

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2007-CP-23-3206

North American Rescue Products, Inc., .....

Respondent/Petitioner

v.

P.J. Richardson, .....

Petitioner/Respondent

APPENDIX - VOLUME III

C. Mitchell Brown  
William C. Wood, Jr.  
A. Mattison Bogan  
Nelson Mullins Riley & Scarborough LLP  
Post Office Box 11070  
Columbia, SC 29211  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Nelson Mullins Riley & Scarborough LLP  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

*Attorneys for P.J. Richardson*

Robert L. Widener  
McNair Law Firm, PA  
Post Office Box 11390  
Columbia, SC 29211  
(803) 799-9800

Bernie W. Ellis  
McNair Law Firm, PA  
101 North Main Street, Suite 900  
Greenville, SC 29601  
(864) 271-4940

*Attorneys for North American Rescue  
Products, Inc.*

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AS&E Draft  
April 24, 2005

STOCK PURCHASE AGREEMENT

AMONG

NORTH AMERICAN RESCUE PRODUCTS, INC.,

ROBERT CASTELLANI,

B. D. Ministries

AND

P.J. RICHARDSON,

\_\_\_\_\_, 2005

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## STOCK PURCHASE AGREEMENT

THIS STOCK PURCHASE AGREEMENT (this "Agreement") is entered into as of April 22, 2005, among NORTH AMERICAN RESCUE PRODUCTS, INC., a Delaware corporation (the "Company"), ROBERT CASTELLANI, a resident of the State of South Carolina ("Controlling Shareholder"), BD MINISTRIES, a [ ] ("BD Ministries"), and P. J. RICHARDSON ("Purchaser"). The Company, the Controlling Shareholder, BD Ministries and Purchaser are referred to collectively herein as the "Parties."

### RECITALS

Purchaser desires to purchase { } shares of the Common Stock of the Company, representing seven and one-half percent (7½%) of the issued and outstanding shares of the Company's common stock, par value \$1.00 per share (the "Common Stock"), on a Fully Diluted Basis (as defined herein) in accordance with the terms of this Agreement.

### TERMS OF AGREEMENT

NOW, THEREFORE, in consideration of the premises and the mutual promises herein made, and in consideration of the representations, warranties, and covenants herein contained, the Parties agree as follows.

#### 1. Definitions

"Adverse Consequences" means all actions, suits, proceedings, hearings, investigations, charges, complaints, claims, demands, injunctions, judgments, orders, decrees, rulings, damages, dues, penalties, fines, costs, amounts paid in settlement, Liabilities, obligations, Taxes, liens, losses, expenses, and fees, including court costs and reasonable attorneys' fees and expenses, and any other cost of enforcing a party's rights under this Agreement.

"Affiliate" has the meaning set forth in Rule 12b-2 of the regulations promulgated under the Exchange Act.

"Affiliated Group" means any affiliated group within the meaning of Code Section 1504(a) or any similar group defined under a similar provision of state, local or foreign law.

"Agreement" means this Stock Purchase Agreement together with all exhibits and schedules referred to herein.

"Applicable Rate" means the corporate base rate of interest publicly announced from time to time by Citibank, N.A.

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"Articles of Incorporation" means the Company's Articles of Incorporation as in effect as of the date hereof.

"Basis" means any past or present fact, situation, circumstance, status, condition, activity, practice, plan, occurrence, event, incident, action, failure to act, or transaction that forms or could form the basis for any specified consequence.

"Cash Consideration" has the meaning set forth in Section 2(c) below.

"Closing" has the meaning set forth in Section 2(d) below.

"Closing Date" has the meaning set forth in Section 2(d) below.

"Code" means the Internal Revenue Code of 1986, as amended.

"Common Stock" has the meaning set forth in the preamble above.

"Company" has the meaning set forth in the preamble above.

"Consideration" has the meaning set forth in Section 2(c) below.

"Controlling Shareholder" has the meaning set forth in the preamble above.

"Employee Benefit Plan" means any (a) nonqualified deferred compensation or retirement plan or arrangement which is an Employee Pension Benefit Plan, (b) qualified defined contribution retirement plan or arrangement which is an Employee Pension Benefit Plan, (c) qualified defined benefit retirement plan or arrangement which is an Employee Pension Benefit Plan (including any Multiemployer Plan), (d) Employee Welfare Benefit Plan or (e) bonus, incentive, stock purchase, stock ownership, stock option, stock appreciation right, severance, salary continuation, termination, change of control or other fringe benefit plan or program.

"Employee Pension Benefit Plan" has the meaning set forth in ERISA Section 3(2).

"Employee Welfare Benefit Plan" has the meaning set forth in ERISA Section 3(1).

"Environmental, Health, and Safety Requirements" means all federal, state, local and foreign statutes, regulations, ordinances and other provisions having the force or effect of law, all judicial and administrative orders and determinations, all contractual obligations and all common law concerning public health and safety, worker health and safety, and pollution or protection of the environment, including without limitation all those relating to the presence, use, production, generation, handling, transportation, treatment, storage, disposal, distribution, labeling, testing, processing, discharge, release, threatened release, control, or cleanup of any Hazardous Materials (which, for purposes of this Agreement, shall mean any hazardous materials, substances or wastes,

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chemical substances or mixtures, pesticides, pollutants, contaminants, toxic chemicals, petroleum products or byproducts, asbestos, polychlorinated biphenyls, noise or radiation), each as amended and as now or hereafter in effect.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

"ERISA Affiliate" means (i) any corporation included with the Company in a controlled group of corporations within the meaning of Section 414(b) of the Code; (ii) any trade or business (whether or not incorporated) which is under common control with the Company within the meaning of Section 414(c) of the Code; (iii) any member of an affiliated service group of which the Company is a member within the meaning of Section 414(m) of the Code; or (iv) any other person or entity treated as an Affiliate of the Company under Section 414(o) of the Code.

"Exchange Act" means the Securities Exchange Act of 1934, as amended, or any similar federal law then in force.

"Existing Shareholders' Agreement" has the meaning set forth in Section 5(h) below.

"Family Group" with respect to any Holder of Registrable Securities, means such holder's spouse, siblings and descendants (whether or not adopted) and any trust, family limited partnership or limited liability company solely for the benefit of such holder and/or such holder's spouse, siblings and/or descendants.

"Fiduciary" has the meaning set forth in ERISA Section 3(21).

"Financial Statements" has the meaning set forth in Section 4(f) below.

"Fully Diluted Basis" means, without duplication, (i) all shares of Common Stock outstanding at the time of determination plus (ii) all shares of Common Stock issuable directly or indirectly upon conversion of all outstanding convertible securities, including without limitation the Preferred Stock, or the exercise or exchange of all outstanding options, warrants or similar rights, whether or not such convertible security, right or option, warrant or similar right is then convertible, exercisable or exchangeable.

"GAAP" means United States generally accepted accounting principles as in effect from time to time.

"Governmental Authorizations" has the meaning set forth in Section 4(s) below.

"Hart-Scott-Rodino Act" means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

"Holders of Registrable Securities" means Purchaser and any transferees of Purchaser under Section 8(f) hereof who hold Registrable Securities. For purposes of this Agreement, a Person will be deemed to be a Holder of Registrable Securities whenever such Person has the right to

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acquire directly or indirectly such Registrable Securities (upon conversion or exercise in connection with a transfer of securities or otherwise, but disregarding any restrictions or limitations upon the exercise of such right), whether or not such acquisition has actually been effected.

"Indemnified Party" has the meaning set forth in Section 11(d)(i) below.

"Indemnifying Party" has the meaning set forth in Section 11(d)(i) below.

"Intellectual Property" means all of the following used in, related to, developed in connection with, purchased in connection with or related to the Company's business or owned by the Company: (a) all inventions (whether patentable or unpatentable and whether or not reduced to practice), all improvements thereto, and all patents, patent applications, and patent disclosures, together with all reissuances, continuations, continuations-in-part, revisions, extensions, and reexaminations thereof, (b) all trademarks, service marks, trade dress, logos, trade names, and corporate names, together with all translations, adaptations, derivations, and combinations thereof and including all goodwill associated therewith, and all applications, registrations, and renewals in connection therewith, (c) all copyrightable works, all copyrights, and all applications, registrations, and renewals in connection therewith, (d) all mask works and all applications, registrations, and renewals in connection therewith, (e) all trade secrets and confidential business information (including ideas, research and development, know-how, formulas, compositions, manufacturing and production processes and techniques, prototypes, technical data, designs, drawings, diskettes, stored data, suite, application, operating system, specifications, lists of and data relating to current, prior and prospective customers and suppliers, pricing and cost information, and business and marketing plans and proposals), (f) all computer software (including data and related documentation), (g) all other proprietary rights, (h) all copies and tangible embodiments thereof (in whatever form or medium) and (i) derivative works made or developed in connection with the foregoing.

"Knowledge" means that which is known by a Person and that of which a Person should have constructive knowledge after conducting a diligent and comprehensive examination of all matters relating thereto. In the case of the Company, BD Ministries or Purchaser, "Knowledge" includes, without limitation, the "Knowledge" of its respective employees, independent contractors, directors and executive officers.

"Liability" means any liability (whether known or unknown, whether asserted or unasserted, whether absolute or contingent, whether accrued or unaccrued, whether liquidated or unliquidated, and whether due or to become due), including any liability for Taxes.

"Majority Holders" means Controlling Shareholder and any transferees of Controlling Shareholder under Section 8(f) hereof who in the aggregate are the holders of fifty percent (50%) or more of the Registrable Securities.

"Material Adverse Effect" means, individually or together with other adverse effects, any material adverse effect on the assets, liabilities, results of operations, business condition

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(financial or otherwise) or prospects of the Company or on the Company's ability to consummate the transactions contemplated hereby or the ability of Purchaser to operate the business of the Company immediately after the Closing in substantially the same manner as such business is conducted prior to Closing.

"Most Recent Balance Sheet" means the balance sheet contained within the Most Recent Financial Statements.

"Most Recent Financial Statements" has the meaning set forth in Section 4(f) below.

"Most Recent Fiscal Period End" has the meaning set forth in Section 4(f) below.

"Most Recent Fiscal Year End" has the meaning set forth in Section 4(f) below.

"Multiemployer Plan" has the meaning set forth in ERISA Section 3(37).

"Operative Agreements" means the Stockholder Agreement

"Ordinary Course of Business" means the ordinary course of business consistent with past custom and practice (including with respect to quantity and frequency).

"Other Purchaser Shares" means (i) any equity securities acquired from time to time by Purchaser and (ii) any equity securities issued or issuable directly or indirectly with respect to the securities referred to in clause (i) by way of dividend or split or in connection with a combination of shares, recapitalization, merger, consolidation or other reorganization.

"Parties" has the meaning set forth in the preamble above.

"PBGC" means the Pension Benefit Guaranty Corporation.

"Person" means an individual, a partnership, a corporation, a limited liability company, an association, a joint stock company, a trust, a joint venture, an entity, an unincorporated organization, or a governmental entity (or any department, agency, or political subdivision thereof).

"Piggyback Registration" has the meaning set forth in Section 8(b) below.

"Prohibited Transaction" has the meaning set forth in ERISA Section 406 and Code Section 4975.

"Proprietary Rights Agreements" has the meaning set forth in Section 6(i) below.

"Public Offering" means a public offering and sale of Common Stock pursuant to an effective registration statement under the Securities Act.

"Purchased Stock" has the meaning set forth in Section 2(a) below.

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"Purchaser" has the meaning set forth in the preamble above.

"Qualified Public Offering" has the meaning set forth in Section 11(a) below.

"Redemption Agreement" has the meaning set forth in Section 5(j) below.

"Registrable Securities" means (i) any shares of Common Stock acquired by Purchaser, any Common Stock issued or issuable directly or indirectly with respect to the securities referred to in clauses (i) above by way of stock dividend or stock split or in connection with a combination of shares, recapitalization, merger, consolidation or other reorganization. As to any particular shares constituting Registrable Securities, such shares will cease to be Registrable Securities when they have been (x) effectively registered under the Securities Act and disposed of in accordance with the registration statement covering them, or (y) sold to the public through a broker dealer or market maker pursuant to Rule 144 under the Securities Act.

"Registration Expenses" has the meaning set forth in Section 8(e) below.

"Related Party" has the meaning specified in Section 4(z) below.

"Reportable Event" has the meaning set forth in ERISA Section 4043.

"Restrictive Covenant Agreements" has the meaning set forth in Section 4(ac) below.

"Securities Act" means the Securities Act of 1933, as amended, or any similar federal law then in force.

"Security Interest" means any mortgage, pledge, lien, charge, security interest or encumbrance of any nature whatsoever.

"Stockholder Agreement" has the meaning set forth in Section 5(j) below.

"Stock Option Plan" has the meaning set forth in Section 5(i) below.

"Short-Form Registrations" has the meaning set forth in Section 8(a) below.

"Subsidiary" means any corporation or entity with respect to which a specified Person (or a Subsidiary thereof) owns a majority of the common stock (or equity securities) or has the power to vote or direct the voting of sufficient securities to elect a majority of the directors (or similar Persons).

"Tax" means any federal, state, local, or foreign income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental (including Taxes under Code Section 59A), customs duties, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal

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property, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated, or other Tax of any kind whatsoever, including any interest, penalty, or addition thereto, whether disputed or not, and any obligations under any agreements or arrangements with respect to any of the foregoing.

"Tax Return" means any return, declaration, report, claim for refund, declaration, or information return or statement or document relating to Taxes, including any schedule or attachment thereto, and including any amendment thereof.

"Third Party Claim" has the meaning set forth in Section 11(c) below.

"Undisclosed Liability" has the meaning set forth in Section 11(b) below.

"Witness" has the meaning set forth in Section 4(ac) below.

