people have the ability to call their lawyers,
18 you can ask yourself, "What did their lawyers tell them about
19 doing it this way?" Okay? I would guess -- that's
20 attorney-client privilege, so I -- I can't ask them that in
21 discovery, but I -- I believe they said "You can do that, but
22 you're going to be subject to being sued by Sealevel for the
23 way you've done it," okay? It doesn't have to be illegal,
24 okay?

25 And again, this is super important because this is how

1 important it is what you all are deciding. Then everybody
2 has an interpretation of the contract, okay? And -- at one
3 point in time, the contract's interpreted one way, but the
4 judge is going to charge you -- and I don't know how detailed
5 the charge's on this, but once you breach, everything
6 changes, okay? And Mr. Shealy wants you to think that, well,
7 you can only go forward with the remedy if the product's
8 made.

9 Well, I want you to go back and look at Exhibit 4,
10 because these parties -- these parties bargained on these
11 terms. And I called attention to this early on in the case,
12 and then -- I think there was an objection and someone said
13 the agreement speaks for itself, well, it sure does.

14 Paragraph 16 is a limitation of liability versus
15 Sealevel, okay? What Mr. Shealy wants you to do is he wants
16 you to read that limitation of liability into this contract,
17 and it's not there, okay? These are incidental consequential
18 damages that are a result of the breach.

19 Do these damages that Sealevel is alleging naturally
20 flow from the conduct of the Defendant? Was it foreseeable
21 to the Defendants that Sealevel was going to get stuck
22 holding the bag, having invested all of their money and time
23 and good faith and effort, and that it was just going to go
24 off to nothing? Yes, they knew that, okay? And they did not
25 have this provision. And if their lawyers -- when they asked

1 them, and I bet they did, but I don't know that they did,
2 read this agreement, they would've probably said something
3 like, "You should have made that one mutual, pal. You should
4 have made that one apply both ways," but it doesn't --
5 doesn't apply both ways. It applies one way to the benefit
6 of Sealevel, which you can infer from that in the
7 interpretation is that special incidental and consequential
8 damages are recoverable by Sealevel under this agreement.

9 Now -- one other thing that was mentioned while I'm
10 here, I want you to look at paragraph 12, we've already
11 looked at 14, which is Confidential Information Termination.
12 There's three ways to terminate this contract: mutual
13 agreement -- well, Sealevel wasn't going mutually agree to do
14 it, so -- and -- and they've already admitted that they
15 didn't terminate it, so they didn't take any of these steps,
16 either party upon a breach, okay?

17 If they alleged that Sealevel breached and didn't make
18 a -- a performing product, they could have done that, okay?
19 They could have chosen this option, but they didn't. And
20 then, after all that language, there's right to cure, it says
21 "After the 10th anniversary of the effective date" -- well,
22 that's already passed and they still haven't done it. I
23 don't know why they haven't done it, they never terminated
24 the contract.

25 So ladies and gentlemen, this is important -- it's

1 super important, and -- we think the facts speak for
2 themselves, you can see what's happened here, you can see
3 that all of this was orchestrated by these folks. And then
4 -- well, let me talk about the yard sale analogy, and the
5 hogwash of punitive damages, that's Mr. Shealy's opinion on
6 behalf of his clients, but you get to decide -- you get to
7 decide this. You get to decide if this is important, and you
8 can think of every contract that's out there for somebody
9 building a fence, or somebody promising to do something or
10 somebody putting a roof on a house or -- or whatever it may
11 be, this is where the rubber meets the road in your jury
12 room.

13 You get to decide: "Is this a breach of a contract --
14 is this a breach of a contract? Is this the type of conduct
15 that should be allowed and permitted and encouraged in this
16 country?" Because if it's not punished -- and this is why
17 your opportunity is so special, if this corporate rating, and
18 this we outsmarted you, and this "Heads we win, tails you
19 lose" is allowed to continue, they get emboldened and they do
20 it again and again -- and again -- and again, and there'll be
21 another victim, and another victim -- and another victim like
22 Tommy is.

23 They'll -- there will be people that write these
24 agreements and they get you to do things, they get you to
25 give them a bunch of stuff for free, and then somebody comes

1 along and says "I want all of this and I'm going to take it
2 all," but they're going to get left in the dark, that's just
3 the way we operate. "We're bigger than you, we got more
4 money than you, we can hire lawyers, we hired our lawyers,"
5 they told us that we could do this, they also probably told
6 you that you stand subject to this lawsuit that we brought,
7 and they took that risk, and now you get to -- you get to let
8 them feel the consequences of -- of the -- of what's happened
9 here. The way they've taken this property, the way they've
10 left them sitting in the lurch, and -- so I'm going to ask
11 again, when you go back, we want you to reward full amount
12 that's on that invoice, and on the punitive damages, you got
13 to ask yourself, "How much is enough to send a message?"
14 Okay? And think about it, use your common sense.

15 Think about -- this is outside of my world too, I -- I
16 -- I -- most people are not involved in big corporations, and
17 you know -- you know, I'm not saying this guy's -- these are
18 -- I want to say anything about that -- well, I know, but I
19 -- I know what -- I've seen what they've done, and you got to
20 ask yourself, "How much is enough for this case?"

21 Do you think it's worthy to be in the news like these
22 other cases? For this case to send a message to people in
23 the business world that, "Hey, you better watch out if you
24 think that you can go bully people and out-lawyer them, and
25 take it and run, and think that you're going to continue to

1 get away with it again." Thank you very much.

2 THE COURT: All right. Is everybody good or we need to
3 take a break? It's going to be about 25 to 30 minutes right
4 in there.

5

6 (Jury exits room)

7 THE COURT: All right. Counsel approach on the
8 question we had just before. I put something on the record
9 about nominal damages, I'm not really sure what you're
10 asking, but if you want to put something on there, that's
11 fine.

12 MR. FEW: I may as well. I'm sorry, I hadn't done
13 really.

14 THE COURT: No, that's fine.

15 MR. FEW: Let me get on ChatGPT and see if I can find a
16 case. Are we ready?

17 THE COURT: Yes.

18 MR. FEW: Yeah, Plaintiff had just raised the issue, I
19 guess we had requested that there be a consideration of
20 nominal damages, a sentence or two, being in the jury
21 charge, that's --

22 THE COURT: Okay. I think is where I've ever -- ever
23 had to address that is, if some reason they don't -- they
24 come back with no damages, then you have to send them back to
25 do so -- I -- I -- I'm going to go with what we've got and we

1 need to address it at some point.

2 MR. FEW: Okay.

3 THE COURT: All right. If the jury's ready, bring them
4 in. Plaintiff's ready?

5 MR. FEW: Plaintiff's ready.

6 THE COURT: Defense's ready?

7 MR. SHEALY: Yes, your Honor.

8 MR. FEW: All right. Well, we don't have anything left
9 to do except to object to interrupt you and your charge,
10 right?

11 THE COURT: That's right.

12 (Jury enters room)

13 THE COURT: All right. Ladies and gentlemen, now you
14 get to hear from me. I always come down here, I'm different
15 than a lot of judges and they sit up there, (inaudible), like
16 the Wizard Of Oz when I'm sitting down, keep looking for Toto
17 down here, so -- I figure it's a little bit -- you know,
18 talking about the law, it's easier if I'm down here,
19 (inaudible) kill myself, so -- all right. What I'm going --
20 what I'm going to do for you now is tell you what the law of
21 the case is, okay? And if you -- where has that all gone?

22 MR. FEW: I -- I'm sorry, I -- I -- I with the exhibit
23 it needs to.

24 THE COURT: All right. I'm going to tell you what the
25 law is, if you had an opinion of what you thought the law was

1 or maybe you have an opinion of what you think the law should
2 be, if it's different than what I'm telling you, then you're
3 to disregard that, because in your oath you've taken it is to
4 apply the law which I'm charging you now.

5 Now, the claims that are being presented to you, first,
6 we have -- we have two claims that you're to consider, okay?
7 We have a claim for breach of a contract, which the Plaintiff
8 has asserted against CreatiVasc Medical Inc., Brookhaven
9 Vascular Inc., and Brookhaven Merger Corp., okay? That
10 breach of a contract claim is only against those successors.

11 And then, we have a separate claim for intentional
12 interference with a contract against Diaxamed LLC, okay? So
13 you have two claims that you're dealing with in two sets of
14 parties. And your -- when you go through -- and I'm going to
15 go through the verdict form with you in a few minutes. The
16 -- when you go through these claims and you determine the
17 elements, your decision on one does not necessarily bind your
18 decision on the other. You suppose -- you should consider
19 each claim on its own merits and then go to the next one, and
20 ultimately you want to make a decision, and your decision
21 would have to be unanimous, meaning all 12 of you must decide
22 what the answer is.

23 All right. Also as I told you in the very beginning,
24 your role and my role is totally different. My role is to
25 preside over the trial, is to rule on objections -- and as I

1 mentioned, there were objections and those are not of any
2 kind of nefarious purpose there, that's the objections so
3 that we follow the specific rules that all parties have to
4 come into this Court, and use both evidence and rules of
5 civil procedure.

6 So my job is to rule on the objections, and finally is
7 to rule to tell you what the law is, okay? Now your role, as
8 I said, is to determine what the facts of the case are, and
9 if there's anything I said or did makes you think I have an
10 opinion of the facts, disregard that, because that is not my
11 job and that was not my intent at any point to have an
12 opinion on that -- I mean, like your position, I don't have
13 to have an opinion of the facts, so that's your job.

14 And how do you determine what the facts are?
15 Ultimately, you're going to be asked to answer two questions
16 on this verdict form, and I'll go through this form, and it
17 really -- it really kind of helps you lay out what your
18 questions -- what your answers are -- what your choices are.
19 You -- how do you determine -- you are to consider the
20 testimony, you are to consider the evidence, the documents,
21 any stipulations that Counsel may have made or anything like
22 that.

23 And you're -- as to each piece of evidence or
24 testimony, you're to give it the weight and the value which
25 you feel is appropriate. There's no set rule about what

1 weight or value you're supposed to give to that, you're to
2 give it the weight and value which you think is appropriate.

3 One of the -- one of the -- as I mentioned too, there
4 was the depositions that were put into record, and as I told
5 you, depositions -- using a deposition is the same -- you're
6 considering that the same as if the person were testifying
7 from that witness stand. They were put under oath and
8 they're following the same set of rules. So for your
9 purposes, you're to consider those in the same fashion.

10 Now, burden of proof, okay? As -- as mentioned, the
11 burden of proof, and that is what is the Plaintiff in this
12 matter, what standard did they have to meet for -- to -- for
13 you to make the determination when they're seeking?

14 They're the move -- they're the Plaintiff, they have
15 the burden of proof on their claims, and it's a -- it is a
16 phrase we use "Preponderance Of Evidence, which is very much
17 a legal term, greater weight of the evidence, or more likely
18 than not, that's the standard. And really what it is -- is
19 the parties come into a courtroom kind of with a -- and this
20 -- you always see the scales of justice. You -- they come
21 into this -- the courtroom kind of with the scales even,
22 okay?

23 For the Plaintiff to be successful in a particular
24 claim, they have to tilt those scales ever so slightly in
25 their favor, okay? If they fail to do that or they go the

1 other way or they don't move at all, then they haven't met
2 their burden, okay? So that's really kind of a simplified
3 version of what a preponderance of the evidence is.

4 Now, in a few minutes, I'll talk -- when I talk to you
5 about punitive damages, I will tell you what a little bit
6 different standard, which just applies to punitive damages,
7 and that's "clear and convincing." It doesn't apply to any
8 of this other stuff, just punitive damages, and I'll go
9 through that with you in just a minute.

10 Now, in addition to the types of evidence or the -- the
11 -- the manner in which evidence is presented, the parties can
12 rely on both direct and circumstantial evidence, okay?
13 Direct evidence is when a particular piece of -- an exhibit
14 or testimony directly proves the point they're trying to
15 prove, that element is no -- there's -- there's no inference
16 needed.

17 Circumstantial evidence is you may have to have a
18 series of facts to prove the element that you're trying to
19 prove. It's a chain of facts in circumstances which indicate
20 a fact. Circumstantial evidence can be based on inference
21 and maybe not necessarily personal knowledge. It's proof
22 that does not actually establish the fact, but it describes
23 something for which you can reasonably infer the truth of the
24 matter, and whether they're relying on direct or
25 circumstantial or a combination of the two, the burden is

1 still the same, is preponderance of the evidence.

2 I always like to have a very simple kind of
3 illustration of the -- of the difference between direct and
4 circumstantial. Direct evidence: Say you go home this
5 evening, as you pull in your driveway, just as you get ready
6 to get out of your car, the bottom falls out, it's pouring
7 rain, well, you have direct evidence, it's raining because
8 you've seen the rain.

9 Circumstantial evidence, though, is a little different:
10 Say you pull into the driveway and you're just a few minutes
11 earlier, cloudy, you hear some rumble of thunder, you go into
12 your house, you don't know look out the window, but you come
13 back out in a few minutes, your car is wet, there's --
14 there's obviously -- the pavement's wet which was not before,
15 so that's -- you have to have a series of facts to show the
16 same thing that it had been raining. So that's a very simple
17 explanation, but it's direct evidence versus a chain of
18 direct evidence that has to prove a particular point.

19 Another thing in your toolbox is to determine the
20 credibility of witnesses. "Credibility" merely means
21 believability, and that's something for you to determine --
22 to determine the believability of witnesses and what weight
23 and value you should give those witnesses. Now, you can
24 consider that particular witness have a bias, an interest
25 that -- and the outcome, how they reacted on the stand,

1 anything like that you can consider in determining the
2 believability of a witness.

3 Now, you may accept one witness over several witnesses,
4 you may accept several witnesses over one. You may determine
5 that you should accept a portion of somebody's testimony and
6 -- and not the remaining portion. Again, that is totally up
7 to you to give each part of the testimony the weight and
8 value which you (inaudible).

9 All right. Those are the general tools that I always
10 tell -- that -- that those are your tools to use in making
11 your evaluation of these claims. Now, I'm going to go
12 somewhere more specific to certain elements, and just certain
13 charges that relate specifically to this case. Specifically,
14 we're dealing with corporations or LLCs, Limited Liability
15 Companies, if you see the phrase LLC, that means limited --
16 Limited Liability Company and Corporations. Those are
17 business entities.

18 And under the eyes of the law -- and for your
19 consideration, a business entity, whether it's a corporation
20 or LLC is to be treated the same way as if it was a person.
21 They are considered persons under the -- under the -- the
22 law. A corporation can act through its employees, agents,
23 directors, and officers. The law therefore holds a
24 corporation responsible for the acts of its employees,
25 agency, directors, and officers, if they're -- not only

1 they're authorized and they're acting within the scope of
2 their employment.

3 So whether a particular act was authorized is something
4 you must decide. The fact that the Defendant is a
5 corporation, again, is to be treated the same way. So that
6 is your -- you know, that -- that -- that corporation -- the
7 only way they can act is through the people that are employed
8 by it, or their authorized agents.

9 All right. Now, let's talk about the breach of a
10 contract, I'm going to give you kind of a general -- this is
11 almost like a law school summary of what about the breach of
12 a contract, and was involved in a contract. The Plaintiff
13 has alleged that the Defendants CreatiVasc, Brookhaven
14 Vascular and Brookhaven Merger, or you can refer as "its
15 successors," have breached the contract.

16 What exactly is a contract? A contract is an
17 obligation which arises from an actual agreement of the
18 parties manifested by -- by words, oral or written, or by
19 conduct. A contract exists where there is an agreement
20 between two or more persons upon sufficient consideration,
21 either to do or not to do a particular act. Stated another
22 way, there must be an offer and an acceptance and accompanied
23 by valuable consideration.

24 A binding valid contract must exist for there to be a
25 cause of action for breach of a contract. The Plaintiff must

1 prove each element of the contract sued on, and the elements
2 are: An offer, acceptance, and valuable consideration. A
3 contract is an agreement between two or more persons or two
4 more parties, the preliminary step in the making of which is
5 an offer by one and acceptance by the other in which the
6 minds of the parties meet and concur in understanding the
7 terms.

8 It can be in writing again or oral, but there must be a
9 meaning of the minds. It involves an offer and acceptance.
10 The essentials of a contract are; a person or entity able to
11 contract, and, again, parties in this case are corporations.
12 A person or entity able to -- to be contracted with a thing
13 to be contracted for, good and sufficient consideration,
14 clear and express -- clear and explicit words to express the
15 contract and the assent of both parties.

16 For an agreement to be legally enforceable, the parties
17 must manifest by way of an offer to enter an agreement by one
18 party and acceptance by the other in an intention to enter a
19 contract under the terms which are completely understood by
20 each party, and that is what we mean by "Meeting of the
21 minds."

22 The parties must manifest their mutual assent to all
23 essential terms of the contract, in order for an enforceable
24 obligation to exist. If one of the parties does not agree
25 that a prerequisite to formation of the contract is lacking,

1 it constitutes a valid binding contract, it's essential that
2 both parties are saying the same thing in the same sense.
3 Mutual assent to all essential terms is necessary to the
4 formation of that contract.