## 2. Authorization and Purchase.

(a) Authorization. The Company will authorize the sale of [ ] ( ) shares of Common Stock, all of which shares of Common Stock shall be purchased by Purchaser pursuant to this Agreement (the "Purchased Stock").

(b) Purchased Stock. At the Closing, upon the terms and subject to the conditions of this Agreement, BD Ministries shall sell, transfer and deliver to Purchaser all of the shares of Purchased Stock, free and clear of any and all Security Interests.

(c) Consideration. At the Closing, Purchaser shall deliver to BD Ministries cash in the amount of [ ] Hundred Thousand Dollars (\$) (the "Cash Consideration") payable to or at the direction of BD Ministries to one or more accounts designated by BD Ministries by wire transfer or other immediately available funds. The Cash Consideration shall represent payment in full for the Purchased Stock.

(d) The Closing. The closing of the transactions contemplated by this Agreement (the "Closing") shall take place at the offices of [ ] or at any other place, time or date as the Parties designate in writing, and shall be effective as of 12:01 a.m., on the date of Closing (the "Closing Date").

## 3. Representations and Warranties Concerning the Transaction.

(a) Representations and Warranties of the Controlling Shareholder and BD Ministries. Each of the Controlling Shareholder and BD Ministries represents and warrants to Purchaser that the statements contained in this Section 3(a) are correct and complete as of the date of this Agreement, except as set forth on Section 3(a) of the Disclosure Schedule.

(i) Authorization of Transaction. Such Controlling Shareholder or BD Ministries, as the case may be, has full power and authority to execute and deliver this

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Agreement and to perform his or its obligations hereunder and thereunder. This Agreement constitutes the valid and legally binding obligation of such Controlling Shareholder or BD Ministries, as the case may be, enforceable against him or it in accordance with its terms and conditions.

(ii) Noncontravention. Neither the execution and the delivery of this Agreement, nor the consummation of the transactions contemplated hereby or thereby, will (A) violate any constitution, statute, regulation, rule, Governmental Authorization, injunction, judgment, order, decree, ruling, charge, or other restriction of any government, governmental agency, or court to which such Controlling Shareholder or BD Ministries, as the case may be, is subject or, in the case of BD Ministries, any provision of the organizational documents of BD Ministries, (B) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify, or cancel, or require any notice under any agreement, contract, lease, license, instrument, or other arrangement to which such Controlling Shareholder or BD Ministries, as the case may be, is a party or by which he or it is bound or to which any of his or its assets is subject.

(b) Representations and Warranties of Purchaser. Purchaser represents and warrants to the Company that the statements contained in this Section 3(b) are correct and complete as of the date of this Agreement, except as set forth on Section 3(b) of the Disclosure Schedule.

(i) Experience. Purchaser has substantial experience in evaluating and investing in private placement transactions of securities so that it is capable of evaluating the merits and risks of its investment in the Company. Purchaser has been represented by independent legal counsel in this transaction. Purchaser has had, prior to the purchase of the Purchased Stock, the opportunity to ask questions of, and receive answers from, the Company concerning the terms and conditions of the offering and the Company's business, management and financial affairs, and to obtain additional information (to the extent the Company possessed such information or could acquire it without unreasonable effort or expense) necessary to verify the accuracy of any information furnished to Purchaser or to which Purchaser had access. Purchaser is an "accredited investor" as defined in Rule 501(a) of Regulation D under the Securities Act.

(ii) Investment. Purchaser is acquiring the Purchased Stock for investment for its own account, not as a nominee or agent, and not with the view to, or for resale in connection with, any distribution thereof. Purchaser understands that the Purchased Stock has not been registered under the Securities Act or any applicable state securities laws by reason of a specific exemption from the registration provisions of the Securities Act and such state securities laws, the availability of which depends upon, among other things, the bona fide nature of the investment intent and the accuracy of Purchaser's representations as expressed herein.

(iii) Rule 144. Purchaser acknowledges that the Purchased Stock must be held indefinitely unless subsequently registered under the Securities Act or unless an

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exemption from such registration is available. Purchaser is aware of the provisions of Rule 144 promulgated under the Securities Act which permit limited resale of shares purchased in a private placement subject to the satisfaction of certain conditions.

(iv) No Public Market. Purchaser understands that no public market now exists for any of the securities issued by the Company and that the Company has made no assurances that a public market will ever exist for the Company's securities.

(v) Caveat. Nothing contained in this Section 3(b) shall in any way limit, or be deemed to limit or otherwise affect, the Company's, the Controlling Shareholder's or BD Ministries' representations, warranties, covenants or indemnity obligations set forth in this Agreement.

4. Representations and Warranties Concerning the Company. The Company and the Controlling Shareholder, jointly and severally, represents and warrants to Purchaser that the statements contained in this Section 4 are correct and complete as of the date of this Agreement except as set forth in the Disclosure Schedule. The Disclosure Schedule shall be effective to modify only those representations and warranties to which the Disclosure Schedule makes explicit reference.

(a) Organization, Qualification, and Corporate Power. The Company is a[n] corporation duly incorporated and organized, validly existing, and in good standing under the laws of the jurisdiction of its incorporation. A valid election under Section 1362(a) of the Code has been in effect since [Date], and such election has not been revoked or terminated. Neither the Company nor any of the Shareholders has taken any action which would cause or have caused a termination of such "S" election and the Company has never failed to be a small business corporation as defined in Section 1361 (b) of the Code and the Treasury Regulations thereunder. The Company is duly authorized to conduct business and is in good standing under the laws of each jurisdiction where such qualification is required. The Company has full corporate power and authority and all licenses, permits, and authorizations necessary to carry on the businesses in which it is engaged and in which it presently proposes to engage and to own and use the properties owned and used by it. Section 4(a) of the Disclosure Schedule lists the directors and officers of the Company. Correct and complete copies of the charter and bylaws of the Company (as amended to date) are included as part of Section 4(a) of the Disclosure Schedule. The minute books (containing the records of meetings of the stockholders, the board of directors, and any committees of the board of directors), the stock certificate books, and the stock record books of the Company are correct and complete and a true and correct copy thereof has been provided to Purchaser. The Company is not in default under or in violation of any provision of its charter or bylaws. The Company has full power and authority (including full corporate power and authority) to execute and deliver this Agreement and to perform its obligations hereunder and thereunder. This Agreement and each of the Operative Agreements to which it is a party constitutes the valid and legally binding obligation of the Company, enforceable against it in accordance with its terms and conditions. The Company need not give any notice to, make any filing with, or obtain any authorization, consent, or approval of any government or governmental agency or any other Person in order to consummate the transactions contemplated by this Agreement.

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(b) Capitalization: Purchased Stock.

(i) The authorized capital stock of the Company consists of [ ] ( ) shares of Common Stock. The Company has issued and outstanding [ ] ( ) shares of Common Stock, all of which shares have been duly authorized, are validly issued, fully paid, and nonassessable, and are held of record and owned beneficially by the Persons and in the amounts set forth in Section 4(b) of the Disclosure Schedule. All outstanding securities of the Company were issued in compliance with applicable federal and state securities laws. There are no classes or series of capital stock other than the Common Stock, and, except as disclosed in Section 4(b) of the Disclosure Schedule (w) there are no outstanding or authorized options, warrants, purchase rights, subscription rights, conversion rights, exchange rights, preemptive rights or other contracts or commitments that could require the Company to issue, sell, or otherwise cause to become outstanding any of its capital stock or securities convertible or exchangeable for, or any options, warrants, or rights to purchase, any of such capital stock; (x) there are no outstanding obligations of the Company to repurchase, redeem or otherwise acquire any capital stock or any securities convertible into or exchangeable for such capital stock or any options, warrants or rights to purchase such capital stock or securities; (y) there are no outstanding or authorized stock appreciation, phantom stock, profit participation, or similar rights with respect to the Company; and (z) there are no voting trusts, proxies, or other agreements or understandings with respect to the voting, transfer, dividend or other rights (such as registration rights under the Securities Act) of the capital stock of the Company. The Controlling Shareholder further represents and warrants that, except as disclosed in Section 4(b) of the Disclosure Schedule, the Common Stock owned directly or indirectly by him is free and clear of any and all liens, claims, charges, encumbrances, options, rights of refusal, voting proxies or other voting agreements whatsoever.

(ii) The Purchased Stock is (1) fully paid and non-assessable; (2) represents seven and one-half percent (7½%) of the issued and outstanding shares the issued and outstanding Common Stock of the Company, and (3) is free and clear of any and all liens, claims, charges, encumbrances, options, rights of refusal, voting proxies or other voting agreements whatsoever, except as provided pursuant to this Agreement and except for the Stockholder's Agreement. BD Ministries has the full, unqualified and exclusive right, power and authority to sell, issue, assign, transfer and deliver the Purchased Stock to Purchaser pursuant to the terms of this Agreement.

(c) Noncontravention. Neither the execution and the delivery of this Agreement, nor the consummation of the transactions contemplated hereby or thereby, will (i) violate any constitution, statute, regulation, rule, injunction, judgment, order, decree, ruling, charge, or other restriction of any government, governmental agency, or court to which the Company is subject or any provision of the charter or bylaws of the Company or (ii) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify, or cancel, or require any notice under any agreement, contract, lease, license, instrument, or other arrangement to which the Company is a party or by which it is bound or to which any of its assets is subject (or result in the imposition of any Security Interest upon any of its

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assets). The Company need not give any notice to, make any filing with, or obtain any authorization, consent, or approval of any Person, government or governmental agency in order for the Parties to consummate the transactions contemplated by this Agreement, except as set forth in Section 4(c) of the Disclosure Schedule.

(d) Brokers' Fees. The Company has not paid or accrued any fees or commissions due from the Company to any broker, finder, or agent with respect to the transactions contemplated by this Agreement. The Company and the Controlling Shareholder agree that they will pay any amounts that may become due from the Company to any such broker, finder or agent in the future, including as a result of any indemnification obligations.

(e) Subsidiaries. The Company does not currently have, and has never had, any Subsidiaries and does not own any securities of any other Person.

(f) Financial Statements. Attached hereto as Exhibit C are the following financial statements (collectively the "Financial Statements"): (i) [unaudited] balance sheet and statements of income, and retained earnings and cash flow, including the independent accountant's review report thereon, as of and for the fiscal year ended December 31, 2004 (the "Most Recent Fiscal Year End") for the Company; (ii) [unaudited] balance sheet and statements of income, and retained earnings and cash flow, including the independent accountant's review report thereon as of and for the fiscal year ended December 31, 2003; and (iii) unaudited balance sheet and statements of income, and retained earnings and cash flow (the "Most Recent Financial Statements") as of December 31, 2004 and for the period from January 1, 2000, through June 30, 2000 (the "Most Recent Fiscal Period End") for the Company. The Financial Statements (including the notes thereto) have been prepared in accordance with GAAP applied on a consistent basis throughout the periods covered thereby, present fairly the financial condition of the Company as of such dates and the results of operations of the Company for such periods, and are correct and complete, and are consistent with the books and records of the Company (which books and records are correct and complete).

(g) Events Subsequent to Most Recent Fiscal Year End. Since the Most Recent Fiscal Year End and except as disclosed in the Disclosure Schedule, there has not occurred any Material Adverse Effect and the Company has been operated in the Ordinary Course of Business. Without limiting the generality of the foregoing, since that date:

(i) The Company has not sold, leased, transferred, or assigned any of its assets, tangible or intangible, other than for fair consideration in the Ordinary Course of Business to Persons who are not Affiliates of the Company or the Controlling Shareholder;

(ii) The Company has not entered into any agreements, contracts, leases, or licenses either (A) involving more than \$50,000 in the aggregate, (B) having a term greater than 12 months or (C) outside the Ordinary Course of Business;

(iii) No party (including the Company) has accelerated, terminated, modified, or canceled any agreements, contracts, leases, or licenses involving more than

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\$50,000 in the aggregate to which the Company is a party or by which it is bound, or threatened to do any of the foregoing;

(iv) The Company has not imposed or allowed to be imposed any Security Interest upon any of its assets, tangible or intangible;

(v) The Company has not made any capital expenditures involving more than \$50,000 in the aggregate or outside the Ordinary Course of Business;

(vi) The Company has not made any capital investment in, any loan to, or any acquisition of the securities or assets of, any other Person;

(vii) The Company has not issued any note, bond, or other debt security or created, incurred, assumed, or guaranteed any indebtedness for borrowed money or capitalized lease obligation involving more than \$50,000 in the aggregate;

(viii) The Company has not delayed or postponed the payment of accounts payable and/or other Liabilities outside the Ordinary Course of Business, or accelerated the receipt of any amount owed to it outside the Ordinary Course of Business;

(ix) The Company has not accelerated or delayed collection of notes or accounts receivable in advance of or beyond their regular dates or the dates when the same could have been collected in the Ordinary Course of Business;

(x) The Company has not canceled, compromised, waived, or released any right or claim either involving more than \$50,000 in the aggregate;

(xi) The Company has not granted any license or sublicense of any rights under or with respect to any Intellectual Property or disclosed any proprietary or confidential information to any third party;

(xii) There has been no change made or authorized in the charter or bylaws of the Company;

(xiii) The Company has not issued, sold, or otherwise disposed of any of its capital stock or securities convertible into or exchangeable for such stock, or granted any options, warrants, or other rights to purchase or obtain any of such capital stock or securities;

(xiv) The Company has not declared, set aside, or paid any dividend or made any distribution with respect to its capital stock (whether in cash or in kind) or redeemed, purchased, or otherwise acquired any of its capital stock or other securities;

(xv) The Company has not experienced any damage, destruction, or loss (whether or not covered by insurance) to its property involving more than \$50,000 in the aggregate;

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(xvi) The Company has not made any loan to, or entered into any other transaction with, any of its directors, officers, and/or employees or any of their Affiliates or "Associates" (as defined in Rule 12b-2 under the Exchange Act);

(xvii) The Company has not applied any of its assets to the direct or indirect payment, discharge, satisfaction or reduction of any amount payable directly or indirectly to or for the benefit of any of the Controlling Shareholder or any Affiliate thereof or to the prepayment of any such amounts;

(xviii) The Company has not entered into any employment contract or collective bargaining agreement, written or oral, or modified the terms of any such existing contract or agreement;

(xix) The Company has not granted any increase in any compensation of any of its directors, officers, agents, representatives, independent contractors or employees;

(xx) The Company has not adopted, amended, modified, or terminated any bonus, profit-sharing, incentive, severance, or other plan, contract, or commitment for the benefit of any of its directors, officers, and employees (or taken any such action with respect to any other Employee Benefit Plan, Employee Pension Benefit Plan or Employee Welfare Benefit Plan);

(xxi) The Company has not made any other change in employment or engagement terms for any of its directors, officers, agents, representatives, independent contractors or employees;

(xxii) The Company has not made or pledged to make any charitable or other capital contribution;

(xxiii) There has not been any other material occurrence, event, incident, action, failure to act, or transaction outside the Ordinary Course of Business involving the Company;

(xxiv) The Company has not increased, or experienced any change in assumptions underlying or method of calculating, any bad debt, contingency, Tax or other reserves or changed its accounting practices, methods or assumptions (including changes in estimates or valuation methods); or written down the value of any assets; and

(xxv) The Company has not taken any action in furtherance of or committed to any of the foregoing.

(h) Undisclosed Liabilities. Except as disclosed in Section 4(h) of the Disclosure Schedule, the Company does not have any Liability, except for (i) Liabilities set forth on the face of the Most Recent Balance Sheet (rather than in any notes thereto) and (ii) Liabilities which have

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arisen after the Most Recent Fiscal Period End in the Ordinary Course of Business (none of which results from, arises out of, relates to, is in the nature of, or was caused by any breach of contract, breach of warranty, tort, infringement, or violation of law and none of which could be expected to have, individually or in the aggregate, a Material Adverse Effect).

(i) Legal Compliance. The Company and its predecessors and Affiliates have complied with all applicable laws (including rules, regulations, codes, plans, injunctions, judgments, orders, decrees, rulings, and charges thereunder) of federal, state, local, and foreign governments (and all agencies thereof), and no action, suit, proceeding, hearing, investigation, charge, complaint, claim, demand, or notice has been filed or commenced against any of them alleging any failure so to comply.

(j) Tax Matters.

(i) The Company has filed all Tax Returns that it was required to file. All such Tax Returns were correct and complete in all respects. All Taxes owed by the Company (whether or not shown on any Tax Return) have been paid or are fully and adequately accrued and adequately disclosed on the Most Recent Balance Sheet. The Company is not currently the beneficiary of any extension of time within which to file any Tax Return. No claim has ever been made by an authority in a jurisdiction where the Company does not file Tax Returns that it is or may be subject to taxation by that jurisdiction. There are no Security Interests on any of the assets of the Company that arose in connection with any failure (or alleged failure) to pay any Tax.

(ii) The Company has withheld and paid all Taxes required to have been withheld and paid in connection with amounts paid or owing to any employee, independent contractor, creditor, stockholder, or other third party.

(iii) None of the Controlling Shareholder or the Company has any Knowledge that any authority expects to assess any additional Taxes for any period for which Tax Returns have been filed, and there is no reasonable Basis for any such assessment. There is no action, suit or proceeding, investigation, dispute or claim now pending or threatened concerning any Tax Liability of the Company or proposed adjustment to the taxable income of the Company either (A) claimed or raised by any authority or (B) as to which any Controlling Shareholder or the Company has Knowledge. Section 4(j) of the Disclosure Schedule contains a summary of all Tax Returns filed with respect to the Company for the last six completed Tax years, indicates those Tax Returns that have been audited, and indicates those Tax Returns that currently are the subject of audit, and the Controlling Shareholder have made available to Purchaser correct and complete copies of all such Tax Returns, examination reports and statements of deficiencies assessed against or agreed to by the Company with respect to such Tax Returns.

(iv) The Company has not waived any statute of limitations in respect of Taxes or agreed to any extension of time with respect to a Tax assessment or deficiency.

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(v) The Company has not filed a consent under Code Section 341(f) concerning collapsible corporations. The Company has not made any payments, is not obligated to make any payments, or is not a party to any agreement that under certain circumstances could obligate it to make any payments that will not be deductible under Code Section 280G or that would give rise to any obligation to indemnify any Person for any excise Tax payable pursuant to Code Section 4999. The Company has not been a United States real property holding corporation within the meaning of Code Section 897(c)(2) during the applicable period specified in Code Section 897(c)(1)(A)(ii). The Company has disclosed on its federal income Tax Returns all positions taken therein that could give rise to a substantial understatement of federal income tax within the meaning of Code Section 6662. Neither the Company nor any predecessor or affiliate thereof is a party to any Tax allocation, sharing, indemnification or similar agreement. The Company (A) has not been a member of an Affiliated Group filing a consolidated federal income Tax Return (other than a group the common parent of which was the Company) and (B) does not have any Liability for the Taxes of any Person (other than the Company) under Reg. Section 1.1502-6 (or any similar provision of state, local, or foreign law), as a transferee or successor, by contract, or otherwise. No indebtedness of the Company consists of "corporate acquisition indebtedness" within the meaning of Code Section 279.

(vi) Section 4(j) of the Disclosure Schedule sets forth as of the most recent practicable date the basis for Federal income Tax purposes of the Company in its assets.

(vii) The unpaid Taxes of the Company (A) did not, as of the Most Recent Fiscal Period End, exceed the reserve for Tax Liability set forth on the face of the Most Recent Balance Sheet (rather than in any notes thereto) and (B) do not exceed that reserve as adjusted for the passage of time through the Closing Date in accordance with the past custom and practice of the Company in filing its Tax Returns.

(k) **Real Property.** The Company does not own any real property. Section 4(k) of the Disclosure Schedule lists and describes briefly all real property leased or subleased to the Company. The Company has delivered to Purchaser correct and complete copies of the leases and subleases listed in Section 4(k) of the Disclosure Schedule (as amended to date). With respect to each lease and sublease listed in Section 4(k) of the Disclosure Schedule:

(i) The lease or sublease is legal, valid, binding, enforceable, and in full force and effect;

(ii) The lease or sublease will continue to be legal, valid, binding, enforceable, and in full force and effect on identical terms following the consummation of the transactions contemplated hereby;

(iii) No party to the lease or sublease is in breach or default, and no event has occurred which, with notice or lapse of time, would constitute a breach or default or permit termination, modification, or acceleration thereunder;

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(iv) No party to the lease or sublease has repudiated any provision thereof;

(v) There are no disputes, oral agreements, or forbearance in effect as to the lease or sublease;

(vi) The Company has not received a notice from the lessor indicating that the lease will not be renewed at the end of its current term for any additional terms provided for in the lease;

(vii) The term of the lease will continue for a minimum of six months past the Closing Date;

(viii) With respect to each sublease, the representations and warranties set forth in subsections (i) through (vii) above are true and correct with respect to the underlying lease;

(ix) The Company has not assigned, transferred, conveyed, mortgaged, deeded in trust, granted any Security Interest or encumbered any interest in the leasehold or subleasehold;

(x) All facilities leased or subleased thereunder have received all approvals of governmental authorities (including licenses and permits) required in connection with the operation thereof and have been operated and maintained in accordance with applicable laws, rules, and regulations;

(xi) All facilities leased or subleased thereunder are supplied with utilities and other services necessary for the operation of said facilities; and

(xii) None of the Controlling Shareholder or the Company is aware of any pending or threatened foreclosure or other enforcement proceedings relating to the real property underlying the leases or subleases set forth in Section 4(k) of the Disclosure Schedule that could result in the Company's loss of possession of such real property.

(l) Intellectual Property.

(i) The Company owns (or has the right to use pursuant to license, sublicense, agreement or permission in writing and set forth in Section 4(l)(iv) of the Disclosure Schedule) all Intellectual Property necessary for the operation of the businesses of the Company as presently conducted and as presently proposed to be conducted. The Company has taken all necessary action to maintain and protect each item of Intellectual Property that it owns or uses. All employees, consultants, agents and independent contractors of the Company have executed and delivered to the Company invention assignment and work-made-for-hire agreements which assign to the Company their entire right, title and interest in and to works of authorship, works-made-for-hire, and other Intellectual Property conceived or developed by them solely or jointly with others while

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working for the Company or while using property of the Company and which obligate such employees, consultants and agents to maintain the confidentiality of such Intellectual Property. No Controlling Shareholder, and to the Knowledge of the Company and the Controlling Shareholder, no other Company employee or consultant, is obligated under any contract (including licenses, covenants or commitments of any nature) or other agreement, or subject to any judgment, decree or order of any court or administrative agency, that would conflict with his, her or its obligation to use his, hers or its best efforts to promote the interests of the Company or that would conflict with the Company's business as conducted or as proposed to be conducted. Neither the execution nor delivery of this Agreement nor the carrying on of the Company's business by the Controlling Shareholder, or to the Knowledge of the Company and the Controlling Shareholder, other employees and consultants of the Company, nor the conduct of the Company's business as proposed, will, conflict with, result in a breach of the terms, conditions or provisions of, or constitute a default under any contract, covenant or instrument under which any of such employees and consultants is now obligated. It is not and will not be necessary to utilize any inventions of any Controlling Shareholder or any of the Company's other employees or consultants (or people it currently intends to hire) made prior to their employment by or association with the Company. To the Knowledge of the Company and the Controlling Shareholder, no former employee or consultant of the Company has possession of any Intellectual Property (including software in source code or object code form).

(ii) The Company has not interfered with, infringed upon, misappropriated, or otherwise come into conflict with any Intellectual Property rights of third parties, and none of the Controlling Shareholder, or any of the officers, directors, employees, agents or independent contractors of the Company has ever received any charge, complaint, claim, demand, or notice alleging any such interference, infringement, misappropriation, or violation (including any claim that the Company must license or refrain from using any Intellectual Property rights of any third party). To the Knowledge of the Controlling Shareholder and the Company, no third party has interfered with, infringed upon, misappropriated, or otherwise come into conflict with any Intellectual Property rights of the Company.

(iii) Section 4(l)(iii) of the Disclosure Schedule identifies each patent or registration which has been issued to the Company with respect to any of its Intellectual Property, identifies each pending patent application or application for registration which the Company has made with respect to any of its Intellectual Property, and identifies each license, agreement, or other permission which the Company has granted to any third party with respect to any of its Intellectual Property (together with any exceptions). The Company has delivered to Purchaser correct and complete copies of all such patents, registrations, applications, licenses, agreements, and permissions (as amended to date) and have made available to Purchaser correct and complete copies of all other written documentation evidencing ownership and prosecution (if applicable) of each such item. Section 4(l)(iii) of the Disclosure Schedule also identifies each service mark, trade name, Internet domain name, corporate name or unregistered trademark used by the Company in connection with any of its

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businesses. With respect to each item of Intellectual Property required to be identified in Section 4(l)(iii) of the Disclosure Schedule:

(A) The Company possesses all right, title, and interest in and to the item, free and clear of any Security Interest, license, or other restriction;

(B) The item is not subject to any outstanding injunction, judgment, order, decree, ruling, or charge;

(C) No action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand is pending or is threatened which challenges the legality, validity, enforceability, use, or ownership of the item; and

(D) The Company has never agreed to indemnify any Person for or against any interference, infringement, misappropriation, or other conflict with respect to the item.

(iv) Section 4(l)(iv) of the Disclosure Schedule identifies each item of Intellectual Property that any third-party owns and that the Company uses pursuant to license, sublicense, agreement, permission or otherwise. The Company has delivered to Purchaser correct and complete copies of all such licenses, sublicenses, agreements, and permissions (as amended to date). With respect to each item of Intellectual Property required to be identified in Section 4(l)(iv) of the Disclosure Schedule:

(A) The license, sublicense, agreement, or permission covering the item is legal, valid, binding, enforceable, and in full force and effect;

(B) The license, sublicense, agreement, or permission will continue to be legal, valid, binding, enforceable, and in full force and effect on identical terms following the consummation of the transactions contemplated hereby;

(C) No party to the license, sublicense, agreement, or permission is in breach or default, and no event has occurred which with notice or lapse of time would constitute a breach or default or permit termination, modification, or acceleration thereunder;

(D) No party to the license, sublicense, agreement, or permission has repudiated any provision thereof;

(E) The Company has no Liabilities to any third party for any royalty or compensation for the use of the license, sublicense agreement or permission;

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(F) With respect to each sublicense, the representations and warranties set forth in subsections (A) through (E) above are true and correct with respect to the underlying license;

(G) The underlying item of Intellectual Property is not subject to any outstanding injunction, judgment, order, decree, ruling, or charge;

(H) No action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand is pending or is threatened which challenges the legality, validity, or enforceability of the underlying item of Intellectual Property; and

(I) The Company has never granted any sublicense or similar right with respect to the license, sublicense, agreement, or permission.

(v) To the Knowledge of the Controlling Shareholder and the Company, the Company will not interfere with, infringe upon, misappropriate, or otherwise come into conflict with, any Intellectual Property rights of third parties as a result of the continued operation of its businesses as presently conducted and as presently proposed to be conducted.

(vi) Neither the Controlling Shareholder nor the Company has any Knowledge of any new products, inventions, procedures, or methods of manufacturing or processing that any competitors or other third parties have developed which reasonably could be expected to supersede or make obsolete any product or process of the Company.