5 Under South Carolina law, in addition to the general
6 terms of truth which they have agreed to, there exists in
7 every contract an implied covenant of good faith and fair
8 dealing, okay? That's just the general, I guess, the law
9 school summary of what a contract is.

10 Now, let -- what we're here for is a breach of a
11 contract, which the Plaintiff has asserted against CreatiVasc
12 Medical Inc. and his successors. To recover for a breach of
13 a contract, the Plaintiff must establish three elements: A
14 binding contract which was entered by the parties, a breach
15 or unjustifiable failure to perform on the contract, and
16 damages suffered by the Plaintiff as a direct and approximate
17 result of the breach.

18 So you have a contract, the breach of that contract,
19 and damages from that breach, that -- those are the three
20 elements that the Plaintiff in this matter has to -- to prove
21 to you by the preponderance of the evidence. And as I said,
22 when a contract is breached by conflict of corporation as a
23 result of the inducement of an officer or agent of a
24 corporation, then that corporation is responsible and is
25 liable for the breach.

1 Now -- so you've got the -- you've got the binding
2 contract we've discussed, and you have the breach, which is
3 what you -- you will have to determine: Was there a breach of
4 this contract? And then the third element, again, is
5 damages. Now, what kind of damages can you, the jury,
6 consider when determining this matter?

7 Do you find that the -- first, you must find the
8 Defendant breached the contract, and then you may award money
9 damages. The general rule that for breach of the contract,
10 the breaching party is liable for whatever damages followed
11 as a natural consequence and approximate result of the
12 breach, including damages that consist of out-of-pocket costs
13 actually incurred as a result of the contract.

14 The purpose of the award of damages to -- to put the
15 parties back to where they would've been if the contract had
16 been performed. The proper measure of compensation is the
17 loss actually suffered by the Plaintiff as a result of the
18 breach.

19 Now, proof of this -- of the damages is not to the
20 standard of a mathematical certainty, but the -- the amount
21 of the damage cannot be left to -- to conjecture, guess, or
22 speculation, okay? So there you've got the elements of the
23 breach of a contract, and that's the first claim that you
24 will be -- will -- will need to address. The second claim,
25 which -- which you will need to address, is that of

1 intentional interference with a contract.

2 Plaintiff has claimed that Diaxamed LLC intentionally
3 interfered with their contract, for you to return a verdict
4 for the Plaintiff on this claim, must establish the elements,
5 again, by preponderance of evidence, in these elements,
6 there's five elements, a little bit different, but you -- but
7 some of them overlap. You must have the existence of a valid
8 contract, you must have the Defendant's knowledge of that
9 contract, you must have the Defendant's intentional
10 procurement of the breach, you must have the absence of
11 justification by the Defendant and the resulting damages. So
12 you have: Contract, knowledge of the contract; the
13 intentional procurement of the breach; absence of any
14 justification; and the resulting damages.

15 So that's the -- the damages for you to consider, and
16 we're going to talk about two different kinds here, but you
17 have actual damages which you can consider for this, but you
18 also can consider punitive damages. For actual damages, you
19 are doing the -- the -- the -- what I just talked to you
20 about, actual damages on the breach of a contract is the same
21 here, you use that same analysis. But the damages
22 recoverable could be the financial loss of the benefits of
23 the contract, consequences of the loss, which the
24 interference is the legal calling of -- of -- of the -- of
25 the breach.

1 Now, the additional part on this claim only is punitive
2 damages. If you provide -- if you find the Plaintiff has
3 proven by clear and convincing evidence that the Defendant
4 acted with ill will in what it did, when it designed to
5 costly, and want to injure the Plaintiff or that the
6 Defendant acted with reckless disregard for the Plaintiff's
7 rights, then you can award punitive damages to the Plaintiff.

8 The purpose for punitive damages are to punish the
9 wrongdoer, and deter the wrongdoer and others from engaging
10 in similar reckless, willful, malicious -- malicious conduct
11 in the future. Punitive damages serve to vindicate a private
12 right of the injured party are requiring the wrongdoer to pay
13 money to the injured party.

14 Now, as I said, the standard for that is a little bit
15 higher. It is clear and convincing -- clear and convincing
16 evidence is the -- the degree of proof that will produce in
17 your mind a firm belief as to the allegations sought to be
18 established. In other words, entitlement to punitive
19 damages. Such measure of proof is intermediate more than a
20 mere preponderance which is allowed -- required on the
21 regular causes of action, and if it's not to the reasonable
22 doubt, it's indicated by criminal cases, it does not mean
23 clear and unequivocal, so like I said, that only applies to
24 doubt.

25 All right. Now I'm going to go through the verdict

1 form with you. Now, this is what you will have back in your
2 jury room. And the top of it is just -- that's the caption
3 of the case, it says "Verdict," okay? And it says "Please
4 answer the following questions."

5 All right. The first question you will have is for the
6 breach of a contract, we deteriorate harshly fine. If you
7 find that the Plaintiff has met all of the -- all of the --
8 has met his burden of proof -- of preponderance of the
9 evidence, all the elements of the breach of a contract, then
10 you would find -- you would check the first blank there for
11 the Plaintiff against Defendants, CreatiVasc Brookhaven --
12 and Brookhaven, and then you would determine actual damages,
13 and you would write that in that blank, okay?

14 If you find that the Defendant -- I mean, the Plaintiff
15 has not met its burden on this claim, then you would check
16 for the Defendants, all right? Then you go to the next one,
17 which is a separate -- you determine this separately, all
18 right?

19 Now -- all right, so this is for the claim of
20 intentional interference with the contract. "We, the jury,
21 unanimously find" If you find that the Plaintiff, again, has
22 met his burden by the preponderance of the evidence against
23 Defendant, Diaxamed LLC, for intentional interference, then
24 you would check that box and you would put the amount of
25 actual damages in that blank, or you find again they haven't

1 met their burden, then you would check Defendant.

2 All right. Now it's to the punitive damages, which is
3 in different analysis. You only answer this question if you
4 find -- if you had found actual damages against Diaxamed in a
5 intentional interference. So that's the only time you --
6 when you go to this question and you found for the Defendant
7 offended, but you answered this question if you find the
8 Plaintiff establish actual damages in question two above. If
9 you find the Plaintiff is entitled to actual damages against
10 Diaxamed and you can consider whether the Plaintiff has
11 established by clear and commencing evidence that Plaintiff's
12 entitled to punitive damages, "We, the jury, unanimously find
13 that Plaintiff be awarded the damages in the mount of" -- and
14 you put that in that box. And again, if you've gotten to
15 this question and you find that they're not entitled punitive
16 damages, you would find for the Defendant.

17 I realize I misprinted that, so I'm going to have to
18 reprint that, it should say "We find --" no, that's -- that's
19 right. "We find the Plaintiff is not entitled to punitive
20 damages," so that's right. And then, once you briefed your
21 verdict Mr. Foreman, you would sign right there, you would
22 let the bailiffs know that you have completed your
23 deliberations.

24 Now let me give you a couple more rules. One is: Your
25 decision must be unanimous. That means you -- all 12 of you

1 must agree on your decision on each of these questions, all
2 right? And it's not -- it's to be based on the evidence and
3 the law I've given you, it should not be based on any passion
4 or prejudice or motion or anything outside the record.

5 Now, once you get back in your jury room, if you should
6 have questions, that's what your role as foreperson is, you'd
7 write those in a piece of paper, sign and date it, and give
8 it to the bailiff. Now, the bailiff will bring that question
9 to me and I'll have to discuss it with the lawyers, and I can
10 respond in one or two ways, I can -- sometimes I can respond
11 to you by writing on a back on a piece of paper and send it
12 back, sometimes that's very -- that's all that's needed.

13 Sometimes, I may have to bring you back in here to give
14 you an additional charge or maybe answer your question. But
15 anyway, if you have any questions, that's your role. We
16 cannot answer factual questions, we cannot answer, or make
17 any -- reference anything that was not in the record. Always
18 a lot of times on cases involving motor vehicle accidents,
19 someone says "Well, there was a reference to the accident
20 report, who did the officer charge?" Again, you can only
21 consider what is in the record here before you. We can't
22 answer factual questions.

23 Now, one of the things too is your lunch probably is
24 here by now, and it's up to you to determine, do you want to
25 just, like, "Okay, let's take a break, let's eat our lunch,

1 and then we talk about it," or do we want to talk about it
2 after lunch? That's totally up to you all, you all make that
3 decision, there's no rule on that.

4 Now, let me talk to my alternates. You all have worked
5 just as hard and had to put up with me just as much as these
6 other 12 people, but under our law, you were -- you're not
7 allowed to deliberate with them -- you know, but I don't -- I
8 don't want you to think that you weren't appreciated, I
9 always kind of like to compare it to like -- at the Super
10 Bowl the other night if -- you know, everybody knew who the
11 two starting quarterbacks were, but nobody knew who the
12 backups were unless you were really (inaudible).

13 Because nobody -- it didn't really matter, but the
14 moment that starting quarterback went down, the most
15 important person in that stadium was a backup, that's where
16 you followed it, because it's -- for some reason, these
17 jurors -- any of these jurors could not go forward, you --
18 one of you would've had to step in or we would not have been
19 able to complete the trial.

20 So by kicking you out, I don't want you to think we
21 don't appreciate your role because it has been important, and
22 you still also get lunch too, so -- but anyway, we do
23 appreciate your service, but you cannot be participating in
24 the deliberation.

25 So at this point, I'm going to send you back in your

1 jury room, but guess what? I might tell you one more time,
2 not discuss the case, and the reason is I need to make sure I
3 haven't left anything out, which I do occasionally or mistake
4 -- I -- I -- I told you something that's wrong, if that's the
5 case then I'll bring you back in here any correcting any
6 mistakes I made, or any -- any missed law.

7 And -- but if I don't have anything to add, then I will
8 -- I will -- the bailiff will bring the exhibits, they'll
9 bring the verdict form and they'll say "You can begin your
10 deliberations," and at that point, the alternates will step
11 up. So at this point, you will step back in your jury room,
12 and wait for further instructions from the Court.

13 (Jury exits room.)

14 MR. SHEALY: I have a correction, that may be the
15 verdict form.

16 THE COURT: What -- did I miss something?

17 MR. SHEALY: Your Honor, I think the guy's name is
18 Bishop. His name's not on there --

19 THE COURT: She did write it, yes.

20 MR. FEW: Your Honor, I -- also believe that the
21 verdict form should be amended because I believe that if the
22 jury finds for the Defendants in the first cause of action,
23 they don't get to the second cause of action, because the
24 second cause of action is dependent upon the finding of a
25 breach of a valid contract. And so, I would suggest that

1 they be reconstructed, and the verdict form be amended to say
2 "If you find for the Defendants, stop right here, sign and
3 date the verdict form."

4 THE COURT: That is a good point.

5 MR. FEW: I cannot argue with the man. I could, but --

6 THE COURT: We can have that on the record, by the way.

7 MR. FEW: All right. And, your Honor, and I hate --

8 THE COURT: No, that's fine.

9 MR. FEW: -- I have two proposed corrections to the
10 charge, and -- and these are on me for not catching them
11 before we got started. Well, one of them is actually on page
12 --

13 THE COURT: Well, I got to file -- I -- before you get
14 there, let me find the verdict form.

15 MR. FEW: Okay.

16 THE COURT: All right. And I don't necessarily have
17 what you have, so -- anymore, so what are you talking -- what
18 -- what's the heading?

19 MR. FEW: Well, this is -- it's page -- it's breach of
20 a contract kind of general.

21 THE COURT: Okay.

22 MR. FEW: The last paragraph of that charge, you --
23 which you gave to us, you omitted in your charge to the jury.

24 MR. SHEALY: All right. Which -- what page?

25 MR. FEW: The paragraph that begins "Mutual assent of

1 all essential terms."

2 MR. SHEALY: I got some notes on there, I'm not going
3 to check the transcript. I -- I thought he's --

4 THE COURT: Okay.

5 MR. FEW: I'm positive that you did not object to the
6 --

7 THE COURT: Mutual assent to all essential terms of --

8 MR. FEW: The -- the agreement is necessary -- that --
9 that entire paragraph.

10 THE COURT: Well, I -- and you know what? I -- I did
11 not -- did not say it because I felt like I said it three
12 times before.

13 MR. FEW: But there's -- the language that's important
14 to the -- to the Defendants is, "Without the actual agreement
15 of the parties as to the contract price, there is not a
16 meeting of the minds."

17 THE COURT: Okay. You know, I realize when I was
18 reading it -- it was like, okay, I'm just saying the same
19 thing over and over --

20 MR. FEW: Right.

21 THE COURT: -- that's -- and I saw the -- okay.

22 MR. FEW: And I have one other.

23 THE COURT: Let me get to --

24 MR. FEW: Okay.

25 MR. SHEALY: Your Honor, what was the -- and -- and I

1 don't want to interrupt, but I mean --

2 THE COURT: Hold on.

3 MR. SHEALY: -- I said the (inaudible).

4 THE COURT: Hold on.

5 MR. SHEALY: Okay. Sorry, I mean...

6 THE COURT: Okay. What if your -- is it relating to
7 what he just said?

8 MR. SHEALY: Yes, your Honor. I just was curious to
9 know what -- what's the authority as to that specific
10 phraseology there in the middle of page 6?

11 MR. FEW: I will tell you.

12 MR. SHEALY: Well, I got it here.

13 MR. FEW: While he's looking, I -- I -- I -- I looked
14 at that Stevens & Wilkinson case, and we'll just -- for the
15 record say that it does not apply to this case. It was a
16 memorandum of understanding, it involved a third party, it
17 involved a contractor paying a third party and the city was
18 supposed to reimburse them, it was just factually extremely
19 different from what we're dealing with here.

20 THE COURT: Yes.

21 MR. FEW: To the authority that -- that comes from
22 Judge Anderson's charge book, we -- we kind of combined
23 sections 19-1, 19-2, 19-3 in -- in that -- in that charge.

24 THE COURT: Mr. Few?

25 MR. FEW: Well, your Honor, I mean, to my way of

1 thinking, a specific case is a moral argument (inaudible)
2 reference for language that --

3 THE COURT: How about if I put as to all the terms
4 including the contract process.

5 MR. FEW: I -- I'd like to look up the thing, if I
6 could have just a second?

7 THE COURT: I mean, the -- the fact pattern doesn't
8 matter, and that's -- that's pretty much your basic contract
9 law, and that's what they were arguing. So what's your next?

10 MR. SHEALY: Your Honor, the final thing is in breach
11 of a contract damages, the first paragraph, this is -- you
12 included language from the Plaintiff's proposed breach of a
13 contract charge that is derived from Bench v. Davidson, and
14 it's -- when you talk about the recovery of out-of-pocket
15 costs actually incurred as -- as a result of the contract is
16 recoverable.

17 Bench v. Davidson is a case where the -- the allegation
18 is that the defendant prevented the Plaintiff from fulfilling
19 the contract, and -- and it's a construction case and so they
20 incurred a bunch of costs, but -- I mean, it was anticipated
21 in this case that the -- that everybody would incur costs.

22 So -- you know, that's contrary to the idea that you --
23 you recover -- you -- you need to be put in the best -- in
24 the -- in the same position that you would've been in had the
25 contract been fully performed, and that would've been that

1 you would've recovered a -- a bunch of profits, not that you
2 would've not incurred out-of-pocket costs. So I feel like
3 that -- that is an inappropriate charge --

4 THE COURT: How about if this -- how about I put it --
5 because I think this kind of goes along more with the
6 generals for breach of a contract, the breaching parties
7 along whatever damage follows the natural consequence
8 approximate result of such breach, including damages that can
9 consist of out-of-pocket costs actually incurred and a result
10 of the contract, if you find that these calls for approximate
11 related to the breach and -- and within the terms of the
12 contract?

13 MR. SHEALY: I -- I just -- I -- based on my reading of
14 Bench v. Davidson, I don't think that that's -- that -- that
15 out-of-pocket costs is -- is an appropriate measure of
16 damages in --

17 THE COURT: Well, I guess it normally is, and what I
18 think -- that's what I'm saying is, if they find that they --
19 if approximate relates to the breach and they find us within
20 the terms of this contract, and I think that protects your
21 side and your argument, but it also covers their -- their
22 side and their argument.

23 MR. SHEALY: I would respectfully just -- I understand
24 --

25 THE COURT: No -- yeah.

1 MR. SHEALY: -- understand -- I understand what you're
2 doing.

3 MR. FEW: Your Honor, I'm -- Kirby, what section is
4 that? I mean, I'm seeing the contract price coming from
5 Anderson Memorial Hospital as a parenthetical, and it's
6 commenting on a "Promise to pay what one can does not
7 manifest" -- I think that's overly specific for -- for this
8 matter. I think it's a bit of a --

9 MR. SHEALY: Is -- is that where you -- is that where
10 it's coming from out of 19-1? I think I have the 2009
11 version of his charges.