(m) Title to and Condition of Personal Property. The Company has good, valid and marketable title to, or a valid leasehold interest in, all of the properties and assets owned by it or used in its business, including, without limitation, each item of equipment and other personal property, tangible, intangible or otherwise included as an asset in the Most Recent Balance Sheet (other than inventory disposed of in the Ordinary Course of Business since the date of the Most Recent Balance Sheet to Persons other than the Controlling Shareholder or Affiliates of the Company or the Controlling Shareholder) and to each item of personal property, acquired since the Most Recent Balance Sheet, free and clear of any Security Interests. Except for the licenses to use certain Intellectual Property specifically identified on Section 4(l)(iv) of the Disclosure Schedule, there are no properties or assets, tangible or intangible, owned by any Person other than the Company which are used in connection with the business of the Company or necessary for the operation of the Company's business. All of the Purchased Stock is being transferred to Purchaser free and clear of any Security Interests. After the Closing, Purchaser shall have sole and exclusive ownership of the Purchased Stock.

[PJR] [(n) Contracts. Section 4(n) of the Disclosure Schedule lists all the contracts, agreements and understandings to which the Company is a party. The Company has delivered to Purchaser a correct and complete copy of each written agreement listed in Section 4(n) of the Disclosure Schedule (as amended to date). With respect to each item listed on Section 4(n) of the Disclosure Schedule: (A) the agreement is legal, valid, binding, enforceable, and in full force and effect; (B) the agreement will continue to be legal, valid, binding, enforceable and in full force and

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effect on identical terms following the consummation of the transactions contemplated hereby without (i) the occurrence of any breach, default or forfeiture of rights thereunder, or (ii) the consent, approval, or act of, or the making of any filings with, any Person; (C) no party is in breach or default, and no event has occurred which with notice or lapse of time would constitute a breach or default, or permit termination, modification, or acceleration, under the agreement; and (D) no party has repudiated any provision of the agreement. Section 4(n) of the Disclosure Schedule lists each currently outstanding bid or proposal for business submitted by the Company in excess of \$50,000.]

(o) Notes and Accounts Receivable. All notes and accounts receivable of the Company are reflected properly on the Most Recent Balance Sheet in accordance with GAAP, are valid receivables subject to no setoffs or counterclaims, are current and collectible, and, will be collected in accordance with their terms at their recorded amounts, subject only to the reserve for bad debts set forth on the face of the Most Recent Balance Sheet (rather than in any notes thereto) as adjusted for the passage of time through the Closing Date in accordance with the past custom and practice of the Company.

(p) Powers of Attorney. There are no outstanding powers of attorney executed on behalf of the Company.

(q) Insurance. Section 4(q) of the Disclosure Schedule includes a true, correct and complete list of all policies of insurance (including policies providing property, casualty, liability, and workers' compensation coverage and bond and surety arrangements) to which the Company is a party, a named insured, or otherwise the beneficiary of coverage. Genuine and complete copies of each of the insurance policies listed in Section 4(q) of the Disclosure Schedule have been provided to Purchaser. With respect to each such insurance policy: (A) the policy is legal, valid, binding, enforceable, and in full force and effect; (B) the policy will continue to be legal, valid, binding, enforceable and in full force and effect on identical terms following the consummation of the transactions contemplated hereby; (C) neither the Company nor any other party to the policy is in breach or default (including with respect to the payment of premiums or the giving of notices), and no event has occurred which, with notice or the lapse of time, would constitute such a breach or default; or permit termination, modification, or acceleration, under the policy; (D) none of the Company, any ERISA Affiliate or Purchaser shall be subject to a retroactive rate adjustment, loss sharing arrangement or other actual or contingent liability; and (E) to the Controlling Shareholder's and the Company's Knowledge, no party to the policy has repudiated any provision thereof. The Company has been fully covered at all times during the past three years by insurance in scope and amount customary and reasonable for the businesses in which it has engaged during the aforementioned period. Section 4(q) of the Disclosure Schedule describes any self-insurance arrangements affecting the Company.

(r) Litigation. Section 4(r) of the Disclosure Schedule sets forth each instance in which the Company (i) is subject to any outstanding injunction, judgment, order, decree, ruling, or charge or (ii) is a party, or to the Knowledge of the Controlling Shareholder and/or the Company, is threatened to be made a party to any claim, action, suit, proceeding, hearing, or investigation of, in, or before any court or quasi-judicial or administrative agency of any federal, state, local, or foreign jurisdiction or before any arbitrator. Except as set forth in Section 4(r) of the Disclosure Schedule,

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there is no other pending, or to the Knowledge of the Controlling Shareholder and/or the Company, threatened claim, arbitration proceeding, action, suit, investigation or other proceeding against or involving the Company or any property or rights of the Company or any officer or director or the Company. None of the actions, suits, proceedings, hearings, and investigations set forth in Section 4(r) of the Disclosure Schedule could individually or in the aggregate result in any Material Adverse Effect with respect to the Company. Neither the Shareholder nor the directors and officers (and employees with responsibility for litigation matters) of the Company has any reason to believe that any such action, suit, proceeding, hearing, or investigation may be brought or threatened against the Company.

(s) Governmental Authorizations. Set forth on Section 4(s) of the Disclosure Schedule is a list of all authorizations, consents, approvals, franchises, licenses and permits required under applicable law or regulation for the operation of the business of the Company as presently operated (the "Governmental Authorizations"). All of the Governmental Authorizations have been duly issued or obtained and are in full force and effect, and the Company is in compliance with the terms of all the Governmental Authorizations. Neither the Company nor any of the Controlling Shareholder has any Knowledge of any facts which could be expected to cause them to believe that the Governmental Authorizations will not be renewed by the appropriate governmental authorities in the ordinary course. Each of the Governmental Authorizations will continue in full force and effect following the consummation of the transactions contemplated hereby without (i) the occurrence of any breach, default or forfeiture of rights thereunder, or (ii) the consent, approval, or act of, or the making of any filings with, any Person.

(t) Commitments and Warranties. All services and products provided by the Company have been performed and provided in conformity with all applicable contractual commitments (written or oral) and all express and implied warranties (written or oral), and the Company has no Liability and, to the Knowledge of the Controlling Shareholder and the Company, there is no Basis for any present or future action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand against any of them giving rise to any Liability in connection with any such services or products. Neither the Company nor any of the Controlling Shareholder has received notice (written or oral) from any of the Company's customers stating that the customer intends to reduce the volume of business that it currently conducts with the Company or to cease doing business with the Company.

(u) Liability for Services Performed. The Company has no Liability (and, to the Controlling Shareholder's Knowledge, there is no Basis for any present or future action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand against any of them giving rise to any Liability) arising out of any injury to individuals or property as a result of or in connection with any services provided by the Company.

(v) Employees. The Company has complied with all applicable laws, rules and regulations which relate to prices, wages, hours, discrimination in employment and collective bargaining, and no penalties have been assessed or could be assessed for failure to comply with any of the foregoing. Without limiting the generality of Section 4(v), (i) no unfair labor practice complaints are pending or, to the Company's or the Controlling Shareholder's Knowledge, threatened

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against the Company, and (ii) no Person has made any claim, and to the Company's or the Controlling Shareholder's Knowledge there is no Basis for any claim, against the Company under any statute, regulation or ordinance relating to employees or employment practices, including without limitation those relating to age, sex and racial discrimination, conditions of employment, and wages and hours. The Company has no contingent liability for sick leave, vacation time, severance pay or similar items not reflected on the Most Recent Balance Sheet. The Company has no contingent liability for occupational diseases of its employees, former employees or others. The execution, delivery and performance of this Agreement and the consummation of the transactions contemplated hereby will not trigger any liability or any severance pay obligation under any collective bargaining agreement or under any law, rule or regulation. Except as set forth in Section 4(v) of the Disclosure Schedule, since December 31, 2004, no employee or independent contractor of the Company has (i) been terminated, resigned or otherwise ceased his or her relationship with the Company or otherwise adversely modified his or her relationship with the Company or (ii) to the Knowledge of the Company and the Controlling Shareholder, indicated that he or she intends to do so.

(w) Employee Benefits.

(i) Section 4(w) of the Disclosure Schedule lists each Employee Benefit Plan that the Company or any ERISA Affiliate maintains, contributes to, or is required to contribute to or under which the Company or any ERISA Affiliate has any liability.

(A) Each such Employee Benefit Plan (and each related trust, insurance contract, or fund) complies in form and in operation in all respects with the applicable requirements of ERISA, the Code, and other applicable laws and regulations.

(B) All required reports and disclosures (including Form 5500 Annual Reports, Summary Annual Reports, PBGC-1's, and Summary Plan Descriptions) have been filed or distributed appropriately with respect to each such Employee Benefit Plan. The requirements of Part 6 of Subtitle B of Title I of ERISA and of Code Section 4980B and of the Health Insurance Portability Act of 1996 have been met with respect to each such Employee Benefit Plan which is an Employee Welfare Benefit Plan.

(C) All contributions (including all employer contributions and employee salary reduction contributions) which are due have been paid to each such Employee Benefit Plan which is an Employee Pension Benefit Plan and all contributions for any period ending on or before the Closing Date which are not yet due have been paid to each such Employee Pension Benefit Plan or accrued in accordance with the past custom and practice of the Company and in accordance with GAAP. All premiums or other payments for all periods ending on or before the Closing Date have been paid with respect to each such Employee Benefit Plan which is an Employee Welfare Benefit Plan.

(D) Each such Employee Benefit Plan which is an Employee Pension Benefit Plan now meets and at all times since inception have met the requirements of a "qualified plan" under Code Section 401(a) and has received, within the last two years, a favorable determination letter from the Internal Revenue Service.

(E) As of the Closing Date, the market value of assets under each such Employee Benefit Plan which is an Employee Pension Benefit Plan (other than any Multiemployer Plan) will equal or exceed the present value of all vested and nonvested Liabilities thereunder determined in accordance with PBGC methods, factors, and assumptions applicable to an Employee Pension Benefit Plan terminating on such date.

(F) The Company has delivered to Purchaser correct and complete copies of the plan documents and summary plan descriptions including all amendments thereto, the most recent determination letter received from the Internal Revenue Service, the three most recent Form 5500 Annual Reports (including all schedules thereto), the three most recent annual premium payment forms filed with the PBGC, and all related trust agreements, insurance contracts, and other funding agreements which implement each such Employee Benefit Plan.

(ii) With respect to each Employee Benefit Plan that the Company or any ERISA Affiliate maintains, contributes to, or is required to contribute to or under which the Company or any ERISA Affiliate has any liability:

(A) No such Employee Benefit Plan which is an Employee Pension Benefit Plan (other than any Multiemployer Plan) has been completely or partially terminated or been the subject of a Reportable Event as to which notices would be required to be filed with the PBGC. No proceeding by the PBGC to terminate any such Employee Pension Benefit Plan (other than any Multiemployer Plan) has been instituted or threatened.

(B) There have been no Prohibited Transactions with respect to any such Employee Benefit Plan. No Fiduciary has any Liability for breach of fiduciary duty or any other failure to act or comply in connection with the administration or investment of the assets of any such Employee Benefit Plan. No action, suit, proceeding, hearing, or investigation with respect to any such Employee Benefit Plan (other than routine claims for benefits) is pending or threatened. Neither the Shareholder nor the Company has any Knowledge of any Basis for any such action, suit, proceeding, hearing, or investigation.

(C) Neither the Company nor any ERISA Affiliate has incurred, and none of the Controlling Shareholder or any of the directors and officers (and employees with responsibility for employee benefits matters) of the Company has any reason to expect that the Company or any ERISA Affiliate will incur, any Liability to

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the PBGC (other than PBGC premium payments) or otherwise under Title IV of ERISA (including any withdrawal Liability) or under the Code with respect to any such Employee Benefit Plan which is an Employee Pension Benefit Plan.

(iii) Neither the Company nor any ERISA Affiliate contributes to, ever has contributed to, or ever has been required to contribute to any Multiemployer Plan or has any Liability (including withdrawal Liability) under any Multiemployer Plan.

(iv) Neither the Company nor any ERISA Affiliate maintains or contributes to, or has ever been required to contribute to any Employee Welfare Benefit Plan providing medical, health, or life insurance or other welfare-type benefits for current or future retired or terminated employees, their spouses, or their dependents (other than in accordance with Code Section 4980B).

(v) No Employee Benefit Plan obligates the Company to pay separation, severance, termination or similar benefits as a result of any transaction contemplated by this Agreement or solely as a result of a "change of control" (as defined in Section 280G of the Code) and no individual shall accrue or receive any additional benefits, services or accelerated rights to payments of benefits under any Employee Benefit Plan as a result of the transactions contemplated by this Agreement.

(x) Guaranties. The Company is not a guarantor or otherwise liable for any Liability or obligation (including indebtedness) of any other Person.

(y) Environmental, Health, and Safety Matters.

(i) The Company and its predecessors and Affiliates have complied and are in compliance with all Environmental, Health, and Safety Requirements.

(ii) Without limiting the generality of the foregoing, the Company and its Affiliates have obtained and complied with, and are in compliance with, all permits, licenses and other authorizations that are required pursuant to Environmental, Health, and Safety Requirements for the occupation of its facilities and the operation of its business; a list of all such permits, licenses and other authorizations is set forth on Section 4(y) of the Disclosure Schedule.

(iii) Neither the Company nor its predecessors or Affiliates has received any written or oral notice, report or other information regarding any actual or alleged violation of Environmental, Health, and Safety Requirements, or any liabilities or potential liabilities (whether accrued, absolute, contingent, unliquidated or otherwise), including any investigatory, remedial or corrective obligations, relating to any of them or its facilities arising under Environmental, Health, and Safety Requirements.