12 THE COURT: Hold on, let me go -- while she goes to
13 print this, let's go -- I mean, I can get the verdict form.
14 After breach of a contract, I say -- I put, "If you find for
15 the Defendants, then you must stop here and do not answer
16 question number two"?

17 MR. FEW: Agreed.

18 MR. SHEALY: No objection.

19 THE COURT: Okay. First, can you tell them that we do
20 have -- we're going to bring them back out for just a few
21 minutes, but they're not -- not now.

22 THE CLERK: And -- and we didn't allow them to start.

23 THE COURT: Okay. Tell them (inaudible) just a very
24 short.

25 THE CLERK: Yeah, but I didn't -- so they're not eating

1 and we'll tell them a few minutes, like --

2 THE COURT: And just a few minutes we'll bring them out
3 here.

4 THE CLERK: Okay.

5 THE COURT: All right. So we got the verdict form, and
6 I'm going to soften it up on mutual assent. "Without the
7 actual agreement of the parties, it's all terms include the
8 contract process, no meeting of the minds and there's no
9 contract expressed or applied."

10 MR. SHEALY: I'm -- I'm perfectly fine with that, your
11 Honor.

12 MR. FEW: Your Honor, as far I can tell --

13 THE COURT: Object or consent?

14 MR. FEW: I object.

15 THE COURT: Okay. Your objection's on the record.
16 Okay. Damages to general rules of breach of a contract, the
17 breaching parties allow before damage follows the natural
18 consequences including any out-of-pocket costs which were
19 approximately related to the breach and within the terms of
20 the contract.

21 MR. FEW: And if I may put just a little more on the
22 record on that last objection?

23 THE COURT: Okay.

24 MR. FEW: I'm looking at chapter 19 of the 2009 version
25 of the requested charge, the only language I see regarding

1 that language is from Anderson Memorial Hospital v. Hagen,
2 Court of Appeals, 1994, and that -- they're addressing the
3 specific situation, it says "Promise to pay what one can does
4 not manifest a meeting of the minds between the parties as to
5 contract price.

6 Such promise is not sufficiently certain to bind
7 promisor contractually. Too much is left to judgment of
8 promisor," and I would argue that if that is in fact the case
9 where the language is coming from, as Opposing Counsel has
10 cited from Judge Anderson's charge book, that that is too
11 factually specific of a holding and a statement related to
12 facts in that case which are not in this case to warrant that
13 charge.

14 THE COURT: Okay. And again, I think that's general
15 contract law regardless of -- I mean, that's very similar to
16 what I have in my normal charge, but I went for your charges
17 instead. So -- all right, so -- and not to cut you off, but,
18 I mean -- all right.

19 So we're going to -- I'm going to charge the mutual
20 assent, the out-of-pocket expense, the cost incurred,
21 approximately related to the breach in terms of the contract,
22 and when I talk about intentional interference, you can't go
23 to that unless you find a breach in number one.

24 MR. SHEALY: Your Honor, I -- I guess I would -- rather
25 than highlighting the out-of-pocket, I'd rather that you just

1 not highlight it -- I mean, just -- just leave it as it is,
2 if...

3 THE COURT: Okay.

4 MR. SHEALY: So I would withdraw the --

5 THE COURT: All right.

6 MR. SHEALY: -- objection to that.

7 THE COURT: Okay. So we just have the -- I don't know
8 why we didn't catch about that? I know, I'm glad you caught
9 that. All right. Anything else then? I like -- I'm going
10 to wait until she gets back with the verdict form so you all
11 can look at that.

12 MR. FEW: Your Honor, I just -- not to belabor, but the
13 -- the portion that I quoted, the only time the word "price"
14 is included in that charging book, that's part of a
15 (inaudible) cite on page 192 to language -- which is proposed
16 charge says "The parties must manifest their mutual assent to
17 all essential terms of the contract in order for an
18 enforceable obligation to exist. If one of the parties has
19 not agreed, then a prerequisite to the formation of the
20 contract is lacking. To constitute a valid/invalid contract,
21 it's essential that both parties ascent to the same thing in
22 the same sense."

23 I think that -- I think that's a more appropriate
24 general charge not tied in specifically to the facts of this
25 1994 Anderson Hospital case.

1 MR. SHEALY: You'd like to hear me on that?

2 THE COURT: Yes.

3 MR. SHEALY: Your Honor, I would point the Court to
4 Eastwood Construction Partners v. GHD Brooks Creek that cites
5 a number of different cases that -- this is a quote, "South
6 Carolina Common Law requires that in order to have a valid
7 and enforceable contract, there must be a meeting of the
8 minds between the parties with regards to all essential and
9 material terms of the agreement." In Player v. Chandler,
10 Consignment Sales v. Tucker Oil, terms such as price, time,
11 and place are indispensable to a binding contract and must be
12 set out with reasonable certainty. "Where a contract fails
13 to fix a price, there must be a definite method for
14 ascertaining."

15 MR. FEW: What was that (inaudible)?

16 MR. SHEALY: This is all Eastwood (inaudible).

17 THE COURT: All right. I'm charging you all are on the
18 record, okay? Well, I'm not going to go -- we're not going
19 to spend another hour going through this.

20 MR. SHEALY: Understood.

21 THE COURT: It's the basic contract law. I will add --
22 when you said your little list of -- I sent this to her
23 because I realized -- did you give me a slide on that?

24 I did add "Without the actual grievance parties, and
25 terms of contract price, time and place, there's no meeting

1 of the minds," so that covers what you read. Mr. Few?

2 MR. FEW: Well, your Honor, now I look this up, this --
3 the case that Opposing Counsel cited is unpublished in 2004.

4 THE COURT: That's basic contract law. I'm -- I -- I
5 mean, let's -- I'm not going to argue, you're on the record,
6 your objection's on the record, his provision's on the
7 record.

8 MR. FEW: Understood. I just think the record needs to
9 be clear that that's an unpublished case --

10 THE COURT: I'm not relying on that case. I'm -- I'm
11 actually relying on what you read, I've typed what you read.

12 MR. FEW: What the -- which is the quote from Judge
13 Anderson's charge?

14 THE COURT: But I -- I'm not -- I don't -- I didn't
15 particularly cite on that.

16 MR. FEW: While we have a policy -- can say something
17 else?

18 THE COURT: Not -- not if it relates to that other
19 argument.

20 MR. FEW: Please.

21 THE COURT: No.

22 MR. FEW: Please.

23 THE COURT: Cut your computer -- cut your stuff off
24 there. And other than the objections -- subject to the
25 objections. All right. Are we ready for the jury?

1 MR. SHEALY: Yes, your Honor.

2 THE COURT: All right. Bring them in.

3 (Jury enters room.)

4 THE COURT: Mutual assent to all essential terms of
5 agreement is necessary to the formation of the contract,
6 including the contract price, time, and place, and if there's
7 not that, then there's no meeting of the minds, and no
8 contract expressed or implied, that's just a little further
9 on the express. The other thing is when I go to -- when
10 you're looking at your verdict form here, and you -- if you
11 should find for the Defendants in the first call of action,
12 then you really don't -- you don't go to the second one.

13 I don't -- I don't know why we case this earlier,
14 because one of the elements for the second one is the breach
15 of a contract. So if you find that the -- again, the
16 Plaintiff met its burden, then you would find for the
17 Plaintiff in the actual damage, but if you find for the
18 Defendant that there is no breach of a contract, the
19 Plaintiff -- or the Plaintiff did not establish that, then
20 you wouldn't go to the second cause of action for intentional
21 interference.

22 So if you do find for the Plaintiff on the first one,
23 then you would go to the second, and do that analysis there.
24 And it says at the bottom here -- it says "If you find for
25 the Defendants, then you must stop here and do not answer

1 question number two." I guess not technically stop, you
2 would then go sign and let the bailiff know that you're --
3 that you've reached a verdict.

4 So, sorry I had to make you look at your food or at
5 least you know it's here, time is 1:15, so at this time go
6 back in, just make sure I haven't missed anything or
7 misstated anything yet. Let me just look right quick to make
8 sure. Okay.

9 All right. I think we're good, but don't -- we will
10 get -- we'll send you the exhibits and the verdict form,
11 that's your signal to deliver. So at this time, you can look
12 at your food a little bit for a few seconds until you get the
13 signal.

14 (Jury exits room.)

15 THE COURT: All right. Other than your previous
16 objection, anything else to that re-charge?

17 MR. FEW: No, your Honor.

18 THE COURT: Except up to your objections, anything
19 else?

20 MR. SHEALY: No, your Honor.

21 THE COURT: All right. You all make sure you have all
22 these exhibits that are into the record, and the alternates
23 can step out now, but they -- they can be delivered when they
24 get (inaudible). All right. We'll be at ease. And if you
25 all go anywhere, make sure that Lendell (ph) has your cell

1 phone numbers.

2 MR. SHEALY: Defendant's exhibits are all here.

3 (Off the record.)

4 (On the record.)

5 THE COURT: There's a note for the jury that, "Need
6 copy of the deposition read, Brian McMurray." Obviously, we
7 cannot send the deposition back there and so many portions of
8 it. I think really the only response is -- I kind of draft a
9 response is, "Only portions are read. We will have to play
10 back the recording from the original, and this will be --
11 have to be heard in Court, and approximate time is 15
12 minutes." That suits the Defense?

13 MR. SHEALY: Suits me, your Honor.

14 THE COURT: Plaintiff?

15 MR. FEW: That's fine, your Honor.

16 THE COURT: They come back in, you probably
17 (inaudible).

18 MR. FEW: Well, I will.

19 THE CLERK: You're not supposed to be eating in the
20 courtroom.

21 MR. FEW: Well, if he brought my food back --

22 THE CLERK. Well, you eat in the conference room, but
23 I'm going to get in trouble for that.

24 THE COURT: No, we'll have to play the recording in
25 Court from the original, approximate time 15 minutes, any

1 objection from the Plaintiff?

2 MR. FEW: No, your Honor.

3 THE COURT: And from the Defense?

4 MR. SHEALY: No, your Honor.

5 THE COURT: All right.

6 MR. FEW: They might say we forget about it.

7 THE COURT: Unless we -- I've had that happen plenty of
8 times when -- especially if it's in the evening, and so they
9 won't -- the testimony of, like, a couple of witnesses, and
10 we'll let them know how long it is, and they'll come back "We
11 reached a verdict," I've had that happen several times,
12 especially if it's pretty lengthy, and they call back and you
13 have three lengthy witnesses they will listen to. We're
14 back, (inaudible) they don't discuss it, and they'll let us
15 know they want a replay back.

16 MR. SHEALY: I guess if we give them option B that we
17 could be (inaudible).

18 THE COURT: All right.

19 MR. FEW: (Inaudible) elements of both claims?

20 THE COURT: All right. Court's Exhibit 5 is, question,
21 the three points for the breach of a contract, number two,
22 the five points for punitive or intentional interference with
23 the contract.

24 Before I was told differently and actually researched
25 this issue, I would've just sent that back to the jury when

1 they requested, but there is a case by the Supreme Court that
2 says that's reversible error unless you send the whole thing
3 back. And since I don't exactly read what I gave you all,
4 the only way I really know how to do it is to bring them back
5 in here, charge them those three elements.

6 (Court's Exhibit 5 marked for identification.)

7 MR. FEW: Understood.

8 MR. SHEALY: Understood.

9 THE COURT: Let me pull that up. You can just tell
10 them we'll have to bring them in here for that.

11 THE CLERK: Okay.

12 THE COURT: I'll -- in just a few minutes.

13 THE CLERK. Yeah, a few minutes?

14 THE COURT: Well, yeah, I'm going to pull it up.

15 THE CLERK. Okay.

16 THE COURT: All right. Based on their note, I'm just
17 going to read the three elements to recover the breach of a
18 contract that are previously charged and the exactly what I
19 charged on the five elements for intentional inflection --
20 intentional interference with the contract.

21 MR. SHEALY: Otherwise known as "intentional
22 inflection"?

23 THE COURT: That's right. They referenced punitive
24 damages, but I think the way they write it, the five points
25 for punitive or intentional interference with the contract.

1 It doesn't sound like they're -- they want anything with
2 punitive, but I'll -- I'll have that ready. All right.
3 Anything from the Plaintiff before we bring the jury in?

4 MR. FEW: No, your Honor.

5 THE COURT: Anything from the Defense?

6 MR. SHEALY: No, your Honor.

7 THE COURT: All food put away?

8 MR. FEW: Out of sight.

9 THE COURT: I did have contempt powers. All right.
10 The jury's ready, bring them in.

11 (Jury enters room.)

12 THE COURT: All right. Since this is a short -- I'm
13 going -- I'm off -- do my wizard (inaudible) thing. All
14 right. We have gotten the request that three point -- that
15 you've asked for three points of a breach of a contract, to
16 five points for punitive or intentional interference with the
17 contract.

18 So based on that, I'm going to read the elements for
19 those two claims. The way you throw the punitive in, I
20 didn't know if you wanted me to read anything about the
21 actual punitive damages part or just the five elements?

22 UNIDENTIFIED SPEAKER: Just the five.

23 THE COURT: Okay. All right. So first on the breach
24 of a contract, to recover for the breach of the contract, the
25 Plaintiff must establish the following three elements by the

1 preponderance of the evidence: A binding contract entered
2 into by the parties breach or unjustifiable failure to
3 perform the contract, and three, damage suffered by the
4 Plaintiff, a direct approximate result of the breach, so
5 those are three elements of the breach of a contract.

6 Now, for intentional interference with the contract,
7 for you to return a verdict from the Plaintiff on this claim,
8 it must -- the Plaintiff must establish the following five
9 elements by preponderance of the evidence: The existence of a
10 valid contract: The Defendant's knowledge of the contract;
11 the Defendant's intentional procurement of the contract's
12 breach: The absence of justification; and resulting damages,
13 all right? Is that -- is that satisfying what you were --
14 your request was? All right. Well then you go ahead, you --
15 you'll proceed back and continue your deliberations.

16 THE COURT: All right. Any exceptions from the side of
17 the Plaintiff?

18 MR. FEW: None from the Plaintiff.

19 THE COURT: From the Defense?

20 MR. SHEALY: No, your Honor.

21 THE COURT: All right. Until further questions.

22 (Off the record.)

23 (On the record.)

24 THE COURT: That they want to hear the deposition of
25 Brian McMurray -- McMurray, so you queued up for that -- do

1 you how you --

2 THE CLERK: I'm ready.

3 THE COURT: All your speakers and stuff?

4 THE CLERK: Yeah, well tested.

5 (Videos starts.)

6 THE COURT: All right. Ladies, gentlemen, this is
7 going to be the second deposition (inaudible).

8 (Video stops.)

9 THE CLERK: Is that too loud?

10 THE COURT: I don't sound like that (inaudible).

11 THE CLERK: Okay.

12 MR. SHEALY: Like you said, you have such a soft voice.

13 THE COURT: A clear nasal one too. All right. Is the
14 Plaintiff ready?

15 MR. FEW: Plaintiff is ready.

16 THE COURT: Defense is ready?

17 MR. SHEALY: Yes, your Honor.

18 THE COURT: All right. Bring them in.

19 (Jury enters room.)

20 THE COURT: All right. Ladies and gentlemen, I know
21 it'd be easier if we could just send something back there to
22 you all to listen to it so you can discuss it, but the way
23 that -- especially since we use just a portion -- different
24 portions of deposition, we have to -- we'll replay the
25 recording of that, so that -- that's -- and she says it's

1 about 15 minutes long, so -- all right, with that being said,
2 we proceed.

3 (Video starts.)

4 THE COURT: All right. Ladies and gentlemen, this is
5 going to be the second deposition. Again, the same things I
6 told you earlier, apply to this one this way.

7 MR. FEW: Okay. So for the record, this was a
8 teleconference Zoom deposition of Brian McMurray that
9 occurred on Thursday, November 2, 2023, and we're starting on
10 page 4, line 17; is that right?

11 MR. SHEALY: Actually, yes. That's right.

12 MR. FEW: Correct.

13 (Read testimony starts.)

14 DIRECT EXAMINATION

15 BY MR. FEW:

16 Q. Thank you. Good morning, Mr. McMurray. My name
17 is Wes Few, I'm a lawyer in Greenville, South Carolina, and I
18 don't think we have ever met before, have we?