(iv) None of the following exists at any property or facility owned or operated by the Company: (1) underground storage tanks, (2) asbestos-containing material in

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any form or condition, (3) materials or equipment containing polychlorinated biphenyls, or (4) landfills, surface impoundments, or disposal areas.

(v) None of the Company or its predecessors or Affiliates has treated, stored, disposed of, arranged for or permitted the disposal of, transported, handled, or released any substance, including without limitation any hazardous substance, or owned or operated any property or facility (and no such property or facility is contaminated by any such substance) in a manner that has given or would give rise to liabilities, including any liability for response costs, corrective action costs, personal injury, property damage, natural resources damages or attorney fees, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, the Solid Waste Disposal Act, as amended, or any other Environmental, Health, and Safety Requirements.

(vi) Neither this Agreement nor the consummation of the transaction that is the subject of this Agreement will result in any obligations for site investigation or cleanup, or notification to or consent of government agencies or third parties, pursuant to any of the so-called "transaction-triggered" or "responsible property transfer" Environmental, Health, and Safety Requirements.

(vii) Neither the Company nor its predecessors or Affiliates has, either expressly or by operation of law, assumed or undertaken any liability, including without limitation any obligation for corrective or remedial action, of any other Person relating to Environmental, Health, and Safety Requirements.

(viii) No facts, events or conditions relating to the past or present facilities, properties or operations of the Company or any of its predecessors or Affiliates will prevent, hinder or limit continued compliance with Environmental, Health, and Safety Requirements, give rise to any investigatory, remedial or corrective obligations pursuant to Environmental, Health, and Safety Requirements (whether on-site or off-site), or give rise to any other liabilities (whether accrued, absolute, contingent, unliquidated or otherwise) pursuant to Environmental, Health, and Safety Requirements, including without limitation any relating to onsite or offsite releases or threatened releases of hazardous materials, substances or wastes, personal injury, property damage or natural resources damage.

(z) Certain Business Relationships with the Company. Except as disclosed in Section 4(z) of the Disclosure Schedule, no Controlling Shareholder or any current director, officer, employee, agent or independent contractor of the Company (individually a "Related Party" and collectively the "Related Parties") or any Affiliate of any Controlling Shareholder or any Related Party: (i) owns, directly or indirectly, any interest in any Person which is a competitor, potential competitor, supplier or customer of the Company; (ii) owns, directly or indirectly, in whole or in part, any property, asset or right, real, personal or mixed, tangible or intangible (including, but not limited to, any of the Intellectual Property) which is utilized by or in connection with the business of the Company; (iii) is a customer or supplier of the Company; or (iv) directly or indirectly has an interest in or is a party to any contract, agreement, lease, arrangement or understanding, whether or

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not in writing, pertaining or relating to the Company, except for employment, consulting or other personal service agreements which are listed on Section 4(z) of the Disclosure Schedule.

(aa) Absence of Certain Business Practices. No Controlling Shareholder, or any Related Party, any Affiliate of any Controlling Shareholder or of any Related Party, any agent of the Company, or any other Person acting on behalf of or associated with the Company, acting alone or together, has: (i) received, directly or indirectly, any rebates, payments, commissions, promotional allowances or any other economic benefits, regardless of their nature or type, from any customer, supplier, employee or agent of any customer or supplier, official or employee of any government (domestic or foreign) or other Person; or (ii) directly or indirectly, given or agreed to give any money, gift or similar benefit to any customer, supplier, employee or agent of any customer or supplier, official or employee of any government (domestic or foreign), or any political party or candidate for office (domestic or foreign) or other Person who was, is or may be in a position to help or hinder the business of the Company (or assist the Company in connection with any actual or proposed transaction) which (A) may subject the Company to any damage or penalty in any civil, criminal or governmental litigation or proceeding, (B) if not given in the past, may have had an adverse effect on the assets, business, operations or prospects of the Company or (C) if not continued in the future, may adversely affect the assets, business, operations or prospects of the Company.

(ab) Agreements of Controlling Shareholder, Directors, Officers and Employees.

(i) Except as set forth in Section 4(ac) of the Disclosure Schedule, no Controlling Shareholder is a party to any agreement which contains provisions relating to non-competition, non-solicitation of customers, non-disclosure of confidential information or proprietary information, non-inducement or non-hiring of employees or agents of another party, work-for-hire or any other agreement or provision which, directly or indirectly, (i) limits the freedom of such Controlling Shareholder to compete in any line of business in any geographical area; (ii) limits the freedom of such Controlling Shareholder to use any patent or trademark, trade name, service mark, copyright or other item of Intellectual Property; (iii) requires such Controlling Shareholder to share any profits or revenues; or (iv) claims ownership for any other party of Intellectual Property created by such Controlling Shareholder (collectively, "Restrictive Covenant Agreements"). Set forth in Section 4(ac) of the Disclosure Schedule is a true, complete and correct copy of any agreement between any Controlling Shareholder and Witness Systems, Inc., or any predecessor or successor thereto (collectively, "Witness"). No Controlling Shareholder is currently in breach of, or in violation of, or in default under, any Restrictive Covenant Agreement or any agreement with Witness, nor has any Controlling Shareholder received any notice alleging that he is in breach of, or violation of, or in default under, any Restrictive Covenant Agreement or any agreement with Witness. The execution, delivery and performance of and compliance with this Agreement and each of the Operative Agreements by each Controlling Shareholder has not resulted and will not result in any violation of, or conflict with, or constitute a default under, any Restrictive Covenant Agreement or any agreement with Witness.

(ii) To the Knowledge of the Company and the Controlling Shareholder, no director, officer or employee of or consultant to the Company is in violation of any terms

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of any employment contract, non-competition agreement, non-disclosure agreement, patent disclosure or assignment agreement or other contract or agreement containing restrictive covenants relating to the right of any such director, officer, employee or consultant to be employed or engaged by the Company because of the nature of the business conducted or proposed to be conducted by the Company, or relating to the use of trade secrets or proprietary information of others.

(ac) Bulk Sales: Hart-Scott-Rodino Act. The transactions contemplated under this Agreement and the Operative Agreements are not subject to any bulk sales, transfer or similar law of any jurisdiction. The filing and waiting requirements under the Hart-Scott-Rodino Act are inapplicable to the transactions contemplated hereby.

(ad) Registration Rights. Except as set forth in this Agreement or in Section 4(ae) of the Disclosure Schedule, the Company is not under any contractual obligation to register under the Securities Act any of its presently outstanding securities or any of its securities which may hereafter be issued.

(ae) Offering. Assuming the truth and accuracy of Purchaser's representations in Section 3(b) hereof, the offer, sale and issuance of the Purchased Stock to be issued in conformity with the terms of this Agreement constitutes a transaction exempt from the registration requirements of Section 5 of the Securities Act.

(af) Bankruptcy. Neither the Company, any Controlling Shareholder, nor any entities affiliated, related or controlled by any of such parties, has filed a petition or request for reorganization or protection or relief under the bankruptcy laws of the United States or any state or territory thereof; made any general assignment for the benefit of creditors; or consented to the appointment of a receiver or trustee, including a custodian under the United States bankruptcy laws, whether such receiver or trustee is appointed in a voluntary or involuntary proceeding.

(ag) Previous Sales of Securities. Except as set forth in Section 4(ah) of the Disclosure Schedule, all offers and sales of securities by the Company have been made in compliance with applicable exemptions of the securities registration requirements of the Securities Act and applicable state securities laws; and, to the best knowledge of the Company and the Controlling Shareholder, no holder of any security of the Company has any bona fide claim against the Company for a failure to disclose any material fact in connection with the acquisition of any security of the Company pursuant to any federal or state law, including, but not limited to, Section 10(b)(5) of the Exchange Act.

(ah) No Impending Material Adverse Events. Neither the Company nor any Controlling Shareholder has any knowledge of impending material loss of business or of any other condition, the occurrence of which might have a material adverse effect on the business, financial condition or prospects of the Company.

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(ai) Solvency. After the Closing Date, the Company will not (i) be insolvent, (ii) have unreasonably small capital with which to engage in its business or (iii) have incurred debts beyond its ability to pay as they become due.

(aj) Disclosure. Neither this Agreement nor any of the exhibits, attachments, written statements, documents, certificates or other items prepared for or supplied to Purchaser by the Controlling Shareholder or the Company with respect to the transactions contemplated hereby contains any untrue statement of a material fact or omits to state any material fact necessary in order to make each statement contained herein or therein not misleading. There is no fact which any Controlling Shareholder or the Company has not disclosed to Purchaser herein and of which any Controlling Shareholder or the Company is aware which could be anticipated to have a Material Adverse Effect.

5. **Affirmative Covenants of the Company and the Controlling Shareholder.** So long as Purchaser shall own any shares of Common Stock, the Company shall comply with, and the Controlling Shareholder shall cause the Company to comply with, the following covenants and agreements:

(a) Maintenance of Existing Properties and Foreign Qualifications; Compliance with Law; Taxes; Insurance; Payments of Senior Indebtedness. The Company shall:

(i) maintain corporate existence, rights and foreign qualifications in full force and effect or permit the termination or abandonment of rights or foreign qualifications, if in the opinion of the Company it is no longer in the Company's best interests to maintain such existence, rights or other foreign qualifications and such termination or abandonment will not be prejudicial in any material respect to the holders of the Common Stock;

(ii) maintain their Intellectual Property in full force and effect and maintain their respective tangible properties and assets in good repair, working order and condition so far as necessary or advantageous to the proper carrying on of their respective businesses;

(iii) materially comply with all applicable laws and with all applicable orders, rules, rulings, certificates, licenses, regulations, demands, judgments, writs, injunctions and decrees;

(iv) pay promptly when due all taxes, fees, assessments and other governmental charges imposed upon their respective properties, assets or income and all claims or indebtedness (including, without limitation, materialmen's, vendor's, workmen's and like claims) which might become a lien or other Security Interest upon such properties or assets, provided, that payment of any such tax, fee, assessment, charge, claim or indebtedness shall not be necessary so long as (i) the applicability or validity thereof shall be contested in good faith by appropriate proceedings and a reserve, if appropriate, shall have been established (segregated to the extent required by GAAP) with respect thereto and (ii) failure to make such payment will not have a Material Adverse Effect;

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(v) maintain such insurance with coverage and in amounts as shall be customary for the Company's industry, including without limitation liability and extended coverage insurance and workers' compensation insurance, and officers' and directors' liability insurance, and take all steps necessary to fully indemnify all members of the Board of Directors of the Company to the fullest extent permitted by law. All such insurance shall be underwritten by insurance companies having an A.M. Best rating of A or higher;

(vi) maintain, at its sole cost and expense, key man life insurance (i) on the life of Controlling Shareholder in the amount of [ ] (\$ ). Such insurance shall be underwritten by life insurance companies having an A.M. Best rating of A or higher. Each such policy shall provide for the proceeds thereof to be paid to Purchaser;

(vii) maintain, at its sole cost and expense, long-term disability insurance on each of the Controlling Shareholder in such amounts and on such terms as shall be determined by the Company. Such insurance shall be underwritten by a disability insurance company having an A.M. Best rating of A or higher; and

(viii) pay or cause to be paid when due all payments of principal, interest or premium on indebtedness and will not permit or suffer any event of default with respect to any indebtedness (as defined therein or in the instrument under which the same is outstanding).

(b) Notices. The Company shall give notice to Purchaser promptly after it learns (other than by notice from all of such holders) of the existence of any of the following:

(i) any suits, assessments, or litigation instituted against the Company or its Subsidiaries claiming damages or assessing liability in excess of Ten Thousand Dollars (\$10,000) or any action or proceeding which has been commenced or threatened against the Company or any of its Subsidiaries and which, if adversely determined, would have, individually or in the aggregate, a Material Adverse Effect or the ability of the Company to perform its obligations under this Agreement;

(ii) any governmental audits or investigations instituted against the Company or any of its Subsidiaries; and

(iii) any (i) Reportable Event, (ii) "complete withdrawal" or "partial withdrawal" (within the meaning of Sections 4203 and 4205 of ERISA) from a Multiemployer Plan, or (iii) Prohibited Transaction in connection with any Employee Benefit Pension Plan, maintained or contributed to (or required to be maintained or contributed to) by the Company, any Subsidiary of the Company or any Affiliate of the Company (including, without limitation, any Multiemployer Plan), or any trust created thereunder, which in the case of clause (i), (ii) or (iii) may, either individually or in the aggregate, result in a liability which would materially adversely affect the assets, properties, liabilities, business, affairs, results of operations, condition (financial or otherwise) or prospects of the Company and its

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Subsidiaries on a consolidated basis or the ability of the Company to perform its obligations under this Agreement, the Operative Agreements or the Series C Preferred Stock or the Conversion Shares.

Such notice shall specify the nature of any such matter referred to in such clause, what action the Company or any Subsidiary proposes to take with respect thereto and what action any other relevant Person is taking or proposes to take with respect thereto.

(c) Environmental Matters. The Company shall keep any real property (including improvements) either owned or occupied by the Company free and clear of any liens or other Security Interests imposed for failure to comply with any Environmental, Health and Safety Requirements.

(d) No Dilution or Impairment. The Company shall not, by amendment of its articles of incorporation or through any consolidation, merger, reorganization, transfer of assets, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms of this Agreement.

(e) Proprietary Rights Agreements. All future officers, directors, employees and consultants of the Company who have access to confidential information shall be required to execute and deliver a Proprietary Information and Inventions Agreement in the form attached hereto as Exhibit I (the "Proprietary Rights Agreement") as such form may be amended from time to time subject to the approval of Purchaser, which approval shall not be unreasonably withheld or delayed.

(f) Regular Course of Business. After the Closing Date, the Company shall operate its business such that the representations and warranties in Section 4 remain true and correct in all material respects.