19 A. Not that I'm aware of.

20 Q. Do you recall ever meeting Tom O'Hanlan or anybody
21 involved with Sealevel?

22 A. I do not.

23 MR. FEW: And we'll go to 12, line 6?

24 MR. SHEALY: Correct.

25 BY MR. FEW:

1 Q. So, Diaxamed got involved -- I think, according to
2 the documents around December 30, 2016; is that right?

3 A. That sounds correct.

4 Q. Okay. And who is -- or who are the owners of
5 Diaxamed?

6 A. DXM Holdings.

7 Q. Who is that?

8 A. That's an LLC, that's a holding company.

9 Q. Who are the owners of DXM Holdings?

10 A. My family now owns DXM Holdings.

11 Q. And when you say your family, who all does that
12 encompass?

13 A. My wife and I.

14 MR. FEW: Do we do the next one -- the next two lines
15 or we --?

16 MR. SHEALY: The next two lines.

17 BY MR. FEW:

18 Q. Okay. Anybody else?

19 A. No.

20 MR. SHEALY: On page 16, line 20.

21 BY MR. FEW:

22 Q. So how long has ATEX been in business?

23 A. Started in '99, 2000 time frame, so what's that?
24 23 years.

25 Q. Was it started by you?

1 A. Yes.

2 MR. SHEALY: And then, page 20, line 7, in the middle
3 of that line.

4 BY MR. FEW:

5 Q. So ATEX at some point in time -- like you've
6 testified, became involved or made -- made contact or was
7 contacted by CreatiVasc at the trade show and you thought --
8 that you thought was in Boston, but you're not sure -- you're
9 pretty sure that was the first contact with CreatiVasc?

10 A. Yes.

11 Q. And it was CreatiVasc at that time, right? It was
12 not under the Brookhaven name or anything like that?

13 A. That's correct.

14 MR. FEW: We go to line 21?

15 MR. SHEALY: Correct.

16 BY MR. FEW:

17 Q. And so, I'm not sure how big or what the chain of
18 command is, but at some point in time, you then became aware
19 of an opportunity to become involved as, like, a collaborator
20 on product development with CreatiVasc, is that what the
21 initial focus was?

22 A. To collaborate on a component of their device,
23 that's correct.

24 Q. And which component was that?

25 A. It was the actual valve assembly.

1 Q. And what would that be made up of?

2 A. Well, it went through -- you know, different
3 iterations, but kind of the iteration that was landed upon
4 was a balloon inside of the valve assembly. The initial
5 iteration, they were actually collapsing the shunt down and
6 they found out that it wouldn't open back up, but they tried
7 some things to get it to open up, but it didn't work. So
8 they changed the direction.

9 Q. So what was the first work -- were you involved in
10 the decision for ATEX to get involved in that collaborative
11 process?

12 A. Yes.

13 Q. To address the valve assembly?

14 A. Yes.

15 MR. SHEALY: So then we move to page 27, line 19.

16 MR. FEW: 27?

17 MR. SHEALY: I'm sorry, 22.

18 MR. FEW: I think we might skip it.

19 BY MR. FEW:

20 Q. I'll figure that out. And who was the first
21 person that you can recall dealing with that CreatiVasc?

22 A. We dealt with Frank Patterson. I may not have
23 dealt with him -- I met Frank, but my people would have --
24 you know, he was the main contact.

25 Q. When Diaxamed took over on basically December 30,

1 2016, did Frank Patterson stay on?

2 A. Not -- if he did, it wasn't for a long period of
3 time. I -- I don't recall.

4 Q. At some point in time, you met Steve Johnson,
5 right?

6 A. Yes.

7 Q. And he was more of the business contact for
8 CreatiVasc, is that a fair statement?

9 A. Yeah, I would say that characterizes it pretty
10 well.

11 MR. FEW: Line 21?

12 MR. SHEALY: Yes.

13 BY MR. FEW:

14 Q. Okay. And did he -- the relationship between
15 Diaxamed and Johnson was terminated, I believe, around March
16 30, 2017, does that sound right?

17 A. Yes.

18 MR. FEW: All right. So then we moved to page 31, line
19 3.

20 BY MR. FEW:

21 Q. And then, when Diaxamed -- excuse me, and then
22 when did Diaxamed begin working on the hemo-access device?

23 A. It would've been the January after the
24 transaction, and -- you know --

25 Q. Because Diaxamed was formed for the purpose of

1 acquiring the assets of CreatiVasc and/or Brookhaven; is that
2 right?

3 A. Yes.

4 Q. And so, the effort to develop the hemo-access
5 device is continuing?

6 A. Yes.

7 Q. Okay. And has Diaxamed generated any revenue from
8 sales?

9 A. No.

10 Q. Has Diaxamed generated any revenue from any source
11 since its inception?

12 A. No.

13 MR. FEW: All right. 32, 2?

14 MR. SHEALY: Yeah.

15 MR. FEW: All the way to 25?

16 MR. SHEALY: Correct.

17 BY MR. FEW:

18 Q. That would be something that would be in the books
19 and records of Diaxamed, though, right?

20 A. Yes.

21 Q. And then, that would be the only -- all the
22 contributions have come from you and your wife by way of DXM
23 Holdings, is that a fair statement?

24 A. Yes.

25 Q. And has there been any discussions of

1 discontinuing the effort to develop the hemo-access device?

2 A. Not specifically. We are pursuing the path to --
3 you know, prove out -- you know, will the actual therapy work
4 or not, and -- you know, we've continued to go down that
5 path, so we want to obtain that answer if it's at all
6 possible.

7 Q. So what -- I want to ask you about what you know
8 about the product -- the hemo-access product that is being
9 developed currently, are you involved in that?

10 A. Yes.

11 Q. And Diaxamed has taken over ownership of all the
12 intellectual property of CreatiVasc?

13 A. That's correct.

14 MR. SHEALY: And we go to page 34, line 9.

15 BY MR. FEW:

16 Q. So generically, how is the device that's being
17 developed now differentiated or different at all from what
18 CreatiVasc was doing -- CreatiVasc, Brookhaven up through the
19 end of 2016?

20 A. Well, the valve assemblies are -- you know, have
21 been completely reengineered, and we have a different
22 cannulation chamber, but -- you know, we're still using a
23 needle and a subcutaneous port to activate the balloons.

24 Q. A needle and a subcutaneous port, so are you
25 familiar with the work that Sealevel had done as part of its

1 customer supply agreement with CreatiVasc?

2 A. Only a cursory knowledge.

3 Q. Are you aware of whether or not I -- whether or
4 not Diaxamed is currently using any of the technology that
5 was developed by Sealevel?

6 A. Diaxamed is not using any of that.

7 Q. Had Diaxamed ever used any of that technology
8 since its inception?

9 A. No.

10 Q. So Diaxamed has been using the -- what's the
11 difference between what Diaxamed is doing now versus what
12 CreatiVasc Brookhaven was doing as it related to Sealevel's
13 development or contributions to the product?

14 A. My cursory understanding was they were working on
15 some sort of pump and some way to connect the pump to be able
16 to pump it up and pump it down. And like I said, our focus
17 has been on using a subcutaneous port -- using a needle to
18 fill an empty port.

19 MR. SHEALY: Continue on.

20 MR. FEW: Keep going?

21 MR. SHEALY: Yes.

22 BY MR. FEW:

23 Q. That would be the original thing that Dr. Cole was
24 working on.

25 A. They -- they evolved to a port, that is correct --

1 I mean, I think they tried some other things, but yes.

2 Q. So initially, ATEX had a customer supply agreement
3 with CreatiVasc; is that right?

4 A. Yes.

5 MR. SHEALY: All right. So then we're down to page 37,
6 line 24.

7 BY MR. FEW:

8 Q. And did they do some due diligence prior to the
9 investment that was made in Brookhaven?

10 A. They did what they would normally do when looking
11 at making an investment.

12 Q. And what's your understanding of what that would
13 be?

14 A. One, we checked to make sure that -- you know, the
15 company was sound, it didn't have -- you know, any legal
16 problems -- you know, check on -- you know, other things that
17 are out there in the -- you know, in the public domain.

18 Q. Wouldn't they also want to review all of the
19 contracts and obligations of the entity that they were
20 investing in?

21 A. Not necessarily.

22 MR. FEW: 39, 19?

23 MR. SHEALY: I think that's right. 39, 19.

24 BY MR. FEW:

25 Q. So your attorneys did the due diligence -- let me

1 go back and make sure I have a better understanding of the
2 timeline. So your attorneys did some due diligence prior to
3 the initial investment that was made in roughly 2015; is that
4 right?

5 A. That's my estimate.

6 MR. SHEALY: And you go to page 40, line 18.

7 BY MR. FEW:

8 Q. And who did you communicate with at Brookhaven in
9 order to become aware of the opportunity to make that
10 investment?

11 A. John Feldman.

12 Q. How did you come to know him?

13 A. I think Steve Johnson introduced him to me.

14 MR. SHEALY: And onto page 42, line 9.

15 BY MR. FEW:

16 Q. This is February 18, 2015, a document between an
17 agreement between ATEX Technologies Inc., and CreatiVasc
18 Medical Inc., did you see that?

19 A. Yes.

20 Q. Is this the supply agreement that you were
21 referring to?

22 A. It does -- I'm sorry. It looks like it, yes.

23 MR. SHEALY: Then page 45, line 11.

24 MR. FEW: Start at 11?

25 MR. SHEALY: Correct.

1 BY MR. FEW:

2 Q. Next, I want to show you this document that was
3 Exhibit 11 to some request for admission called a
4 Contribution Agreement, dated December 30, 2016. Can you see
5 that on the screen, Mr. McMurray?

6 A. Yes.

7 Q. And this is the one that's dated December 30,
8 2016. Brookhaven Vascular is identified as the contributor,
9 Brookhaven Medical is the parent, and then Diaxamed is the
10 company. What was this document intending to effectuate?

11 A. I believe that this was the formation of Diaxamed
12 in putting the assets that Brookhaven had in there. I'd have
13 to take a minute to really read it, but on the surface of it,
14 that's what it looks like.

15 MR. FEW: Line 13 on 46?

16 MR. SHEALY: Correct.

17 BY MR. FEW:

18 Q. What was the difference between Brookhaven
19 Vascular and CreatiVasc?

20 A. I think that they renamed it "Brookhaven Vascular"
21 when Brookhaven took over. I don't know from a
22 corporate-structure standpoint, but I think the business
23 that's being referred to is "CreatiVasc."

24 Q. And then, you've signed on behalf of DXM?

25 A. Correct.

1 MR. SHEALY: All right. So then page 49.

2 MR. FEW: Line 1?

3 MR. SHEALY: Uh-huh.

4 BY MR. FEW:

5 Q. I am now going to show you what was Exhibit A to
6 the request for admission and ask you if you've ever seen
7 this document before.

8 A. I have not.

9 Q. This is the customer supply agreement between my
10 client, Sealevel and CreatiVasc that was entered into -- on
11 October 28, 2014, have you ever been made aware of the
12 existence of this document at any point in time prior to
13 today?

14 A. Not an executed copy, no.

15 Q. What do you mean by that distinction "Not an
16 executed copy"?

17 A. I had heard at one time that there had been some
18 discussions about a supply agreement. It's something we had
19 no interest in, so I have no working knowledge of this
20 agreement or the technology, for that matter.

21 MR. FEW: Line 13 of 50?

22 MR. SHEALY: Correct.

23 BY MR. FEW:

24 Q. Okay. But your testimony was that you weren't
25 aware of an executed version of this document, as I recall

1 you said, right?

2 A. That's correct.

3 Q. Okay. So if Steve Johnson testified that he
4 executed this document on behalf of CreatiVasc as its Chief
5 Executive -- Executive Officer in October of 2014, you don't
6 have any reason to dispute that, do you?

7 A. I have no knowledge of that.

8 MR. FEW: Keep going?

9 MR. SHEALY: Yes.

10 BY MR. FEW:

11 Q. When did you first become -- you testified a
12 minute ago that you didn't want the technology that Sealevel
13 had been working on, when did that decision-making process
14 first arise?

15 A. So the core therapy to treat a patient is to be
16 able to turn the blood flow on and to turn the blood flow
17 off, and have that functionality be able to be executed at
18 least three times a week without creating thrombosis --
19 without creating damage to the person's vasculature and
20 everything, that is the therapy.

21 And the way that the balloons get activated is -- you
22 know, not a key part of the therapy -- you know, our
23 assessment was people are getting large needles put in their
24 arms for dialysis, the dialysis techs are very familiar with
25 using needles and having another needle in the mix to inflate

1 and deflate a port in somebody's body -- you know, was
2 something that would fit into their workflow, and that's what
3 we've always pursued.

4 MR. SHEALY: So page 53.

5 MR. FEW: Line 12?

6 MR. SHEALY: Yes.

7 BY MR. FEW:

8 Q. And so, the customer supply agreement that we were
9 looking at a minute ago that my client had, this was Exhibit
10 4 to the deposition, it's October 20, 2014, it actually
11 predates the supply agreement that ATEX had with CreatiVasc,
12 right?

13 A. 2014 is before 2015.

14 MR. FEW: On page 76, line 21.

15 MR. SHEALY: Or -- actually those are all -- that's all
16 out.

17 MR. FEW: Okay.

18 MR. SHEALY: So it's page 8, line 17.

19 MR. FEW: Okay.

20 BY MR. FEW:

21 Q. Because Diaxamed took affirmative steps not to
22 assume the Sealevel contract, right?

23 A. No -- no, Diaxamed assumed the things that they
24 needed to move the business forward, and as I stated before,
25 that's what they were focused on. There's no interest in

1 that other technology and it wasn't even looked at.

2 Q. And that would've been communicated to Steve
3 Johnson and others, correct?

4 A. Well, that was the direction that we were going
5 in, so Steve was aware of that, yes.

6 Q. Steve was aware of it, he would've been aware of
7 it even before the transaction occurred on December 30, 2016,
8 right? Because it was specifically not included in that --

9 A. I can't say when -- when he became aware of it.

10 Q. Well, who all was involved in the negotiations
11 leading up to the December 16th, Contribution Agreement?

12 A. John Feldman, their legal counsel, Bob Achenbach,
13 and Steve, to some extent.

14 Q. It's signed by Feldman and Johnson?

15 A. Correct.

16 Q. So is it your testimony that they knew that the
17 Sealevel contract was not being assumed by Diaxamed?

18 A. I don't know what they knew or didn't know.

19 Q. Well, they knew what was in Exhibit A, presumably,
20 right? Do I need to go into that?

21 A. I don't know. I've seen people sign documents
22 that they haven't read, I can't tell you what they knew or
23 what they didn't do or -- you need to talk to them.

24 MR. FEW: I think that's it. Plaintiff rests.

25 (Video stops.)

1 (Read testimony ends.)

2 THE COURT: All right. That's the extent of that
3 testimony, you will go back to your jury room, and continue
4 deliberation. Let us know if you need anything else.

5 (Jury exits room.)

6 THE COURT: All right. Any exceptions from the
7 Plaintiff?

8 MR. FEW: Well, I didn't really like the way my voice
9 sounded.

10 THE COURT: All right. Well, we can strike that whole
11 thing, if you'd like, I'll bring them back out and say "We
12 have to strike all the questions." Anything with the
13 Defense?

14 MR. SHEALY: No, your Honor.

15 (Off the record.)

16 (On the record.)

17 THE COURT: "Do we have to have an actual amount for
18 damages in question to the actual damages or can we state all
19 attorney's fees, court costs, and associated fees? If not,
20 what is the Plaintiff's actual fees from above?"

21 MR. FEW: That is interesting.

22 THE COURT: I mean, the only way I can say is you can
23 only -- you have to make your decision with what's in the
24 record.

25 MR. FEW: Yeah.

1 THE COURT: My draft is: "You have to make your
2 decision on the evidence presented, we cannot add to it."

3 MR. FEW: That's -- that's pretty good, I agree. You
4 have a piece of paper?

5 THE COURT: All right. In response to the question is
6 -- on Court Number 6, response "You have to make your
7 decision based on the evidence presented at trial, we cannot
8 add to it." Any objection to that from the Plaintiff?

9 MR. FEW: No, your Honor.

10 THE COURT: And Defense?

11 MR. SHEALY: No, your Honor.

12 (Off the record.)

13 (On the record.)

14 THE COURT: Plaintiff ready?

15 MR. FEW: Plaintiff is ready.

16 THE COURT: Defense ready?

17 MR. SHEALY: Yes, your Honor.

18 THE COURT: All right. If they're ready, bring them
19 in.

20 THE CLERK: Okay.

21 THE COURT: All right. Bring the jury in.

22 (Jury enters room.)

23 THE COURT: All right. Mr. Foreman, I understand
24 you've reached a verdict?

25 JUROR 16: Yes.

1 THE COURT: All right. If you could hand that to the
2 bailiff, please. It's not like on (inaudible) we get to read
3 it.

4 JUROR 16: I was practicing.

5 THE COURT: All right. Looks like it is in proper
6 form, so you could publish the verdict.

7 THE CLERK: Your Honor, this is case number
8 2022-CP-23-1310, Sealevel Systems Inc. versus CreatiVasc
9 Medical Inc., Diaxamed LLC, successor in interest to
10 Brookhaven Vascular Inc., successor in interest to Brookhaven
11 Merger Corp, successor in interest to CreatiVasc Medical Inc.

12 Number one: "For the claim of the breach of a contract,
13 we, the jury, unanimously find for the Plaintiff against
14 Defendants, CreatiVasc Medical Inc., Brookhaven Vascular
15 Inc., and Brookhaven Merger Corp. actual damages \$321,540."