## 6. Registration Rights.

### (a) Piggyback Registrations.

(i) Right to Piggyback. Whenever the Company proposes to register any of its securities (either on its own behalf or on behalf of others) under the Securities Act (other than pursuant to a registration on Form S-4 or S-8 or any successor or similar forms) and the registration form to be used may be used for the registration of Registrable Securities (a "Piggyback Registration"), the Company will give prompt written notice to all Holders of Registrable Securities of its intention to effect such a registration and will use its reasonable best efforts to include in such registration all Registrable Securities with respect to which the Company has received written requests for inclusion therein within fifteen (15) days after the receipt of the Company's notice.

(ii) Piggyback Expenses. All Registration Expenses of the Holders of Registrable Securities will be paid by the Company in all Piggyback Registrations.

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(iii) Priority on Primary Registrations. If a Piggyback Registration is an underwritten primary registration on behalf of holders of the Company's securities, and the managing underwriters advise the Company in writing that in their opinion the number of securities requested to be included in such registration exceeds the number which can be sold in such offering in an orderly manner within a price range acceptable to the Company, the Company will include in such registration Registrable Securities requested to be included in such registration, pro-rata among the holders of such Registrable Securities on the basis of the number of shares of Registrable Securities owned by each such holder provided; however, that unless the registration is with respect to the Company's initial Public Offering, in no event shall the shares to be included in such registration by the Holders of Registrable Securities constitute less than twenty-five percent (25%) of the total amount of securities to be included in such registration.

(iv) Priority on Secondary Registrations. If a Piggyback Registration is an underwritten secondary registration on behalf of holders of the Company's securities, and the managing underwriters advise the Company in writing that in their opinion the number of securities requested to be included in such registration exceeds the number which can be sold in such offering in an orderly manner within a price range acceptable to the Company, the Company will include in such registration Registrable Securities requested to be included in such registration, pro-rata among the holders of such Registrable Securities on the basis of the number of shares of Registrable Securities owned by each such holder, provided; however, that unless the registration is with respect to the Company's initial Public Offering, in no event shall the shares to be included in such registration by the Holders of Registrable Securities constitute less than twenty-five percent (25%) of the total amount of securities to be included in such registration.

(v) Other Registrations. If the Company has previously filed a registration statement with respect to Registrable Securities pursuant to Section 8(a) or this Section 8(b), and if such previous registration has not been withdrawn or abandoned, the Company will not file or cause to be effected any other registration of any of its equity securities or securities convertible or exchangeable into or exercisable for its equity securities under the Securities Act (except on Form S-4 or S-8 or any successor form), whether on its own behalf or at the request of any holder or holders of such securities, until a period of at least six (6) months has elapsed from the effective date of such previous registration.

(b) Holdback Agreements.

(i) Agreement of Holders of Registrable Securities. No Holder of Registrable Securities will effect any public sale or distribution (including sales pursuant to Rule 144) of equity securities of the Company, or any securities, options or rights convertible into or exchangeable or exercisable for such securities, during the seven (7) days prior to and the 180-day period beginning on the effective date of any underwritten Registration or any underwritten Piggyback Registration (except as part of such underwritten registration), unless the underwriters managing the registered public offering otherwise agree, provided that all

officers, directors, holders of registration rights and other 5% shareholders are similarly bound.

(ii) Company Agreement. The Company will (i) not effect any public sale or distribution of its equity securities, or any securities convertible into or exchangeable or exercisable for such securities, during the seven (7) days prior to and during the 180-day period beginning on the effective date of any underwritten Registration or any underwritten Piggyback Registration (except as part of such underwritten registration or pursuant to registrations on Form S-4 or S-8 or any successor form), unless the underwriters managing the registered public offering otherwise agree, and (ii) cause each holder of shares of Common Stock, or any securities convertible into or exchangeable or exercisable for shares of Common Stock, purchased from the Company at any time after the date of this Agreement (other than in a registered public offering) to agree not to effect any public sale or distribution (including sales pursuant to Rule 144) of any such securities during such period (except as part of such underwritten registration, if otherwise permitted), unless the underwriters managing the registered public offering otherwise agree.

(c) Registration Procedures. Whenever the Holders of Registrable Securities have requested that any Registrable Securities be registered pursuant to this Agreement, the Company will use its best efforts to effect the registration and the sale of such Registrable Securities in accordance with the intended method of disposition thereof, and pursuant thereto the Company will as expeditiously as reasonably possible:

(i) prepare and file with the Securities and Exchange Commission a registration statement with respect to such Registrable Securities and thereafter use its best efforts to cause such registration statement to become effective (provided that before filing a registration statement or prospectus or any amendments or supplements thereto, the Company will furnish to the counsel selected by the Holders of Registrable Securities initiating such registration statement copies of all such documents proposed to be filed, which documents will be subject to review of such counsel);

(ii) notify each Holder of Registrable Securities of the effectiveness of each Registration Statement filed hereunder and prepare and file with the Securities and Exchange Commission such amendments and supplements to such registration statement and the prospectus used in connection therewith as may be necessary to keep such registration statement effective for a period of either (i) not less than six months (subject to extension pursuant to Section 14 hereof) or, if such registration statement relates to an underwritten offering, such longer period as in the opinion of counsel for the underwriters a prospectus is required by law to be delivered in connection with sales of Registrable Securities by an underwriter or dealer or (ii) such shorter period as will terminate when all of the securities covered by such registration statement have been disposed of in accordance with the intended methods of disposition by the seller or sellers thereof set forth in such registration statement (but in any event not before the expiration of any longer period required under the Securities Act), and to comply with the provisions of the Securities Act with respect to the disposition of all securities covered by such registration statement until such time as all of such securities

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have been disposed of in accordance with the intended methods of disposition by the seller or sellers thereof set forth in such registration statement; provided that the Company shall not be obligated to maintain the effectiveness of any registration statement for a period of more than twenty-four (24) months from the date on which such registration statement initially becomes effective;

(iii) furnish to each seller of Registrable Securities such number of copies of such registration statement, each amendment and supplement thereto, the prospectus included in such registration statement (including each preliminary prospectus) and such other documents as such seller may reasonably request in order to facilitate the disposition of the Registrable Securities owned by such seller;

(iv) use its best efforts to register or qualify such Registrable Securities under such other securities or blue sky laws of such jurisdictions as any seller reasonably requests and do any and all other acts and things which may be reasonably necessary or advisable to enable such seller to consummate the disposition in such jurisdictions of the Registrable Securities owned by such seller (provided that the Company will not be required to (i) qualify generally to do business in any jurisdiction where it would not otherwise be required to qualify but for this subparagraph, (ii) subject itself to taxation in any such jurisdiction or (iii) consent to general service of process in any such jurisdiction);

(v) notify each seller of such Registrable Securities, at any time when a prospectus relating thereto is required to be delivered under the Securities Act, upon discovery that, or upon the discovery of the happening of any event as a result of which, the prospectus included in such registration statement contains an untrue statement of a material fact or omits any fact necessary to make the statements therein not misleading in the light of the circumstances under which they were made, and, at the request of any such seller, the Company will prepare and furnish to such seller a reasonable number of copies of a supplement or amendment to such prospectus so that, as thereafter delivered to the purchasers of such Registrable Securities, such prospectus will not contain an untrue statement of a material fact or omit to state any fact necessary to make the statements therein not misleading in the light of the circumstances under which they were made;

(vi) cause all such Registrable Securities to be listed on each securities exchange or market on which similar securities issued by the Company are then listed;

(vii) provide a transfer agent and registrar for all such Registrable Securities not later than the effective date of such registration statement;

(viii) enter into such customary agreements (including underwriting agreements in customary form) as may be requested by the underwriters and take all such other actions as the Holders of Registrable Securities initiating such registration or the underwriters, if any, reasonably request in order to expedite or facilitate the disposition of such Registrable Securities (including, without limitation, effecting a stock split or a combination of shares);

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(ix) make available for inspection by any seller of Registrable Securities, any underwriter participating in any disposition pursuant to such registration statement and any attorney, accountant or other agent retained by any such seller or underwriter, all financial and other records, pertinent corporate documents and properties of the Company, and cause the Company's officers, directors, employees and independent accountants to supply all information reasonably requested by any such seller, underwriter, attorney, accountant or agent in connection with such registration statement;

(x) otherwise use its best efforts to comply with all applicable rules and regulations of the Securities and Exchange Commission, and make available to its security holders, as soon as reasonably practicable, an earnings statement covering the period of at least twelve (12) months beginning with the first day of the Company's first full calendar quarter after the effective date of the registration statement, which earnings statement shall satisfy the provisions of Section 11(a) of the Securities Act and Rule 158 thereunder;

(xi) in the event of the issuance of any stop order suspending the effectiveness of a registration statement, or of any order suspending or preventing the use of any related prospectus or suspending the qualification of any Securities included in such registration statement for sale in any jurisdiction, the Company will use its reasonable best efforts promptly to obtain the withdrawal of such order;

(xii) obtain one or more comfort letters, dated the effective date of such registration statement (and, if such registration includes an underwritten public offering, dated the date of the closing under the underwriting agreement), signed by the Company's independent public accountants in customary form and covering such matters of the type customarily covered by comfort letters as the Holders of Registrable Securities initiating such registration reasonably request (provided that such Registrable Securities constitute at least ten percent (10%) of the securities covered by such registration statement); and

(xiii) as required by the Securities Act or by an underwriter, provide a legal opinion of the Company's outside counsel, dated the effective date of such registration statement (and, if such registration includes an underwritten public offering, dated the date of the closing under the underwriting agreement), with respect to the registration statement, each amendment and supplement thereto, the prospectus included therein (including the preliminary prospectus) and such other documents relating thereto in customary form and covering such matters of the type customarily covered by legal opinions of such nature.

The Company may require each seller of Registrable Securities as to which any registration is being effected to furnish the Company such information regarding such seller and the distribution of such securities as the Company may from time to time reasonably request in writing.

(d) Registration Expenses. All expenses incident to the Company's performance of or compliance with this Agreement, including, without limitation, all registration and filing fees, fees and expenses of compliance with securities or blue sky laws, printing expenses, messenger and

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delivery expenses, and fees and disbursements of counsel for the Company and the fees and disbursements of one counsel chosen by the Holders of Registrable Securities and all independent certified public accountants, underwriters (excluding discounts and commissions) and other Persons retained by the Company (all such expenses being herein called "Registration Expenses"), will be borne as provided in this Agreement, except that the Company will, in any event, pay its internal expenses (including, without limitation, all salaries and expenses of its officers and employees performing legal or accounting duties), the expense of any annual audit or quarterly review, the expense of any liability insurance and the expenses and fees for listing the securities to be registered on each securities exchange on which similar securities issued by the Company are then listed or on the NASD automated quotation system.

(e) Transfer of Registration Rights. The rights to cause the Company to register securities granted to the Holders of Registrable Securities under this Section 8 may be assigned at any time without prior written consent of the Company to a transferee or assignee in connection with any transfer or assignment of Registrable Securities by the Holder of Registrable Securities, provided that written notice thereof is given to the Company and that such transferee or assignee is (i) a trust established solely for the benefit of such holder and/or such holder's Family Group; (ii) a company whose shareholders consist solely of such holder and/or such holder's Family Group; (iii) a partnership whose partners consist solely of such holder and/or such holder's Family Group; (iv) a guardian or conservator of such holder and/or such holder's Family Group; (v) if such holder is a company, a shareholder of such company; (vi) if such holder is a partnership, a partner of such partnership; (vii) if such holder is a limited liability company, a member of such limited liability company; (viii) if such holder is an individual, a transferee pursuant to the laws of descent and distribution; and (ix) a transferee or assignee who acquires at least \$1,000,000 of Registrable Securities.

(f) Indemnification

(i) Indemnification Obligation of the Company. The Company agrees to indemnify and hold harmless, to the extent permitted by law, each Holder of Registrable Securities, its officers and directors and each Person who controls such holder (within the meaning of the Securities Act) against any losses, claims, damages, liabilities and expenses caused by (i) any untrue or alleged untrue statement of material fact contained in any registration statement, prospectus or preliminary prospectus or any amendment thereof or supplement thereto or, (ii) any omission or alleged omission of a material fact required to be stated therein or necessary to make the statements therein not misleading, except in so far as the same are caused by or contained in any information furnished in writing to the Company by or on behalf of such holder expressly for use therein or by such holder's failure to deliver a copy of the registration statement or prospectus or any amendments or supplements thereto after the Company has furnished such holder with a sufficient number of copies of the same. In connection with an underwritten offering, the Company will indemnify such underwriters, their officers and directors and each Person who controls such underwriters (within the meaning of the Securities Act) to the same extent as provided above with respect to the indemnification of the Holders of Registrable Securities.



(ii) Indemnification Procedures. Any Person entitled to indemnification hereunder will (i) give prompt written notice to the indemnifying party of any claim with respect to which it seeks indemnification (provided that the failure to give prompt notice shall not impair any Person's right to indemnification hereunder to the extent such failure has not adversely affected the indemnifying party) and (ii) unless in such indemnified party's reasonable judgment a conflict of interest between such indemnified and indemnifying parties may exist with respect to such claim, permit such indemnifying party to assume the defense of such claim with counsel reasonably satisfactory to the indemnified party. If such defense is assumed, the indemnifying party will not be subject to any liability for any settlement made by the indemnified party without its consent (but such consent will not be unreasonably withheld). An indemnifying party who is not entitled to, or elects not to, assume the defense of a claim will not be obligated to pay the fees and expenses of more than one counsel for all parties indemnified by such indemnifying party with respect to such claim, unless in the reasonable judgment of any indemnified party a conflict of interest may exist between such indemnified party and any other of such indemnified parties with respect to such claim.