16 Number two: "For the claim of intentional interference
17 with the contract, we, the jury, unanimously find for the
18 Plaintiff against the Defendant, Diaxamed, actual damages
19 \$400,000."

20 "The punitive damages. If you find the Plaintiff is
21 entitled to actual damages against the Defendant, Diaxamed
22 LLC, then you can consider whether the Plaintiff has
23 established by clear and convincing evidence that the
24 Plaintiff is entitled to punitive damages. We, the jury,
25 unanimously find for the Plaintiff to be awarded punitive

1 damages in the amount of \$2,500,000. Signed Timothy W.
2 Bishop, Foreperson, Juror 16, February 13, 2024." This is
3 your verdict, so say you all. Raise your right hand.

4 THE COURT: All right. Anything for the jury before --
5 from the Plaintiff?

6 MR. FEW: Nothing from the Plaintiff.

7 THE COURT: Anything from the Defense?

8 MR. SHEALY: No, your Honor.

9 THE COURT: All right. Ladies and gentlemen, thank you
10 for your service this week, and that ends it for the week,
11 and you're good for three years. This time, if you'll go
12 back to the jury room, I'll step back there in just a minute,
13 and if anybody has any questions, it's all up to you, but
14 you'll be able to get out of here by 5:00. All right.

15 (Jury exits room.)

16 THE COURT: All right. Anything from the Plaintiff?

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

18 THE COURT: 10 days?

19 MR. SHEALY: Yes, your Honor.

20 THE COURT: Okay. Yeah, I'm tired thinking about this
21 case too, so -- all right. I'll give you 10 days for a
22 posttrial motion.

23 MR. SHEALY: Appreciate that.

24 THE COURT: Anything else? All right.

25 MR. FEW: Thank you -- thanks everybody.

1 MR. SHEALY: Thank you, your Honor. Thank you all.

2 THE COURT: Take care.

3

4 (THERE BEING NOTHING FURTHER, THIS HEARING CONCLUDED)

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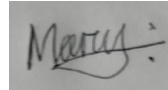
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CERTIFICATE OF TRANSCRIBER

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 13, 2025.

I do further certify that I am neither of kin, Counsel, nor interest to any party hereto.

September 22, 2025.

A rectangular box containing a handwritten signature in dark ink. The signature appears to be "Mary" followed by a stylized flourish or surname.

MARY RAGSDALE

Transcriber

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

SEALEVEL SYSTEMS, INC.) NO. 2022-CP-23-01310
)
) TRANSCRIPT OF RECORD
)
) Motions
CREATIVASC MEDICAL, INC.,)
DIAXAMED, LLC, successor in)
interest to BROOKHAVEN VASCULAR,)
INC., et al)

)

B E F O R E:

THE HONORABLE PERRY H. GRAVELY, JUDGE

DATE: May 23, 2025

Greenville, South Carolina

A P P E A R A N C E S:

WESLEY D. FEW, Esquire

Attorney for the Plaintiff

KIRBY D. SHEALY III, Esquire

Attorney for the Defendants

Reported by: Cathy J. Provost, RMR, Official Court Reporter

INDEXES

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INDEX TO WITNESSES

(No witnesses called.)

INDEX TO EXHIBITS

(No exhibits marked.)

COURT REPORTER LEGEND:

dash -- intentional/purposeful interruption; change in thought

ellipses ... trailing off

[ph] phonetically written

[sic] written as said

[indiscernible] unable to be understood

-- P R O C E E D I N G S --

(Court called to order.)

THE COURT: We're on the record for Sealevel Systems versus CreatiVasc, et al. I was thinking kind of housekeeping, before we address the defendant's motion I thought we need to talk about the promissory estoppel that I took under advisement and figure out how we need to deal with that.

Since it is your claim, I mean -- and again, I know we didn't tell you to brief that, we didn't indicate, but I know you all touched on it on your memos. I mean, do you have a problem with me -- I guess my question to you, do I need to rule on that, and then obviously I think -- not obviously, but I think you have an election of remedy issues once I do make a ruling, or do I -- I don't know. This is a little bit interesting.

ATTORNEY FEW: Your Honor, I've given that a little bit of thought, and I have some thoughts. And the main thought would be if we went up on the legal claims on appeal and for some reason came back down with a result that we didn't like, then we'd have to come back down and probably track Your Honor down -- it would be four years later -- and say can you please --

THE COURT: What if I'm going to retire?

ATTORNEY FEW: Well, you may be.

THE COURT: Might not be four years from now, but may be somewhere, getting close.

ATTORNEY FEW: And so I do think that there is judicial

1 economy reasons to have the Court rule on it in and its
2 alternative status. I've never had to deal with this quite
3 before, but -- and I'm prepared to argue. I didn't argue it but
4 we feel like we did meet the elements of that, and I can argue
5 that when we get into it in response to Kirby's arguments.

6 So it like it's, yes, it would be an election of remedies
7 and it would, I guess, be in the alternative, in the event that
8 our legal remedies hold up, this would be -- I don't have an
9 answer as to whether or not we get to pick. I think if the Court
10 finds that we have a legal remedy, then the promissory estoppel,
11 I'm not sure if there would be, if a plaintiff could elect to
12 take the equitable remedy when the law says if there's a legal
13 remedy you don't get to it.

14 So my response is probably not very helpful, Your Honor.

15 THE COURT: No. That's just one thing about it. I'm not --
16 as far as election of remedies -- and again, I'm not ruling, but,
17 I can't imagine not being as generous as the jury but --
18 Mr. Shealy, just brief comments on the promissory estoppel issue.

19 I mean, my thought is, the one thing the way this is
20 actually set up, regardless of my ruling, you know, I think we
21 need to take care of everything because then the appellate
22 courts -- because obviously this is going up on appeal, I can't
23 imagine it wouldn't be, so they'll have everything they need to
24 make a decision on that. So, I mean, I think there is a
25 definitely a complete record regardless of my decision here, my

1 decision on promissory estoppel. Therefore everything is
2 properly before the appellate courts.

3 ATTORNEY SHEALY: May it please the Court, your Honor. I
4 agree with that sort of general premise that I think the Court
5 does need to rule. I also do believe, depending on what the
6 rulings are with respect to the legal claims, it may present an
7 election of remedies issue. But I think until we see how the
8 legal claims shake out -- and, you know, we've argued that the
9 promissory estoppel claim should be dismissed because the
10 plaintiff had met the elements, and so that is the -- that's our
11 position, is it should be dismissed.

12 If the Court is inclined to rule against us on that
13 obviously there's no, there's no way that the plaintiff gets what
14 we believe would be a triple recovery. There would have to be an
15 election of remedies made if that cause of action is allowed
16 to stand.

17 THE COURT: All right. Let's do this. Let's just go
18 forward on your defense motions. Then at the end of that I'll
19 hear from you on the promissory estoppel. And I'll give anybody,
20 I'll give 10 days if you all want to supplement with legal
21 authority or something like that.

22 ATTORNEY SHEALY: All right.

23 THE COURT: Will that work?

24 ATTORNEY FEW: That's fine, Your Honor. And I was just
25 going to say, my recollection is is that the Court dismissed the

1 quantum merit claims prior to, and so I think the way the record
2 stands right now, the promissory estoppel claim is still in play
3 and it would be within the Court's discretion to treat it under
4 the posttrial motions, just to reject it or deny it, and then it
5 would be in the Court's discretion to set what the recovery would
6 be under that.

7 THE COURT: Yeah. And I think I just took that under
8 advisement. I didn't know if you all wanted to argue it. But
9 generally if you would have the ability to argue that afterwards,
10 and I was just saying if you wanted, if anybody wanted, I'll give
11 you 10 days to.

12 ATTORNEY FEW: That sounds great.

13 THE COURT: All right. So with all that being said,
14 Mr. Shealy, I'll hear from you on your posttrial motions.

15 ATTORNEY SHEALY: Thank you, Your Honor. May it please the
16 Court. I want to start, we made these motions a good while ago,
17 back in February, in February, and just with some comments about
18 this agreement between these parties, just to sort of set the
19 stage a bit, I've gone back and looked, you know, at this
20 agreement and thought about what sort of scenarios might have
21 arisen had the shoe been on the other foot, had Sealevel -- had
22 we sued Sealevel and said, you know, you didn't, you didn't make
23 a handheld, and we're entitled to damages. There's no evidence
24 in the record, and the customer supply agreement that was
25 Plaintiff's Exhibit 4 doesn't say what the specifications are for

1 the thing that Sealevel was supposed to make.

2 So Sealevel could very easily say, you know, we didn't know
3 what we were getting into at the time. You know, I mean, if the
4 specifications turned out to be this handheld needed to be able
5 to activate this pump in a person's leg in Greenville, South
6 Carolina, by somebody sitting in Nome, Alaska, and you would say,
7 well, that's just impossible. And that is one of the infirmities
8 of the agreement. Had we tried to sue Sealevel we would have had
9 a real problem.

10 If everything had gone according to what everybody hoped and
11 we, and Sealevel, was able to make these things but it cost a
12 million dollars per item and nobody was willing to buy them,
13 there is -- you know, if we had sold one, if we had sold ten and
14 that's all we could sell, well, that's what the parties
15 anticipated would have happened, and everybody would have spent a
16 whole lot of money designing a product, and everybody would have
17 lost a lot of money because they wouldn't have been able to
18 recoup all of the research and development, time, and money that
19 they put into this.

20 Those scenarios are not so absurd because they are, really,
21 they provide you a window into where we are now. No product was
22 ever, has ever been developed and there's no provision in this
23 agreement saying that we were supposed to pay Sealevel for its
24 research and development time, and the only evidence put in the
25 record to provide the jury with a measure of damages was an

1 invoice for research and development time.

2 So with those sort of general remarks, I just want to move
3 straight into the positions we've taken. We've asked for
4 judgment notwithstanding the verdict on the grounds that this
5 agreement is unenforceable because at the time specific material
6 terms had not been agreed upon by the parties. And the lack of
7 specifications, I mean, Sealevel put in its papers, reminded the
8 Court, about when the specifications were finally drawn up and it
9 was months, if not years, after the parties entered into this
10 agreement. Specifications for this device were not in the
11 agreement. That is an agreement to agree, and that is
12 unenforceable under *Stevens & Wilkinson*, under that case.

13 Plaintiff has sort of tried to brush off the *Stevens &*
14 *Wilkinson* case saying, well, that has to do with a hotel; that
15 has nothing to do with this. It doesn't matter about what
16 product or what thing is being developed; it matters about the
17 specificity of the agreement, and there isn't a specificity in
18 this customer supply agreement that is needed for a contract for
19 a service. And that's what this is.

20 And plaintiff makes a good point in its papers that this is
21 an agreement for a service, the development of this product.
22 Later there would be individual orders for however many of the
23 products in purchase orders. And that's what the customer supply
24 agreement says, that there would be purchase orders issued by my
25 clients when they were ordering, and that they would figure out

1 what the price was going to be later, and that all of that is
2 subject to the UCC. This is not subject to the UCC; this is just
3 subject to Hornbook contract law about the fact that you need a
4 meeting of the minds about the material terms of the contract,
5 and they're not there for this to be enforceable.

6 That, by itself, wipes the entire case off the table. If
7 this is an unenforceable contract, full stop, that's the end of
8 the case. And we believe the case should not have been submitted
9 to the jury because this agreement is unenforceable.

10 The second basis is there was no breach. What we are
11 obligated to do under the customer supply agreement is, when we
12 sell this product they supply every one of the handheld actuators
13 to us when we sell it, and there's no evidence in this record
14 that a one of these things was ever sold, and so there can't be a
15 breach of the contract.

16 And that's what is maddening about this case, I think, is
17 the fact that, is the way this is written, you know, we're not
18 obligated to buy a certain number of these things from Sealevel;
19 we're not obligated to pay them a certain price, or none of that
20 stuff is in the agreement. The obligation is if we sell, they
21 supply all of those things to us. And we never have, so there's
22 no breach.

23 And I would point out Sealevel just skirts right by that
24 argument in its papers to this Court. It has no argument in
25 opposition to what we're saying; it just blows right by it.

1 Even if there were a breach, evidence of a breach in this
2 record, there's no evidence of damages that are recoverable under
3 the law. And I do want to point out Sealevel takes the position
4 in its papers that we have put to this Court that Sealevel should
5 be limited to only recovering lost products. We pointed out to
6 the Court during the colloquy when we were talking about our
7 directed verdict motion, the Court denied our directed verdict
8 motion and said that the invoice for \$300-some-odd-thousand that
9 was put into evidence over our objection was evidence of
10 incidental or consequential damages.

11 Our pointing out to the Court that it is evidence of neither
12 of those things, as they are defined in the law, was not an
13 effort on our part to, say limit, to say that Sealevel is limited
14 to the recovery of lost profits; we're just saying you have to
15 have evidence that meets the appropriate legal standard of
16 damages.

17 And Sealevel has pointed out, and we agree, that the measure
18 of damages is what is it, what damages would put the person or
19 the entity in the position they would have been had we fulfilled
20 our obligations as they said we breached under the contract.

21 Everybody spent money, lots of money, and time trying to
22 develop this product. We lost lots and lots of money, they
23 expended lots and lots of money, and they would have done that
24 even if we had been successful, and so the invoice is not the
25 measure of damages. They would have incurred those very

1 expenses. That's what this agreement anticipated, that everybody
2 would incur a lot of expense and time developing this device.

3 The only thing left for them is what, and what the law
4 demands of them is, evidence of, okay, had this come to fruition,
5 what was your expectation? Well, the testimony was that they
6 would make a lot of profits on the sale of the items.

7 There is zero evidence of lost profits. They could have put
8 in an expert, they could have projected out what the profits
9 would have been over a period of time. And Sealevel has argued
10 that, well, you know, you can't hold a plaintiff to the same
11 standard when it's the defendants' actions that have made it
12 difficult to ascertain what those damages are in the future. And
13 they cite the *Minter v. GOCT* case for that proposition and *Drews*
14 *v. Ledwith-Wolfe*, but these are both cases where what the parties
15 were trying to do was project lost profits they should have
16 recovered. And there was evidence put in the record of what
17 their lost profits would be. There is zero evidence in this
18 record of lost profit.

19 So we're not trying to limit anybody to anything except what
20 the law says you're obligated to do with proof, and that is what
21 is absent here, is proof of damages.

22 So then there's this second claim that is only alleged
23 against Diaxamed for tortious interference, and of course if the
24 breach of contract claim fails on any one of the bases that we've
25 said that it should fail, then the tortious interference claim

1 fails, too, because it requires breach of a valid contract and
2 damages as a fundamental foundational principle.

3 But there are additional elements. You have to have some
4 sort of intentional interference and a lack of justification.
5 And we pointed out to the Court how those elements have been
6 treated in the law. And the intentional interference has been
7 equated with behavior that amounts to sabotage, fraud,
8 defamation, you know, doing/taking steps to undermine a contract
9 using methods that the law frowns upon.

10 The law says that a business, making a business decision, is
11 not a -- is a valid justification, and all that the evidence is
12 is that Diaxamed bought the assets, and not this particular
13 product, when it bought assets from Brookhaven. That doesn't
14 equate to the evidence of sabotage, or subterfuge, or whatever
15 nefarious behavior, whatever you want to describe it as, as what
16 the law requires. And that was a business decision to make.
17 That does not, under the law, equal tortious interference.

18 So that claim, that claim fails for those additional bases.
19 And you don't even have to get there because of the severe
20 infirmities that the breach of contract claim has.

21 Your Honor, as a fallback position we've also sought a new
22 trial under the thirteenth juror doctrine. And so if the Court
23 disagrees with us about all of those points, and every one of
24 them, we believe, is a stand-alone reason to get rid of and
25 dismiss the breach of contract and the torturous interference

1 claim, but there's obviously something going on in the jury room
2 because of the note that came out from the jury asking, Can we
3 award attorney's fees and costs? They were never, they were
4 never charged that they could do that. That speaks an animus
5 that is inappropriate in a court of law in a civil case.

6 They awarded damages, they award \$400,000 of damages, actual
7 damages, against Diaxamed and there is nothing, no yardstick, in
8 the record on which to ground such a, base such an, award
9 separate and apart from the \$321,000 award of actual damages
10 against the other defendants for which the yardstick is
11 inappropriate.

12 So these are markers of a jury that is motivated by passion,
13 caprice, prejudice, or considerations that are outside of the
14 record, and those are appropriate bases for this Court to
15 exercise its discretion and grant a new trial under the
16 thirteenth juror doctrine.

17 We've also asked for a new trial absolute on the grounds
18 that a punitive damages award is in clear violation of the
19 Statute 15-32-530(A). And the note from the jury is another
20 basis. This is a verdict that shocks the conscious or is based
21 on improper motives is a basis to grant a new trial absolute.

22 As the next fallback position, or maybe last fallback
23 position, we've asked for a new trial minus a remittitur, again
24 pointing out this: We have a duplicative actual damages award,
25 and the punitive damages award duck shouldn't survive the *Gamble*

1 factors.