(iii) Other Indemnification Provisions. The indemnification provided for under this Agreement will remain in full force and effect regardless of any investigation made by or on behalf of the indemnified party or any officer, director or controlling Person of such indemnified party and will survive the transfer of securities. The Company and any other indemnifying party with respect to the matters set forth in this Section 8 also agree to make such provisions, as are reasonably requested by any indemnified party, for contribution to such party in the event the Company's indemnification is unavailable for any reason.

(g) Participation in Underwritten Registrations. No Person may participate in any registration hereunder which is underwritten unless such Person (i) agrees to sell such Person's securities on the basis provided in any underwriting arrangements approved by the Person or Persons entitled hereunder to approve such arrangements (including, without limitation, pursuant to the terms of any over-allotment or "green shoe" option requested by the managing underwriter(s), provided that no Holder of Registrable Securities will be required to sell more than the number of Registrable Securities that such holder has requested the Company to include in any registration) and (ii) completes and executes all questionnaires, powers of attorney, indemnities, underwriting agreements and other documents reasonably required under the terms of such underwriting arrangements. Each Person that is participating in any registration hereunder agrees that, upon receipt of any notice from the Company of the happening of any event of the kind described in this Section 8(d)(v) above, such Person will forthwith discontinue the disposition of its Registrable Securities pursuant to the registration statement until such Person's receipt of the copies of a supplemented or amended prospectus as contemplated by such Section 8(d)(v). In the event the Company shall give any such notice, the applicable time period mentioned in Section 8(d)(ii) during which a Registration Statement is to remain effective shall be extended by the number of days during the period from and including the date of the giving of such notice pursuant to this Section 8(h) to and including the date when each seller of Registrable Securities covered by such registration

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statement shall have received the copies of the supplemented or amended prospectus contemplated by Section 8(d)(v).

(h) Rule 144 Reporting. With a view to making available to Purchaser the benefits of certain rules and regulations of the Securities and Exchange Commission which may permit the sale of the Purchased Stock to the public without registration, after such time as the Company shall have securities subject to the provisions of the Exchange Act, the Company agrees to use its best efforts to:

(i) make and keep public information available, as those terms are understood and defined in Rule 144 under the Securities Act, at all times after the effective date that the Company becomes subject to the reporting requirements of the Exchange Act;

(ii) use its best efforts to file with the Securities and Exchange Commission in a timely manner all reports and other documents required of the Company under the Securities Act and the Exchange Act (at any time after it has become subject to such reporting requirements); and

(iii) cooperate with Purchaser in providing information necessary to effect a sale, including furnishing to Purchaser forthwith upon request a written statement by the Company as to its compliance with the reporting requirements of Rule 144, and of the Securities Act and the Exchange Act (at any time after it has become subject to such reporting requirements), a copy of the most recent annual or quarterly report of the Company filed with the Securities and Exchange Commission.

#### 7. Closing.

All proceedings to be taken and all documents to be executed at the Closing shall be deemed to have been taken, delivered and executed simultaneously, and no proceeding shall be deemed taken nor documents deemed executed or delivered until all have been taken, delivered and executed.

#### 8. Remedies for Breaches of this Agreement.

(a) Survival of Representations and Warranties. The Parties agree that the (i) the representations and warranties contained in Sections 4(j), 4(w) and 4(y) shall survive the Closing until 30 days after the expiration of the statute of limitations applicable thereto, and (ii) all of the remaining representations, warranties, covenants and agreements of the Parties contained in this Agreement or in any certificate, document, instrument or agreement delivered pursuant to this Agreement shall survive the Closing hereunder and continue in full force and effect upon the closing of a firmly underwritten public offering of shares of Common Stock for the account of the Company to the public at a price per share of not less than Ten Dollars (\$10.00) with aggregate proceeds to the Company, prior to underwriting discounts and commissions and expenses, of not less than Thirty Million Dollars (\$30,000,000) (a "Qualified Public Offering") and (z) the automatic conversion of

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the Series C Preferred Stock into Conversion Shares upon the election of the holders of at least a majority of the outstanding shares of Series C Preferred Stock.

(b) Agreement to Indemnify. The Company and each Controlling Shareholder, jointly and severally, agree to indemnify, defend and hold harmless Purchaser on demand, from, against and in respect of, the full amount of any and all Adverse Consequences, arising from, in connection with, or incident to:

(i) any breach, inaccuracy or violation of (or any third party allegation of any breach, inaccuracy or violation of) any of the representations, warranties, covenants or agreements of the Company or any Controlling Shareholder contained in or made pursuant to this Agreement, any schedule or exhibit to this Agreement or in any document, agreement or certificate delivered by any of them at or prior to the Closing;

(ii) any Undisclosed Liability (as hereinafter defined); and

(iii) any and all actions, suits, proceedings, demands, assessments or judgments, costs and expenses incidental to any of the foregoing.

As used in this Agreement, "Undisclosed Liability" means any Liability, debt or obligation of any nature of the Company, whether liquidated, contingent, accrued, absolute or otherwise, that is not specifically set forth on the face of the Most Recent Balance Sheet (rather than in any notes thereto), elsewhere in this Agreement or in the Disclosure Schedule or, if so set forth, the amount by which such Liabilities, debts or obligations, as finally determined, exceed the amount thereof so disclosed, by greater than Ten Thousand Dollars (\$10,000).

(c) Matters Involving Third Parties.

(i) If any third party shall notify any party entitled to indemnification hereunder (the "Indemnified Party") with respect to any matter (a "Third Party Claim") which may give rise to a claim for indemnification against any other Party (the "Indemnifying Party") under this Section 1, then the Indemnified Party shall promptly notify each Indemnifying Party thereof in writing; provided, however, that no delay on the part of the Indemnified Party in notifying any Indemnifying Party shall relieve the Indemnifying Party from any obligation hereunder unless (and then solely to the extent) the Indemnifying Party thereby is materially prejudiced.

(ii) Any Indemnifying Party will have the right to defend the Indemnified Party against the Third Party Claim with counsel of its choice reasonably satisfactory to the Indemnified Party so long as (A) the Indemnifying Party notifies the Indemnified Party in writing within 15 days after the Indemnified Party has given notice of the Third Party Claim that the Indemnifying Party is responsible for and will fully indemnify the Indemnified Party from and against the entirety of any Adverse Consequences the Indemnified Party may suffer resulting from, arising out of, relating to, in the nature of, or caused by the Third Party Claim, (B) the Indemnifying Party provides the Indemnified Party with evidence reasonably

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acceptable to the Indemnified Party that the Indemnifying Party will have the financial resources to defend against the Third Party Claim and fulfill its indemnification obligations hereunder, (C) the Third Party Claim involves only money damages and does not seek an injunction or other equitable relief, (D) settlement of, or an adverse judgment with respect to, the Third Party Claim is not, in the good faith judgment of the Indemnified Party, likely to establish a precedential custom or practice materially adverse to the continuing business interests of the Indemnified Party, (E) the named parties to the Third Party Claim do not include both the Indemnified Party and the Indemnifying Party, and (F) the Indemnifying Party conducts the defense of the Third Party Claim actively and diligently.

(iii) So long as the Indemnifying Party is conducting the defense of the Third Party Claim in accordance with Section 11(d)(ii) above, (A) the Indemnified Party may retain separate co-counsel at its sole cost and expense and participate in the defense of the Third Party Claim, (B) the Indemnified Party will not consent to the entry of any judgment or enter into any settlement with respect to the Third Party Claim without the prior written consent of the Indemnifying Party (not to be withheld unreasonably), and (C) the Indemnifying Party will not consent to the entry of any judgment or enter into any settlement with respect to the Third Party Claim without the prior written consent of the Indemnified Party (not to be withheld unreasonably).

(iv) In the event any of the conditions in Section 11(d)(ii) above is or becomes unsatisfied, however, (A) the Indemnified Party may defend against, and consent to the entry of any judgment or enter into any settlement with respect to, the Third Party Claim in any manner it reasonably may deem appropriate (and the Indemnified Party need not consult with, or obtain any consent from, any Indemnifying Party in connection therewith), (B) the Indemnifying Party will reimburse the Indemnified Party promptly and periodically for the costs of defending against the Third Party Claim (including reasonable attorneys' fees and expenses), and (C) each Indemnifying Party will remain responsible for any Adverse Consequences the Indemnified Party may suffer resulting from, arising out of, relating to, in the nature of, or caused by the Third Party Claim to the fullest extent provided in this Section 11.

(d) Determination of Adverse Consequences. The Parties shall take into account the time cost of money (using the Applicable Rate as the discount rate) in determining Adverse Consequences for purposes of this Section 11. All indemnification payments under this Section 11 shall be deemed adjustments to the Consideration.

(e) Other Indemnification Provisions. The foregoing indemnification provisions are in addition to, and not in derogation of, any statutory, equitable, or common law remedy (including without limitation any such remedy arising under Environmental, Health, and Safety Requirements) any Party may have with respect to the Company and the Controlling Shareholder, or the transactions contemplated by this Agreement.

## 9. Termination.

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(a) Termination of Agreement. The Parties may terminate this Agreement as provided below:

(i) The Parties may terminate this Agreement by mutual written consent at any time prior to the Closing;

(ii) Purchaser may terminate this Agreement by giving written notice to the Company at any time prior to the Closing (A) in the event the Controlling Shareholder, BD Ministries or the Company have breached any representation, warranty, or covenant contained in this Agreement in any material respect, Purchaser has notified the Company of the breach, and the breach has continued without cure for a period of five (5) days after the notice of breach or such breach, by its nature, cannot be cured prior to Closing; and

(b) Effect of Termination.

(i) If any Party terminates this Agreement pursuant to Section 9(a) above, all rights and obligations of the Parties hereunder shall terminate without any Liability of any Party to any other Party, except as otherwise provided below.

#### 10. Miscellaneous.

(a) Telecopied Signatures. Any telecopied signature shall be deemed a manually executed original.

(b) No Third-Party Beneficiaries. This Agreement shall not confer any rights or remedies upon any Person other than the Parties and their shareholders and their respective successors and permitted assignee and the Indemnified Parties referred to in Section 11 hereof.

(c) Entire Agreement. This Agreement and the Operative Agreements (including the documents referred to herein and therein) constitute the entire agreement among the Parties and supersede any prior understandings, agreements, or representations by or among the Parties, written or oral, to the extent they related in any way to the subject matter hereof.

(d) Succession and Assignment. This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the Parties named herein and their respective successors and permitted assignees. No Party may assign either this Agreement or any of his or its rights, interests, or obligations hereunder without the prior written approval of the other Parties; provided, however, that Purchaser may (i) assign any or all of its rights and interests hereunder to one or more of its Affiliates (ii) designate one or more of its Affiliates to perform its obligations hereunder (in any or all of which cases Purchaser nonetheless shall remain responsible for the performance of all of its obligations hereunder) and (iii) without the approval of the Company or the Controlling Shareholder assign its rights and interests hereunder to its lenders (and any agent for the lenders), and the Parties consent to any exercise by such lenders (and such agents) of their rights and remedies with respect to such collateral.

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(e) Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together will constitute one and the same instrument.

(f) Headings. The section headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

(g) Notices. All notices, requests, demands, claims, and other communications hereunder will be in writing. Any notice, request, demand, claim, or other communication hereunder shall be deemed duly given if (and then two business days after) it is sent by registered or certified mail, return receipt requested, postage prepaid, and addressed to the intended recipient as set forth below:

If to the Company:

North American Rescue Products, Inc.

Attn: \_\_\_\_\_

Copy to: \_\_\_\_\_

If to the Controlling Shareholder:

Robert Castellani  
\_\_\_\_\_  
\_\_\_\_\_

Copy to: \_\_\_\_\_

If to BD Ministries:

Attn: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Copy to: \_\_\_\_\_

If to Purchaser:

P.J. Richardson  
\_\_\_\_\_  
\_\_\_\_\_

Copy to: \_\_\_\_\_

Attn: President

Any Party may send any notice, request, demand, claim, or other communication hereunder to the intended recipient at the address set forth above using any other means (including personal delivery, expedited courier, messenger service, telecopy, telex, ordinary mail, or electronic mail), but no such notice, request, demand, claim, or other communication shall be deemed to have been duly given unless and until it actually is received by the intended recipient. Any Party may change the address to

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which notices, requests, demands, claims, and other communications hereunder are to be delivered by giving the other Parties notice in the manner herein set forth.

(h) Governing Law. This Agreement shall be governed by and construed in accordance with the domestic laws of the State of Florida without giving effect to any choice or conflict of law provision or rule (whether of the State of Florida or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Florida.

(i) Amendments and Waivers. No amendment of any provision of this Agreement shall be valid unless the same shall be in writing and signed by the Parties. No waiver by any Party of any default, misrepresentation, or breach of warranty or covenant hereunder, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

(j) Severability. Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction.

(k) Expenses. The Company shall bear all expenses incurred on its behalf and all legal expenses incurred on behalf of Purchaser with respect to this Agreement and the Operative Agreements and the transactions contemplated hereby and thereby or consummated contemporaneously herewith or therewith.

(l) Construction. The Parties have participated jointly in the negotiation of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any of the provisions of this Agreement. Any reference to any federal, state, local, or foreign statute or law shall be deemed also to refer to all rules and regulations promulgated thereunder, unless the context requires otherwise. The word "including" shall mean including without limitation. The Parties intend that each representation, warranty, and covenant contained herein shall have independent significance. If any Party has breached any representation, warranty, or covenant contained herein in any respect, the fact that there exists another representation, warranty, or covenant relating to the same subject matter (regardless of the relative levels of specificity) which the Party has not breached shall not detract from or mitigate the fact that the Party is in breach of the first representation, warranty, or covenant.

(m) Incorporation of Exhibits, Schedules and Certificates. The Exhibits, Annexes, Schedules and Certificates identified in this Agreement are incorporated herein by reference and made a part hereof.