2 And in addition, what's been pointed out as willful, wanton
3 behavior on the part of the plaintiff, and evidence of that that
4 is clear and convincing, is absent. I mean, the only thing that
5 is in the record is the assertions of counsel for Sealevel.
6 There is nothing in the proof, in the evidentiary record, to
7 indicate that Diaxamed did anything other than make a business
8 decision and buy assets from another company. But there's no
9 evidence that it did so with an intent to harm Sealevel. There's
10 no evidence in the record that -- what's been pointed to is the
11 evidence in, or the language in, the contract that Steve Johnson
12 signed when Sealevel employed him, the asset protection
13 agreement, and that somehow that is evidence that Diaxamed had
14 the specific intent to harm Sealevel.

15 Your Honor, I don't understand that. That defies logic.
16 Doesn't make any sense to me. That's evidence of nothing
17 relevant to the issues in this case. At most, one or more of the
18 defendants was guilty of maybe being rude by not talking to
19 Sealevel at a point when things, you know, that they were losing
20 money and burning through their capital and they had gotten
21 frustrated with the fact that Sealevel couldn't produce, you
22 know, was having issues with the sensors, the internal sensors,
23 and the fact that they couldn't withstand being in a salient
24 environment, and it was just one hurdle after another. But that
25 is not actionable behavior, is the point.

1 We've got a breach of contract claim, and there is an
2 evidentiary obligation on the part of the plaintiff to put
3 evidence in the record in support of the elements. That evidence
4 as to all of the elements, frankly, of a breach of contract
5 claim, is absent, is not there. It's also absent with respect to
6 the tortious interference claim.

7 So, Your Honor, we really believe this case should never
8 have gone to the jury, but if the Court is inclined to not to
9 reverse its own ruling in that regard, then something must be
10 done here with the damages.

11 We've got a punitive damages award that violates the
12 statute. It doesn't survive the *Gamble* scrutiny. We've got two
13 different actual damages awards, one of which has zero basis.
14 We've got a really-messed-up result.

15 And so, Your Honor, we would ask for JNOV; in the
16 alternative, for a new trial under the thirteenth juror doctrine;
17 in the alternative, a new trial absolute; in the alternative, a
18 new trial minus a remittitur.

19 And then with respect to promissory estoppel, I'm happy to
20 argue that.

21 THE COURT: Yeah. Let's hear this, and then I'll let you go
22 on to promissory estoppel.

23 All right, Mr. Few.

24 ATTORNEY FEW: Thank you, Your Honor. First I'd like to
25 thank the Court for giving us the time to respond. My work

1 schedule has been super crazy ever since we had this trial back
2 in February.

3 THE COURT: Yeah. We've been kind of slammed, too, so.

4 ATTORNEY FEW: Yeah, right. And the other case where I came
5 in, I know you all have been busy and I heard, I think I saw Ben
6 one day, and you all done like 80 things in a day or something.

7 THE COURT: That's your typical day.

8 ATTORNEY FEW: But, Your Honor, so opposing counsel starts
9 out with a bunch of hypotheticals, okay. Well, these are not
10 hypotheticals that we're dealing with. The facts were presented
11 from the witness testimony on that witness stand and, as we noted
12 in our brief, we put 17 exhibits into evidence, they put 8 into
13 evidence. That jury was extremely attentive. They deliberated
14 for several hours. They came back with questions. They wanted
15 to re-hear witness testimony. There's nothing to indicate that
16 the next jury would be any different than that jury.

17 And that just gets us back to why we're here today, Your
18 Honor. They don't like the facts of the case, okay. They had an
19 opportunity to do the right thing and to accept Sealevel's
20 contract under paragraph 24 of the customer supply agreement.
21 And we referred to this in our brief, Your Honor. This is the
22 assignment provision, and it's fairly standard, and it says that
23 you can't assign without consent, but then it creates an
24 exemption to when you can assign without consent, and that is in
25 the event that you sell everything, which is what happened here.

1 And it was well within that jury's province to know that
2 Diaxamed -- and we put up all kinds of evidence -- Diaxamed was
3 on emails with Sealevel all the way back to 2014 and 2015,
4 Diaxamed came down and attended the technology conference when
5 they said, Feltman said, that the South would have won the war if
6 we could have gotten all these people together.

7 And then Diaxamed, when it come time for trial, McMurray
8 tries to say, well, I kind of knew who you were, but I really
9 didn't who you were; and we didn't want you business, but we knew
10 we didn't want your business; but I didn't who you were. The
11 jury didn't believe them. They weren't credible. They tried to
12 do a clever trick and they got caught. And that's what's
13 happened here, Your Honor.

14 This provision is breached. CreatiVasc, it says without
15 consent they could have assigned in connection with the transfer
16 or sale of all, or substantially all, of its business, or in the
17 merger consolidation change the control or other similar
18 situation. Well, they did that in February of 2015 when we put
19 in Exhibit 29, which was that 69-page documents of merger from
20 the Secretary of State's Office.

21 THE COURT: Let me ask you, though. But that doesn't
22 require them to assign that contract; it just says you can assign
23 without consent of the agreement.

24 ATTORNEY FEW: That's right, Your Honor, it doesn't require
25 them to do that, but Steve Johnson -- this is where the

1 non-disparagement agreement comes into play, and it plays a huge
2 role in this whether opposing counsel likes it or not -- Steve
3 Johnson never understood that -- two things. Either he never
4 understood that Diaxamed was not taking the Sealevel contract, or
5 he knew and he wouldn't tell us, because he never came out and
6 told us directly.

7 And there's a document in evidence that was from, I think,
8 January 12th of 2017, he says, Hey, Tom and Ben, I want to get
9 together and tell you about some of these changes that have
10 occurred around here. Then he keeps his job until the end of
11 March, and then he gets terminated. And the evidence is, I'm
12 just referring to the evidence, the evidence is that Brian
13 McMurray then reminds him, We're terminating you and, by the way,
14 we're taking everything on your computer, which is a breach of
15 paragraph 14, confidentiality of this agreement, we're taking
16 everything that's on your computer. You're not going to be here
17 anymore. And so, you know, he never comes and tells us what they
18 now say when we do discovery in this case. That in and of itself
19 is a breach of the covenant of good faith and fair dealing.

20 So we have multiple breaches. The good faith covenant,
21 paragraph 14 has been breached. They've kept our confidential
22 information, never told us that they took it. We didn't find out
23 that that occurred until we took Steve Johnson's deposition in
24 this case which I want to say was as late as 2023 or 2024.

25 And, Your Honor, as I noted in our brief, in that deposition

1 they had still not given us these documents, this assignment and
2 assumption agreement that are in evidence now as Exhibits 14 and
3 15. We were never told about that.

4 How is it not a breach of a covenant of good faith and fair
5 dealing if you jump in with two feet and work as hard as you
6 possibly can to develop a product -- and to Mr. Shealy's point,
7 we had a patent application with 40 pages of drawings that was
8 filed in 2014 and supplemented in 2015, and then in evidence, at
9 Exhibits 11, 12, and 13 -- excuse me -- 10, 11, and 12, are
10 specific emails discussing specifications that were put together
11 by CreatiVasc and Sealevel in the effort for us to prepare our
12 wand, which we did. We performed under the contract; we prepared
13 the wand.

14 Defense came along and put in eight emails where they tried
15 to convince this jury that the battery never worked on the wand.
16 Well, the only problem with that is those were all from late 2015
17 and early 2016. That problem was cured. You never heard
18 anything more about it.

19 One more thing, the defendants lacked credibility before the
20 jury, and that's why they were punished for what they did. And
21 frankly, Your Honor, I don't know that we even realized what
22 Diaxamed had orchestrated until we got in here and we were
23 actually trying the case and you could see everything get put
24 together. That's what that jury saw. They saw that you came in
25 with lawyers in February of 2015, and you did a first

1 transaction. And guess what? What did CreatiVasc do with that?
2 They honored the Section 24, because we were doing all this work.

3 And two other points, Your Honor, before I kind of get into
4 the point about third party. Mr. Shealy says "we", and he says
5 "we", and he says "we". Well, they're not we because CreatiVasc
6 was left to die on the vine just like we were, and Diaxamed took
7 everything. They took that everything CreatiVasc had and
8 everything that we gave to CreatiVasc.

9 And you want to talk about hypotheticals, what's to stop
10 Diaxamed from finishing this product tomorrow and going out and
11 entering into a contract with another party to develop a wand --
12 there's nothing to stop them from doing that -- and taking all
13 the stuff that we've given them that was on Steve Johnson's
14 computer that they never returned to us, that they never told us
15 that they had and say, hey, by the way, look at all this stuff
16 that these nice people down in South Carolina just gave to us.

17 THE COURT: Wouldn't then you have a claim for profits from
18 everything they sold?

19 ATTORNEY FEW: Your Honor, again, I'm using hypotheticals to
20 respond to hypotheticals. What I prefer to do --

21 THE COURT: Well, I think that's more than just a
22 hypothetical; I think that's kind of the gist of the whole case
23 right there.

24 ATTORNEY FEW: No, I don't think it is, Your Honor, because
25 what I'm highlighting is what is, the end result of what Diaxamed

1 orchestrated. They orchestrated dropping us. They dropped
2 CreatiVasc, they dumped create CreatiVasc's CEO which they had
3 every right to do, but what they've taken is they took all of our
4 work, all of our development work, and they took the right, our
5 exclusive right, to make the product in the future.

6 And again, remember this: Paragraph 12, they could have
7 terminated this contract. If what they say is true all they had
8 do was come to us -- first off, they also want this jury to
9 believe that we breached. That was the entirety of Mr. Shealy's
10 presentation of the eight emails that got entered in as
11 defendants' exhibits, is that we breached because we never
12 produced a working product. Well, the testimony was they never
13 produced a working part of their portion, and that Diaxamed
14 bought it, and then Diaxamed said, Well, we wanted to focus on
15 the implantable portion, not the wand.

16 So they knew they didn't want to focus on the wand, but yet
17 they didn't know who we were. They can't have it both ways. So
18 they came before this Court, they tried to get in front of this
19 jury and tell them things that didn't make sense, and all that
20 caught up with them, it added up to it, and then the jury
21 realized what they had done.

22 The jury realized that they had said, just like I told them
23 in closing arguments, we have a problem, we have a potential
24 problem with these Sealevel people. What do we want to do about
25 it? Let's just roll with it. And Sealevel's got a good

1 business, this is not their core business, let's just roll with
2 it, and maybe Sealevel won't do anything about it. Well,
3 Sealevel chose to do something about it, Your Honor.

4 So the hypotheticals, the only hypothetical, I think, that's
5 been discussed before the Court today that has any bearing is the
6 one that I just presented which is not really a hypothetical
7 because it is a reality of where Diaxamed sits today. They have
8 dumped us. Under their position, they have no legal rights to
9 us.

10 Had they just accepted the contract, which they had every
11 right to do and which we believe they were obligated to do, and
12 we believe that -- but, Your Honor, remember, we went through
13 this on the jury instructions and I said I think we have a breach
14 of contract claim against Diaxamed; I don't think that they can
15 come in and buy and everything not, and not take responsibility
16 for the contract.

17 But guess what? The fact is, the fact is that's what they
18 did. They did it not out of neglect. If they had neglected then
19 we would be sitting here under No. 24 and saying you chose our
20 contract. But they specifically chose not to take our contract
21 and then use the non-disparagement clause -- this is what was
22 before the jury, that's they heard, that's what they were
23 convinced by. They heard Mr. Johnson testify either the
24 non-disparagement clause or he was -- whatever reason, they never
25 told us, they never just said, Hey, we're going in a different

1 direction; we just wanted to let you know we're going in a
2 different direction. We only find out only after we sue them and
3 bring the case.

4 Your Honor, in the discussion about the UCC, the defendants
5 represent, they reference that 36-2-715 which gives the
6 definition of incidental and consequential damages, we addressed
7 that in our brief. It's a fairly complicated situation in that,
8 and we addressed this the way that the courts have addressed how
9 do you determine what a contract is. And it's our position, and
10 we think this is borne out by the record, that the contract was a
11 contract for services until such time as it would have become a
12 contract for the sale of goods.

13 We didn't get to the point where it became a contract for
14 the sale of goods. Therefore, we believe that standard contract
15 remedies under common law are what we need to look to in
16 determining what Sealevel's remedies for breach would be. Not
17 only that, Your Honor, but even if we were at that tipping point
18 where we went into the UCC, our brief sets forth black letter
19 law, it's right out of the comment to the rule, that the UCC
20 remedies are not exclusive --

21 THE COURT: If it's set out in comments, does that make it
22 black letter law?

23 ATTORNEY FEW: Well, I believe ... well, I think what the
24 comments --

25 THE COURT: It's just an interpretation by an editor.

1 ATTORNEY FEW: Well, I think the comments are trying to put
2 comment on it. It doesn't have to be black letter law, but it's
3 South Carolina law --

4 THE COURT: Yeah.

5 ATTORNEY FEW: -- and South Carolina law is clear, and
6 there's been -- I know our brief just got in, but I don't know
7 that there's really any way to rebut those points.

8 In addition, Your Honor, the remedies that defendants want
9 this Court to look to to say prevent us from getting damages
10 under incident- -- under the catchphrases incidental or
11 consequential, those are buyer's remedies under the code.

12 The UCC is extensive, we all know that. It's confusing for
13 a lot of people, but that part --

14 THE COURT: Except sovereign citizens. They think they have
15 it down pat.

16 ATTORNEY FEW: Yeah. There's probably a reason that we
17 don't represent any of those folks, Your Honor. But once again,
18 the defendants just don't like the evidence, but there's no
19 disputing the evidence. The evidence is rock-solid, 17 exhibits.
20 There's no doubt about what happened.

21 The defense also argues, Your Honor, that this contract was
22 unenforceable and that we didn't understand what we agreed to.
23 That's just an argument. No one ever testified to that. Steve
24 Johnson never said, We didn't understand it. In fact, Steve
25 Johnson's testimony was, Hey, Tom, Ben, we just went through this

1 merger, and I want to tell you about all the new things that are
2 going on. That's January 12th, 2017. It's Exhibit 17. Not a
3 word. He refers to changes over the last several weeks.

4 And then that was the point in time, Your Honor, that our
5 folks started getting ghosted, after Johnson lost his job on
6 March the 30th and required to sign this asset protection
7 agreement with the non-disparagement agreement. If the asset
8 protection agreement had been signed with the non-disparagement
9 agreement and Johnson didn't testify about it, then it would just
10 be Wes Few arguing stuff, but that's not the facts before the
11 Court.

12 The facts before the Court are in his deposition he didn't
13 want to answer questions, and we've even put it in our brief, I
14 believe, he didn't want to answer questions about these other
15 people for fear that he would violate the non-disparagement
16 agreement. And that's what we put in our brief. It had its
17 intended effect. Diaxamed managed to take everything that they
18 wanted, get rid of Johnson, make him be quiet, not tell Tom
19 what's going on, so then it gets to the point, Your Honor, Ben
20 O'Hanlan, who was our first witness at trial, he sends Exhibit 26
21 which is the June 26, 2017, letter with the invoice for \$321,540
22 as of June 13th, 2017. Sealevel -- I mean -- excuse me.
23 Defendants never asked a single question about, Are these numbers
24 accurate? They chose not to do that because they knew what the
25 effect would be. It would have just gotten hammered down that

1 they were. They had every right to ask questions about it but
2 they didn't, and now they say, Well, that's the only thing that's
3 in evidence.

4 Well, as we pointed out in your brief, that's not the only
5 thing that's in evidence. That is in evidence. This gentleman
6 here, Tom O'Hanlan, testified about his background, and his
7 career, his experience that led him to the point to where he was
8 in 2014 when he was contacted by CreatiVasc to get involved in
9 this matter, which he chose to do. They executed the contract.
10 He also testified about when NCR went out of business he did
11 consulting, and he was paid by the hour. So there's an abundance
12 of evidence in the record to show that his time and his company's
13 time is worth money. And he testified that we do -- most of our
14 projects are to deliver a product, and we get paid for the
15 product, he said, but, however, sometimes we do some
16 troubleshooting and that type of thing for our clients, and then
17 we get paid by the hour. So there's evidence in the record to
18 support --

19 THE COURT: Well, there's evidence, but is there any
20 evidence that that contract allowed for that?

21 ATTORNEY FEW: Your Honor, the contract does not
22 specifically say if you do this, if you do this then we will do
23 this. I mean, there's only so much that a drafter of a contract
24 can be expected to forecast and put in it. The contract is what
25 it is, but what the contract does say, as we pointed out, in

1 conspicuous terms on paragraph 16, it says that Sealevel has
2 limitations on the damages that we can be obligated to pay.

3 And as we pointed out at trial and in our brief again, Your
4 Honor, no such provision exists for the benefit of the CreatiVasc
5 parties. And that was argued to the jury.

6 THE COURT: It sounds like, though, your arguments are more
7 saying there was a basis for this jury to come up with their
8 decision, which is more an argument on the thirteenth juror, but
9 that doesn't, really, because what the jury heard and how they
10 interpreted it really doesn't come into play on the JNOV because
11 then it's saying it should have never been up to the jury to even
12 consider.

13 ATTORNEY FEW: Well, Your Honor, I'll be happy to go through
14 these individual points as we've done it in our brief. I'm just
15 arguing, for the moment, at some of the higher level points and
16 reminding the Court about what transpired in this courtroom, the
17 abundance of the evidence that the witnesses heard, and the
18 evidence was there. And, like I said, the defense just doesn't
19 like the evidence and so they say, well, that's not evidence of
20 damages because this contract doesn't specifically say if, years
21 in the future, we dump you, we just leave you at the side of the
22 road, whether unwittingly or wittingly, which that's what's
23 before the Court. Steve Johnson couldn't say, I didn't think we
24 dumped you. We didn't know we dumped you. And then McMurray
25 says, Oh, yeah, we dumped you. Look at the agreement. We only

1 accepted the one contract. We didn't want you, but we really
2 didn't know who you were. Okay. So those are the facts.

3 But, Your Honor, they argue that the contract's enforceable.
4 They continue to rely on the *Stevenson & Wilkinson* case. The
5 case has absolutely no bearing whatsoever on the facts of this
6 case. *Stevenson & Wilkinson*, which we quoted, says it
7 contemplated multiple future agreements to fully define the
8 duties of the parties. They didn't even know what they were
9 building in this case. There's no evidence to show that they
10 were building a 29-story hotel like what's going on across the
11 street.

12 We had a patent application filed in 2006 by Dr. Cull,
13 refined again by a provisional patent application with disclosure
14 of 42 pictures of what it was that we were trying to develop in
15 April of 2014. Then they contact Tom, and his company signs the
16 agreement on October 28th of 2014. By April of 2015 he's already
17 done so much work they're adding his name to the patent
18 application which is supplemented with additional disclosure to
19 show the wand and everything that they're doing, and now they
20 want to come in here and say this fails because of lack of
21 specifications. The specifications were added by the parties as
22 we moved forward from that point.

23 And, Your Honor, so to say that there was no price term,
24 we've cited the law, and it's clear. You want to talk about what
25 it specifically does provide, 36-2-305 specifically says you can

1 have an open price term. There is case law on that, on this
2 about the gasoline contract, and what it says is that it must be
3 reasonable.

4 And then Mr. -- my opposing counsel, he says to the Court,
5 Well, what if, what if Sealevel's development costs were eight
6 billion and we couldn't afford to buy the product from them?
7 That's not before the Court. What's before the Court are the
8 facts and the law, and the facts and the law are that we had to
9 do it reasonably.

10 So let's think about that. We asked for \$321,000. I think
11 that could have been recouped by the sale of these products. So
12 that's what's also before the jury. Had we gotten to that point,
13 Sealevel would have been obligated to be reasonable. That is a
14 dispute that may have come up in the future.

15 But that also doesn't mean that we're not entitled to
16 damages until such time as we get to a point where a product is
17 developed, because that's not what the contract says. The
18 parties went out of their way to specifically limit damages for
19 one party, the parties went out of their way to specifically have
20 assignment provisions in the contract, and the parties also went
21 out of their way to protect confidential information. Every
22 single one of those things we lost by actions of what Diaxamed
23 did, and yet the argument is that there's no damages.

24 Your Honor, they argue that the contract was not breached.
25 Again, the jury is entitled to make inferences. Even if we

1 didn't have the breach of the confidentiality --

2 THE COURT: Again, we're not talking about what the jury can
3 do; it's whether should I have presented it to the jury. You're
4 talking about the jury can infer. Again, that's the thirteenth
5 juror. But the question is should I have sent it to the jury,
6 not what the jury considered.

7 ATTORNEY FEW: Your Honor, if we're arguing about thirteenth
8 juror --

9 THE COURT: Well, that's what you're arguing about, it seems
10 like, but we're talking about JNOV here.

11 ATTORNEY FEW: I'm not arguing about the 13th juror because,
12 as I understand the 13th juror, if Your Honor says I'm granting a
13 new trial, then you grant a new trial and you don't have to view
14 evidence in the light most favorable to the nonmoving party and,
15 you know, that's -- correct me if I'm wrong, but I don't know
16 that there's anything I can argue on the thirteenth juror if the
17 Court feels like that they need to --

18 THE COURT: Well, I guess what I'm saying is, well, you're
19 saying that the jury could have inferred this and that, but
20 that's really not the standard in a JNOV, what the jury can
21 consider; it's whether there's evidence for me to present it to
22 the jury.

23 ATTORNEY FEW: Well, your Honor, I thought it was a pretty
24 clean trial, and the --

25 THE COURT: Well, you have a definitely different memory

1 than me. I think we fought over every issue and charge. I mean,
2 I don't know that it was clean.

3 ATTORNEY FEW: Well, by disagreeing over charges does not
4 mean it's not a clean trial.

5 THE COURT: No.

6 ATTORNEY FEW: The witnesses testified without much
7 objection. All of the evidence that went in, there's, you know,
8 those things are preserved. The evidence -- and if you just look
9 at this list -- it's all contracts, emails, documents between the
10 parties. There's nothing inflammatory about all these documents.
11 There's nothing inflammatory about the 68-page articles of merger
12 that showed that a \$23 million transaction took place in
13 February of 2015 during which part my client, my client's
14 contract was assigned, and recall at Section 4.8 of that document
15 it said this lists all of the contracts, and it had the little
16 subpart C that said including contracts for the sale of goods and
17 had 24 different categories. There was no dispute that our
18 client's contract would have been included in that list, which
19 goes to the fact that Diaxamed knew about the contract. The jury
20 heard that, and yet Diaxamed tried to say, well, we didn't really
21 know who you were -- and I've covered that enough times already.

22 So as to whether it wasn't breached, Your Honor, I'm not, to
23 be clear, I'm not attempting to argue anything under the
24 thirteenth juror because as I said a minute ago I don't know that
25 there's anything I can do if the Court, if you or any other judge

1 who presided over a trial, wants to take action under the
2 thirteenth juror.

3 As to whether it wasn't breached, they took our confidential
4 information; they ran Rushodd [ph] over -- they didn't Rushodd
5 over it -- well, what happened is, I think what the evidence
6 shows -- that's all I'm arguing now, is what the evidence showed
7 -- what the evidence shows is that Diaxamed knew that they could
8 have taken an assignment of our contract but chose not to, and
9 yet Steve Johnson didn't even know about it, and why did he not
10 know about it, why did he not tell us about it?

11 If they had chosen to go in a different direction, which
12 they say is true, all they had to do was tell us. Johnson would
13 have known. He would have told us. He was a nice man. I think
14 he was a very credible witness. We didn't attempt to impeach him
15 in any way. He just, he said, I was afraid to talk about the
16 facts of the case because I was afraid I was going violate the
17 non-disparagement agreement.

18 So, Your Honor, those are the things we have on breach,
19 covenant of good faith and fair dealing by just walking away from
20 the contract. And that's what paragraph 24 says you can't do.
21 Paragraph 24 is designed to prevent one party from just going, I
22 quit. And, see, they didn't say, I quit. It would be one thing
23 if they went out of business. They didn't go out of business.
24 Our technology and the technology that we were working on, and
25 our exclusive right to manufacture a wand, now belongs to

1 Diaxamed. They didn't pay us for it. They didn't even tell us
2 the truth about what they did for it; they just took it.

3 No evidence of damages, Your Honor. The invoice is in the
4 record. There was also just an abundance of testimony about how
5 the CreatiVasc people were able to just come into the Sealevel
6 facilities, the head of engineering, as well as Mr. O'Hanlan were
7 there working with them, collaborating day and night, there's
8 no -- there's no evidence that Sealevel denied any resources.

9 In fact, there's some evidence in those emails that they put
10 in that there was a slowdown at one point in time, and
11 Mr. O'Hanlan jumped on his people and said, Get moving on this.
12 That happens in every project. That happens all the time.
13 That's just, those are just, bumps in the road; that's just the
14 say sausage is made. We were doing everything we could to get
15 the sausage made, and then Diaxamed came along and did the thing
16 that they did.

17 Your Honor, no evidence of tortious interference. I really
18 covered it all, but I'll just highlight it again. Diaxamed got
19 on the board as of February 5 of 2015. Brian McMurray got an
20 honorary place on the board. Exhibit 5, 13 days later, they
21 execute their own customer supply agreement with CreatiVasc.
22 Now, granted, it was not for the same thing we were doing; it was
23 for a portion of the implantable. So McMurray gets involved. He
24 gets his company a customer supply agreement, which they did
25 accept as a part of the assignment, and then he gets to monitor

1 everything that's going on, watch it for throughout 2015,
2 throughout 2016. December of 2016 he forms a new company called
3 Diaxamed. December 30th of 2016 they do the contribution
4 agreement and the assignment agreement. All those many pages of
5 documents, all of those lawyers, all that due diligence, and yet
6 they give this jury a story that is just not plausible because
7 they tried to have it both ways. We didn't know who you were,
8 but we didn't want you. And that's why. They lied, they just
9 lied about what they did. They tried to get away with it.
10 That's what we argued at closing argument, that they
11 absolutely --

12 And, Your Honor, what is the only result? The one thing
13 that is known that, really, the jury has a power of making
14 inferences, and we don't know what's discussed when they go back
15 there in the room, but when the desired result of what Brian
16 McMurray and his creation of Diaxamed and his acquisition of
17 everything there is with respect to this hemo access system and
18 device, except Sealevel, when that plays out and then you have
19 this subterfuge of hiding it and not telling us what you did, not
20 terminating the contract, not calling for a breach of the
21 contract, they knew that it wasn't going to go anywhere. Our
22 right to be the exclusive maker of the wand went away because
23 CreatiVasc went away. The people that were CreatiVasc that had
24 been cooperating, that wanted to continue to cooperate with us,
25 January 12th of 2017 email, they all went away.

1 They knew that they were leaving us on the side of the road;
2 that the value that existed in the asset known as the customer
3 supply agreement, which is an asset, it all went away, but it
4 didn't go away because Diaxamed took that opportunity for
5 themselves by virtue of what they did, and they took our
6 technology, and they have -- and they can come along in the
7 future and try to go to back and, like I said earlier, Your
8 Honor, contract with another party for the very thing that there
9 is.

10 I also want to go over, if I may, Your Honor, this
11 confidentiality provision. It says under paragraph 14,
12 section -- this is page 5 of the customer supply agreement which
13 is Exhibit 4, paragraph A sets forth what the obligations are,
14 and then B and C are the provisions that say this is not, this is
15 not confidential, and you're not obligated for this. So it's
16 very broad.

17 As to any technical or other information exchanged by the
18 parties during this agreement, the party receiving, receiving
19 party from the other party, disclosing party, under this
20 agreement shall regard such information, whether written, oral,
21 computer-based, or otherwise as confidential and preserve the
22 disclosing party's proprietary rights as to such information.
23 We're the disclosing party. CreatiVasc is the receiving party.

24 The receiving party shall not, without prior written consent
25 from the disclosing party, disclose such information to any third

1 party or use such information for its own benefit except for
2 purposes of this agreement. Once again, we're the disclosing
3 party. We didn't give written consent. They didn't ask us for
4 written consent to take our information. And the third party,
5 the third party, is Diaxamed. Right. I'm reading right out of
6 the contract. The receiving party then shall take necessary
7 steps to preserve -- all such information provided to the
8 receiving party shall remain the sole property of the disclosing
9 party. These obligations carry on for five years following the
10 termination date of this agreement, which still has not come to
11 pass.

12 So they took our information. That's a breach. They ran
13 over paragraph 24, and they just left us on the side of the road,
14 none of which was ever contemplated. If they wanted to preserve
15 these types of rights, they could have said, Hey, you understand
16 that we can get out of this. But they didn't because those
17 termination provisions indicate a commitment to each other. We
18 can't drop you unless you breach. We can't drop you until we get
19 to 10 years and then we give you 90 days' notice. They never did
20 any of that. If you breach, if we allege you breach, you have a
21 right to cure. Those are mutual obligations.

22 So they knew what they had do, and it just makes me believe
23 even more that Diaxamed looked at this situation, they didn't
24 want our contract, they didn't want to be on obligated to us,
25 they didn't want to have to abide by those provisions, they

1 didn't want to have to abide by the fact that if they wanted to
2 sell that technology --

3 THE COURT: I feel like you're repeating your closing
4 argument.

5 ATTORNEY FEW: What's that?

6 THE COURT: I said it just sounds like you're just repeating
7 your closing argument.

8 ATTORNEY FEW: Well, you've got to let me finish.

9 THE COURT: You said I believe, and -- well, go ahead.

10 ATTORNEY FEW: Well, Your Honor, Diaxamed, if you think
11 about this, okay, they develop this product, and then they want
12 to market it, or sell it, or whatever, that confidentiality
13 provision, as well as the amendments to the customer supply
14 agreement, in paragraph 6 of this customer supply agreement
15 created basically a joint ownership situation over the wand and
16 the implantable, and that's another thing that they did not like,
17 and that's one of the reasons, I think, that they left us on the
18 side of the road.

19 But, Your Honor, I don't know if I have really much more to
20 argue over the facts. I want to argue the punitive damages
21 provisions. We've set forth in our brief that the facts warrant
22 the exceptions under both (B) (1) and (C) (1)., and I think that
23 you've got to look at what the jury had in front of it. And what
24 the jury had in front of it is, the jury didn't come in here
25 looking to, they didn't sit down the first day and go, let's get

1 hit people with punitive damages. They sat there, they heard all
2 the evidence, they had it explained to them by what I think are
3 above-average lawyers and an above-average judge, and they made
4 the decision --

5 THE COURT: I don't know if I should take that as a
6 compliment or not. How about you, Mr. Shealy, do you take that
7 as a compliment?

8 ATTORNEY FEW: I didn't want to, like -- I'm not trying to
9 blow us up, Your Honor, but ...

10 THE COURT: You didn't include above-average clients.

11 ATTORNEY FEW: Well, that goes without saying. And then the
12 law clerk, you know, he's exceptional, I'm sure.

13 But, Your Honor, frankly, if you look at (C)(1), at the time
14 of injury the defendant had intent to harm and determines that
15 the defendant's conduct did, in fact, harm the claimant, there's
16 evidence to support that. There's evidence to support that they
17 got to this point. And that all gets back to, well, we knew who
18 you were, but we really didn't know who you were, but we didn't
19 want you, and we knew we didn't want you, and we took 999 things,
20 including all the patents, all the trademarks, all the employees,
21 all the leases, everything but you.

22 THE COURT: In reading through that statute, though, it
23 almost -- and I haven't had a chance to analyze that for quite a
24 while -- it almost seems the exceptions are really the basis for
25 granting punitive damages anyway. There don't really seem to be

1 any strong exceptions out there.

2 ATTORNEY FEW: Well, Your Honor, I think the point I was
3 going to make is that there's also an argument that the (C)(1)
4 exception is maybe easier to me than the (B)(1) exception, but we
5 do meet the (B)(1) exception because it talks about being
6 motivated by financial gain. Well, what could they have
7 otherwise been motivated about? We're basically talking about
8 venture capital here. They're always motivated by money.

9 And, Your Honor, they did harm our client because they took
10 aware our exclusive right to make that wand. And when they did
11 it in December 30th of 2016, no one knew what was going to happen
12 next.

13 Now, they came in and testified that they have not been able
14 to make the implantable yet, but they also testified that they're
15 still working on it. So that technology that we got on board
16 with with CreatiVasc that was the subject of the patent and then
17 the subsequent patent that Mr. O'Hanlan was named on, and then
18 all the work that Sealevel did from that patent application in
19 April of 2015 all the way until early 2017 when Diaxamed took
20 over and we got ghosted, Your Honor, we've also -- you know,
21 there's two different things that have to be looked at.

22 And I really don't think that Mr. Shealy's brief addressed
23 the *Gamble* factors. I didn't see an argument in there that we
24 don't qualify for punitive damages based on *Gamble*. Actually
25 what they did was they referenced the punitive damages statute in

1 the argument for a new trial absolute as indication that the
2 jury's verdict going over the initial-allowed cap is somehow
3 evidence of malice, or caprice, or whatever. They chose not to
4 put in any evidence of net worth. They could have done that.
5 They could have made a bunch of arguments.

6 The information that's in front of the jury is that that
7 initial transaction in February of 2015 was for \$23 million, and
8 then, as I told the jury, we're not talking about small numbers
9 and things that ordinary people deal with on an ordinary basis;
10 this is venture capital, it's a lot of money, and it's an effort
11 to make a lot of money.

12 But what I wanted point out, Your Honor, is under those
13 constitutional standards, to the extent the Court is even -- it's
14 even raised the motion, you look at harm there whereas under the
15 code, the South Carolina Code, it actually says compensatory
16 damages awarded to the claimant.

17 And we make the argument -- and I don't think that it's
18 really -- well, I think it's a good argument that this was a
19 liquidated amount that we submitted in an invoice as of June the
20 13th of 2017, \$321,540. Had we been awarded that amount, we're
21 entitled to prejudgment interest under the code that cited, I
22 think it clearly falls within that category, and that means that
23 that amount, that compensatory damage amount, which would be the
24 judgment amount that would be entered on the 321,000, it has an
25 additional \$215,000, and we did the calculations on that as well.

1 So in the event that the Court is looking at the 3x or the
2 4x cap, I think the Court needs to look at it that way and which,
3 of course, is more than the 400,000 that was awarded to Sealevel
4 in their intentional interference claim against Diaxamed.

5 And as far as that goes, and I can find it because I know I
6 had it when we were doing the jury instructions, there's case law
7 out there that says that the interference claim is a tort claim,
8 and it's different, and the damages can be different, but to be
9 candid, I'm not aware of anything. I don't know how the jury got
10 that to 400,000 versus \$321,540.

11 And, Your Honor, on the promissory estoppel, my argument's
12 pretty short on that, if I may.

13 THE COURT: Well, let's just -- I was going to let him
14 respond to this, and then I'll briefly hear from you on the
15 promissory estoppel. I mean, are you through with his response
16 to his defense motions?

17 ATTORNEY FEW: Yes, Your Honor.

18 THE COURT: Okay. Yes.

19 ATTORNEY SHEALY: May it please the Court. Just real
20 briefly. Your Honor, we addressed *Gamble* on page 20 of our
21 brief. In fact, we cited all of the factors and cited the fact
22 that the Court has to engage in that inquiry.

23 I found it curious that Sealevel argued that somehow we were
24 under some obligation to put in evidence with respect to punitive
25 damages. That burden falls to the plaintiff to put in evidence

1 in support of punitive damages, which it didn't put in anything
2 that would have gone, that would have been probative of the
3 *Gamble* factors, and so I did want to just point that out.

4 I also want to make sure that, in the course of Sealevel's
5 presentation, some of the facts have not gotten scrambled up.
6 The party that entered into the customer supply agreement was
7 CreatiVasc. That's Exhibit 4. CreatiVasc merges with the
8 Brookhaven entities. And that was a merger. Brookhaven becomes
9 the successor. And that is totally consistent with paragraph 24
10 of the customer supply agreement.

11 Diaxamed buys some assets from the Brookhaven, and he never
12 has any contractual relationship whatsoever with CreatiVasc --
13 I'm sorry, with Sealevel, and has never, and it has never, sold
14 this product. I mean, that's where we are.

15 And so, and just to underscore the absurdity, I think, of
16 Sealevel's position with respect to this tortuous interference
17 claim, if it is an appropriate basis for a tortuous interference
18 claim for one party to decide I am going to buy these things from
19 you but I'm not going to buy that, if that is enough to support a
20 tortuous interference claim, then commercial law, as we
21 understand it, is turned on its head. There's got to be
22 something more.

23 And as Your Honor will recall, there has been a lot of
24 various assertions made during Sealevel's presentation, Diaxamed
25 bought those assets. Mr. Few has indicated that the only asset

1 that it didn't buy was this contract -- and there's no evidence
2 that that is the case. The only evidence is that Diaxamed bought
3 some of the assets but it was not a merger and it didn't assume
4 any liabilities -- and so the contract still remains with
5 Brookhaven. There's nothing about making a commercial decision
6 whether you're going to buy certain things or not buy certain
7 things, or that when you're deciding that, that you have to buy
8 item X if you're going to be items A, B and C. That's not what
9 the law says. Sealevel can point to nothing in the law that says
10 that that's the case.

11 Tortuous interference requires much more proof than that.
12 And different damages can be awarded under tortuous interference
13 but they require, again, proof of damages for reputational harm,
14 for emotional distress. Those things can be awarded under
15 tortuous interference, but there wasn't any evidence of that,
16 there was no proof of that put in by the plaintiff.

17 Your Honor, I've really -- this case should, should be
18 resolved by the Court granting judgment notwithstanding the
19 verdict, but if that's not the Court's inclination then a new
20 trial seems appropriate with a result that cannot be squared with
21 the evidence. And one piece of the result is in direct violation
22 to a statute and the *Gamble* factors.

23 We have a mess on our hands, but I believe that the Court
24 can resolve that by granting judgment notwithstanding the
25 verdict.

1 THE COURT: All right. Now on the promissory estoppel.

2 ATTORNEY FEW: Your Honor, can I respond to that just very
3 briefly?

4 THE COURT: Very briefly.

5 ATTORNEY FEW: Your Honor, I agree with Mr. Shealy. Anybody
6 has every right to say Mr. Whitaker can go tell Mr. Toyota at
7 Easley I want to buy Toyota but I don't want them, I don't want
8 them 4Runners, you can keep those. Okay, they can do that. On
9 its face, on its face, that's what they did.

10 But the argument is there has to be something more. There's
11 way more, because the more is the specifics of the contract. And
12 then this is huge -- and then the reference to a lack of privity
13 has nothing but what Mr. Shealy just argued, is that the contract
14 still sits with Brookhaven. Well, I don't know that we ever
15 understood who was who, but -- and I don't have it right here in
16 front of me, but -- Exhibit 29, the 68-page documents of merger,
17 I'm pretty sure that in there it says the surviving company will
18 be known as CreatiVasc.

19 Again, that's why we brought the suit the way we did. We
20 were never sure who was, the testimony and everything. But we
21 know the Brookhaven entity that continued after February 5th was
22 the same people that we dealt with all along, Mr. Johnson, Frank
23 Patterson, the people that they were hiring.

24 But the epitome of a failure of its essential purpose, Your
25 Honor, is for the contract to still be with Brookhaven, but

1 Brookhaven no longer has the rights to the hemo access device in
2 the first place. I think that says everything. That is
3 embodiment of our argument, that it was still at Brookhaven but
4 Brookhaven no longer had the right to do what you joined up with
5 us to do because we took that part.

6 THE COURT: All right. Now since it's your claim I'm hear
7 from you first on the promissory estoppel, and then hear from
8 Mr. Shealy.

9 ATTORNEY FEW: Thank you, Your Honor. The elements of
10 promissory estoppel are set forth in Mr. Shealy's brief. Don't
11 dispute those. We had not identified any specific, definite, or
12 unambiguous promise. It doesn't seem to be what the evidence I
13 heard was.

14 The evidence that went before this jury is that my client
15 took action. Now, if you want to say but for the contract
16 there's no evidence of all this, then -- but I don't think that's
17 the law and I don't think that's what they're arguing. So if the
18 contract is unenforceable, so let's, once again, give the
19 defendants the benefit of their own legal fiction such as the
20 legal fiction that we took over everything but we didn't assign,
21 we didn't accept certain liabilities, and we didn't accept your
22 contract, that is of their own making.

23 This is also of their own making. If it were true that the
24 contract was unenforceable and it's somehow null and void, then
25 the facts are that Steve Johnson was looking for somebody to

1 develop a wand, can't remember the guy's name, but in September
2 of 2014 he responds to Steve Johnson, I believe he copies him on
3 an email to Tom O'Hanlan and says, Hey, man, we have all this
4 expertise right here in the upstate of South Carolina. You need
5 to meet Tom O'Hanlan. And then they get together, and the
6 customer supply agreement is executed a month later. So those
7 are the facts of the promises.

8 Second, even assuming Sealevel subjectively relied on any
9 representations by CreatiVasc, the reliance was not reasonable.
10 Well, again, that's like people don't go through a courtship and
11 get all the way up to marriage and then one person looks at the
12 other one and says, I didn't really want to marry you in the
13 first place. I mean, they worked together, they collaborated
14 extensively, hundreds of thousands of dollars spent, all these
15 documents, all these specifications. We were relying on each
16 other's promises, which is a part of what happens when you work
17 on something together.

18 No evidence that CreatiVasc made any representations and
19 would expect that Sealevel would react in reliance to them to its
20 detriment. Well, Sealevel did rely, and they did rely to their
21 detriment because of what happened, because of the fact that
22 even, as it was just argued, Brookhaven, who took over, was left
23 with our contract, and that's all they were left with, there was
24 nothing left. Brookhaven is a shell of a corporation with no
25 rights to the hemo access device, but they're just sitting up

1 here with our contract which at that point in time just becomes
2 15 pages of paper with letters on it.

3 And then finally, Your Honor, that we suffered any specific
4 injury. Well, we did suffer specific injury, and it's set forth
5 in the evidence, which is Exhibit 26, which was the letter that
6 Ben O'Hanlan sent. And then the response, if you recall, that we
7 got back from the Brookhaven people was it was evasive. I think
8 we disagreed as to whether or not they disavowed the existence of
9 the contract, but the letter speaks for itself, and they told us
10 that -- the gist of that letter was, I don't know what you're
11 talking about. Can you provide us with a copy of the contract?
12 That, to me, says we don't even think that we owe you anything.

13 So, Your Honor, we addressed all that on the record. I
14 don't really remember it but I do remember the discussion about
15 the quantum merit, and I think, Your Honor, also, is to revisit
16 the invoice. It's supportive of what their time was worth
17 because they charged that kind of time with other clients when
18 they normally did the work for them. And certainly CreatiVasc
19 had all of our confidential information, all of our drawings, all
20 of our development work, they had copies of the prototypes of our
21 wand, they had everything that we contributed, and that all now
22 belongs to Diaxamed. They've kept it. They haven't offered to
23 return it.

24 And, Your Honor, CreatiVasc didn't, they didn't -- again,
25 I'm just kind of re-harping -- they didn't tell us that they had

1 done it; they didn't tell us that our information had gotten
2 disclosed to a third party. And I think that Steve Johnson, had
3 he known the truth or had he not been bullied by the
4 non-disparagement agreement, I think he would have told Tom, Hey,
5 they're going that way, and at that point in time he could have
6 said, Well, what about all of our confidential information?

7 And paragraph 14 of this agreement is exactly what attorneys
8 for people like Brian McMurray and Venture Capitalist, that's
9 what they have numerous associates for, to do due diligence to go
10 through and read these contracts and find out if there's problems
11 in anything that we're going to be taken on, Your Honor.

12 So I think that's my argument on the evidence that satisfies
13 the elements of promissory estoppel.

14 THE COURT: Mr. Shealy.

15 ATTORNEY SHEALY: Just briefly, Your Honor. We argued about
16 this claim on pages 22, 23, and 24 of our brief. Where that, I
17 think, promissory estoppel falls short is an unambiguous promise
18 by the promisor. At the time the parties entered into the
19 customer supply agreement, Sealevel's a sophisticated entity, you
20 know, our people have experience working in the medical device
21 field in trying to develop these things, everybody knows that
22 this product is still in development. Then they're aware of what
23 steps need to happen, what milestones need to be achieved to be
24 able to bring this to market. There are issues with FDA
25 approval, with human trials, animal trials, human trials, et

1 cetera.

2 The only thing you could point to in the customer supply
3 agreement that is a promise is, During the term of this agreement
4 Sealevel shall be the exclusive supplier of the product's
5 customer. Customer shall not, directly or indirectly, purchase
6 or order the product, or any other good substantially similar to
7 the product, from any person or entity other than Sealevel.

8 There's no promise that we're gonna sell this product,
9 because they couldn't make such a promise because everybody knows
10 that this thing's still in development, may not ever happen, may
11 not get approval by third parties, by governmental agencies, to
12 be able to do this, so there's not an unambiguous promise that
13 we've breached or that they've relied on and to their detriment.
14 I mean, everybody enters into this understanding the risks.
15 Everybody does. Everybody lost in this endeavor.

16 This is an equitable cause of action that would make sense
17 to -- if it's inequitable for CreatiVasc to have, had gained some
18 benefit from making this, making a promise, and that's caused
19 damage to Sealevel. I mean, the equities here are unbalanced.
20 Everybody lost.

21 And so, and the other point I need to make also is this was
22 alleged against all the defendants. The promise has to be made
23 to the plaintiff. And Diaxamed, again, has no relationship
24 whatsoever with the plaintiff, and so it, the cause of action,
25 can't lie against Diaxamed, I mean, just out of the gate. But if

1 we just, if we delve into what representation or what, if you can
2 call it a, promise was made to Sealevel by CreatiVasc and then
3 its successor in interest, the Brookhaven entities, it's not an
4 unambiguous promise that has been breached.

5 And so, you know, for the same reasons, this cause of action
6 fails because the facts just don't justify a recovery by Sealevel
7 against this party, or these parties, based on the facts and the
8 absence of evidence in this record.

9 And so for that reason, we believe that this cause of action
10 should be dismissed as well.

11 THE COURT: Yes, a brief reply.

12 ATTORNEY FEW: Thank you, Your Honor, if I may. Steve
13 Johnson, as an employee of Diaxamed as set forth in Exhibit 17,
14 on January 12th of 2017, reached out to Tom and Ben O'Hanlan and
15 emailed them wanting to get together regarding, quote, changes
16 over the last several weeks. That's a representation from
17 Diaxamed to my client.

18 THE COURT: How is that a representation? It just says we
19 want to talk about the changes.

20 ATTORNEY FEW: I'm just making the point that Diaxamed did
21 make representations to my client. Now, you know, he makes a
22 good point that Diaxamed is a different entity, they weren't even
23 formed until December of 2016, so I wouldn't -- I'd be -- the
24 worst argument I ever made if I said that Diaxamed made
25 representations to us before it was legally formed in December of

1 2016 for the purpose of taking over everything but my client's
2 stuff.

3 As far as the unambiguous nature, Your Honor, we had
4 Dr. Cull testify about his patent from 2006. When you file a
5 patent application -- I had a brief former life doing that -- you
6 have what's called an abstract, is the first thing you do. The
7 rest of it is called the specification, so a patent application
8 is a specification. And then after the abstract and the
9 specification and the prior art that's disclosed, you then write
10 the claims based on what's in the specification.

11 So the patent, by the standards of the Patent and Trademark
12 Office and the people that practice, have to provide specificity,
13 or else it would be rejected for that reason, we had not one, not
14 two but three patent applications, including one that Tom
15 O'Hanlan was named on April 24 of 2015.

16 And then, Your Honor, we had Exhibits 10, 11, and 12.
17 There's no doubt what these parties were working on. 10, 11, and
18 12 are the bullet-point specifications that Tony Martin was
19 responding back to Lindsey Sanders Culcutt, who was one of the
20 witnesses here at trial, about what we're doing, what we're doing
21 work on the wand.

22 And again, ultimately it's not so much necessary for this,
23 but they tried to argue to the jury we breached, but they never
24 accused us of a breach, and they tried to say that we didn't
25 produce a wand, but we said we did provide a wand that worked,

1 and then the conversation went away. And if the wand didn't
2 work, then why is Steve Johnson talking to my people on January
3 the 12th of 2017 after Diaxamed bought it, saying I want to get
4 together and tell you about the changes.

5 So, Your Honor last thing: Mr. Shealy says everyone lost.
6 I've already argued this once. Diaxamed didn't lose. Diaxamed's
7 got everything that they want from this. They did not lose.
8 They still own this technology, they still have the right to
9 produce it and the right to go out, and they took, what they
10 took, was the consideration that was owed to my client for the
11 consideration that my client provided. We provided the
12 development work up to the point where they still wanted to work
13 with us before Diaxamed got involved and never officially
14 terminated our contract.

15 But what do we not have? We do not have an exclusive right
16 to be the maker of the wand, and if this Court doesn't do
17 something about it, Diaxamed does, and that is, just can never be
18 a just result.

19 THE COURT: All right. Anything further?

20 ATTORNEY SHEALY: No, Your Honor.

21 THE COURT: All right. Well, you all gave me a few things
22 to think about, so I will think about them and let you know what
23 I come up with and let you know if I need anything else.

24 ATTORNEY FEW: Do we still need to do 10 days on the?

25 THE COURT: Do you need any on the promissory? I think

1 you've pretty much covered it.

2 ATTORNEY SHEALY: I briefed it. I do not need to add
3 anything to my brief, Your Honor.

4 ATTORNEY FEW: The only thing I would add if I didn't argue,
5 is that all the evidence that's in the record is obviously in
6 support of, not just what I argued here today --

7 THE COURT: Do you need -- do you want --

8 ATTORNEY FEW: -- so I don't believe I need to do a brief on
9 promissory estoppel, Your Honor.

10 THE COURT: All right. Well, I will take a look at and it
11 let you know who needs to file the appeal.

12 (End of Transcript of Record.)

13 CERTIFICATE OF REPORTER

14 I, Cathy J. Provost, Official Court Reporter for the
15 Fourteenth Judicial Circuit of the State of South Carolina, do
16 hereby certify that the foregoing is a true, accurate and
17 complete Transcript of Record of the proceedings had and evidence
18 introduced in the trial/proceedings of the captioned case in the
19 Court of Common Pleas for Greenville County, South Carolina, on
20 the 23rd day of May, 2025.

21 I do further certify that I am neither of kin, counsel, nor
22 interest to any party hereto.

23 Date: May 28, 2025

24 \s\ Cathy J. Provost
25 Cathy J. Provost, RMR
Official Circuit Reporter