(n) Specific Performance. Each of the Parties acknowledges and agrees that the other Parties would be damaged irreparably in the event any of the provisions of this Agreement are not performed in accordance with their specific terms or otherwise are breached. Accordingly, each

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of the Parties agrees that the other Parties shall be entitled to an injunction or injunctions to prevent breaches of the provisions of this Agreement and to enforce specifically this Agreement and the terms and provisions hereof in any action instituted in any court of the United States or any state thereof having jurisdiction over the Parties and the matter (subject to the provisions set forth in Section 13(o) below), in addition to any other remedy to which they may be entitled, at law or in equity.

(o) Submission to Jurisdiction. Each of the Parties submits to the exclusive jurisdiction of any state or federal court sitting in Broward County, Florida, in any action or proceeding arising out of or relating to this Agreement and agrees that all claims in respect of the action or proceeding shall be heard and determined in any such court. Each of the Parties waives any defense of inconvenient forum to the maintenance of any action or proceeding so brought and waives any bond, surety, or other security that might be required of any other Party with respect thereto. Any Party may make service on any other Party by sending or delivering a copy of the process to the Party to be served at the address and in the manner provided for the giving of notices in Section 13(g) above. Each Party agrees that a final judgment in any action or proceeding so brought shall be conclusive and may be enforced by suit on the judgment or in any other manner provided by law or at equity.

(p) Prevailing Party. In any action or proceeding arising out of or relating to this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees and costs from the other party to the action or proceeding.

(q) Public Announcements. Except as otherwise required by law, no Party will, directly or indirectly, issue any press release or make any other public announcement relating to, connected with or arising out of this Agreement or the transactions contemplated herein, including the existence and terms of this Agreement, without obtaining the prior approval of Purchaser to the contents and the manner of presentation and publication thereof.

(r) WAIVER OF JURY TRIAL. THE PARTIES HEREBY IRREVOCABLY WAIVE ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

[Signature Page Follows]



IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first above written.

**NORTH AMERICAN RESCUE PRODUCTS,  
INC.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**P.J. RICHARDSON, individually**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**CONTROLLING SHAREHOLDER:**

**ROBERT CASTELLANI, individually**

**BD MINISTRIES**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

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Reeves Manufacturing, Inc.  
Castellani Computation

|                      |              |
|----------------------|--------------|
| Cash                 | \$ 9,100,000 |
| Funds Held in Escrow | (500,000)    |
| Corporate Tax        | (789,110)    |
| Transaction Costs    | (385,498)    |
| Personal Taxes       | (1,878,879)  |
| Net Cash Flow        | \$ 5,546,513 |

|                   |                   |
|-------------------|-------------------|
| Sharing Rate 7.5% | <u>0.075</u>      |
| Castellani Share  | <u>\$ 415,988</u> |

EXHIBIT

POR 1

S001003

**Curtis Stodghill**

**From:** Narescue@aol.com  
**Sent:** Friday, January 23, 2004 11:09 AM  
**To:** rmanning@akerman.com  
**Cc:** cstodghill@teleplex.net  
**Subject:** North American Rescue

Hey Rod,

Attach is my attorneys contact information. If you have a copy please place a copy of PJ and my written agreement in the packet to review. I spoke with Curt today and I think he has a pretty good understanding of what we are trying to accomplish. However, I'll try to write the main points down:

1. We each own 25% of the other guys company.
2. We operate our companies separate.
3. First right of refusal on the stock.
4. Finally, I want my 25% to mirror PJ's 75%. If he moves his share to a holding company my share should go too. If he uses his shares to merge with another company I should have the same options ect...

Anyway, once the papers get to Curt and he reviews them we'll sit down and get the agreement finished.

Best Regards Bob

North American Rescue Products  
a member of the Reeves Group

Robert Castellani  
126 Hornbuckle Drive  
Easley, SC 29642  
Phone: 864-220-3004  
Fax: 864-220-3822  
Email: bob@NARescue.com  
Web: www.NARescue.com

1/23/2004

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APP\_1013

Manning, Rod

From: Curtis Stodghill [cstodghill@teleplex.net]  
Sent: Friday, August 27, 2004 3:03 PM  
To: Manning, Rod  
Cc: bob@narescue.com  
Subject: RMI Services Agreement  
Attachments: EAS

Rod:

I have reviewed the draft of the Services Agreement you prepared between NARP and Reeves. Since we have not been able to discuss the document yet, I have taken the liberty to make some suggested revisions, and have attached the revised document for your review. I look forward to your comments.

Additionally, I am trying to wrap up some of NARP's corporate matters. At this point, since we are dealing with 7.5% equity positions instead of 25% perhaps options are the least tax costly means to get Bob and P.J. to where they desire to be, provide they are properly tailored. Your thoughts?

I look forward to hearing from you.

Cordially,

Curt

Curtis Stodghill

Stodghill Law Firm Chartered

PO Box 2431

Greenville, SC 29602-2431

300 East McBee Avenue, Suite 300

Greenville, SC 29601-2899

Phone 864.271.0966

11/17/00



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Fax 864.770.6167

Cell 864.419.9976

[cstodghill@teleplex.net](mailto:cstodghill@teleplex.net)

ASE -016

4/3/2008

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APP\_1015

Manning, Rod

From: Curtis Stodghill [cstodghill@teleplex.net]  
Sent: Monday, October 04, 2004 3:12 PM  
To: Manning, Rod; pjr@reevesdecon.com  
Cc: Bob@narescue.com  
Subject: Option and Stockholder Agreement  
Attachments: pj option.wpd; stockholders agreement.wpd

Rod:

Per our conversation attached is a draft of PJ's option and the Stockholder Agreement applicable at exercise.

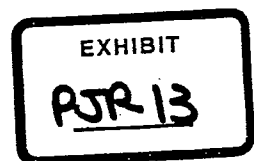
Curt

Curtis Stodghill  
Stodghill Law Firm Chartered  
PO Box 2431  
Greenville, SC 29602-2431  
300 East McBee Avenue, Suite 300  
Greenville, SC 29601-2899  
Phone 864.271.0966  
Fax 864.770.6167  
Cell 864.419.9976  
[cstodghill@teleplex.net](mailto:cstodghill@teleplex.net)

7/24/2007

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## North American Rescue Products, Inc.

Stock Option Agreement  
October \_\_, 2004

This agreement is effective on the date above (the **Date of Agreement**) and is delivered by North American Rescue Products, Inc., a Delaware corporation (NARP) to the undersigned (Optionee).

### RECITALS

A. Optionee has been elected as a member of the board of directors of NARP. Because of his experience and skills it is anticipated that he will make valuable contributions to the management of NARP in the best interests of NARP and its stockholders.

B. In an effort to conserve cash for future growth and other business opportunities, and to further align Optionee's interests with those of NARP and its stockholders, in lieu of directors fees to be paid in the foreseeable future NARP, its directors, and Stockholders wish to grant Optionee an option to purchase capital stock in NARP in accordance with this Stock Option Agreement.

NARP and Optionee agree as follows:

Article 1 **AGREEMENT OF OPTION.** Subject to the terms and conditions hereinafter set forth, NARP with the approval and at the direction of the Committee, hereby grants to the Optionee, as of the Date of Agreement, an option to purchase the number of shares of common capital stock equivalent to seven and one-half percent (7½%) of the common capital stock outstanding on the date of this agreement at a price of \$.01 per share. Such option is hereinafter referred to as the **Stock Option** and the shares of stock purchasable upon exercise of the **Stock Option** are hereinafter sometimes referred to as the **Option Shares**. The **Stock Option** is not intended by the parties hereto to be, and shall not be treated as, an "incentive stock option" as defined in Internal Revenue Code § 422.

### Article 2 **TERMINATION OF OPTION.**

2.1 The **Stock Option** and all rights hereunder with respect thereto, to the extent such rights shall not have been exercised, shall terminate and become null and void after the expiration of ten (10) years from the Date of Agreement (the **Option Term**).

2.2 If the Optionee dies, the **Stock Option** may be exercised by the Optionee's legal representative(s), but only to the extent that the **Stock Option** would otherwise have been exercisable by the Optionee.

2.3 Notwithstanding any other provisions set forth herein if the Optionee shall (i) recklessly, intentionally, or with gross negligence commits a act of malfeasance or wrongdoing which materially and adversely affects NARP or its affiliates; or (ii) materially breaches any covenant not to compete, or employment contract, with NARP or its affiliate

North American Rescue Products, Inc. - Stock Option Agreement - 2003

any unexercised portion of the Stock Option shall immediately terminate and be void. **Affiliate** means a person (legal or natural) that controls, is under common control with, or is controlled by another person, whether through one or more intermediaries; **control** means the possession of the power to direct or cause the direction of management and policies of a person, whether by ownership, contract, or otherwise.

Article 3 EXERCISE OF OPTIONS.

3.1 The Optionee may exercise the Stock Option with respect to all or any part of the number of Option Shares then exercisable hereunder by giving the secretary of NARP written notice of intent to exercise. The notice of exercise shall specify the number of Option Shares as to which the Stock Option is to be exercised and the date of exercise thereof, which date shall be at least five days after the giving of such notice unless an earlier time shall have been mutually agreed upon.

3.2 Full payment (in U.S. dollars) by the Optionee of the option price for the Option Shares purchased shall be made on or before the exercise date specified in the notice of exercise in cash.

3.3 On the exercise date specified in the Optionee's notice or as soon thereafter as is practicable, NARP shall cause to be delivered to the Optionee, a certificate or certificates for the Option Shares then being purchased (out of theretofore unissued common stock or reacquired common stock, as NARP may elect) upon full payment for such Option Shares. The obligation of NARP to deliver Stock shall, however, be subject to the condition that if at any time the board of directors shall determine, in its discretion, that the listing, registration or qualification of the Stock Option or the Option Shares upon any securities exchange or under any state or federal law, or the consent or approval of any governmental regulatory body, is necessary or desirable as a condition of, or in connection with, the Stock Option or the issuance or purchase of Stock thereunder, the Stock Option may not be exercised in whole or in part unless such listing, registration, qualification, consent or approval shall have been effected or obtained free of any conditions not acceptable to the board of directors.

3.4 If the Optionee fails to pay for any of the Option Shares specified in such notice or fails to accept delivery thereof, the Optionee's right to purchase such Option Shares may be terminated by NARP. The date specified in the Optionee's notice as the date of exercise shall be deemed the date of exercise of the Stock Option, provided that payment in full for the Option Shares to be purchased upon such exercise shall have been received by such date.

Article 4 ADJUSTMENT OF AND CHANGES IN NARP COMMON STOCK. If there is a reorganization, recapitalization, change of shares, stock split, spin-off, stock dividend, reclassification, subdivision or combination of shares, merger consolidation, rights offering, or any other change in the corporate structure or shares of capital stock of NARP, the board of directors



North American Rescue Products, Inc. - Stock Option Agreement - 2003

shall make such adjustment as it deems appropriate in the number and kind of shares of common stock subject to the option or in the option price; provided, however, that no such adjustment shall give the Optionee any additional benefits under the Stock Option.

**Article 5 NO RIGHTS OF STOCKHOLDERS.** Neither the Optionee nor any personal representative shall be, or shall have any of the rights and privileges of, a stockholder of NARP in respect to any shares of common stock purchasable or issuable upon the exercise of the Stock Option, in whole or in part, prior to the date of exercise of the Stock Option.

**Article 6 NON-TRANSFERABILITY OF OPTION.** During the Optionee's lifetime, the Stock Option hereunder shall be exercisable only by the Optionee or any guardian or legal representative of the Optionee, and the Stock Option shall not be transferable except, in case of the death of the Optionee, by will or the laws of descent and distribution, nor shall the Stock Option be subject to attachment, execution or other similar process. In no event of (a) any attempt by the Optionee to alienate, assign, pledge, hypothecate or otherwise dispose of the Stock Option, except as provided for herein, or (b) the levy of any attachment, execution or similar process upon the rights or interest hereby conferred, NARP may terminate the Stock Option by notice to the Optionee and it shall thereupon become void. All stock purchased according to this Agreement shall be subject to the terms of the North American Rescue Products, Inc. - Stockholder Agreement as set forth in Appendix A (Stockholder Agreement) attached hereto and made a part hereof. Optionee agrees to the terms set forth in Appendix A, and upon exercise will exercise a counterpart signature page to such agreement.

**Article 7 EMPLOYMENT NOT AFFECTED.** The granting of the Stock Option nor its exercise shall not be construed as granting to the Optionee any right with respect to employment with NARP. Except as may otherwise be limited by a written agreement between NARP and the Optionee, the right of NARP to terminate at will the Optionee's employment with it at any time (whether by dismissal, discharge, retirement or otherwise) is specifically reserved by NARP, as NARP or on behalf of NARP (whichever the case may be), and acknowledged by the Optionee.

**Article 8 AMENDMENT OF OPTION.** The Stock Option may be amended by the board of directors at any time (i) if the board of directors determines, in its sole discretion, that amendment is necessary or advisable in the light of any addition to or change in the Internal Revenue Code or in the regulations issued thereunder, or any federal or state securities law or other law or regulation, which change occurs after the Date of Agreement and by its terms applies to the Stock Option; or (ii) other than in the circumstances described in clause (i), with the consent of the Optionee.

**Article 9 NOTICE.** Any notice to NARP provided for in this instrument shall be addressed to it in care of its President at its principal place of business and any notice to the Optionee shall be addressed to the Optionee at the address shown below. Any notice or other communication shall be conclusively deemed to have been given if by (a) personal delivery, on the day of actual delivery; (b) nationally recognized delivery service, delivery prepaid on the day of actual delivery, provided written confirmation of receipt is obtained by the delivery service; (c) certified US mail, on the second business day after deposit, postage prepaid,

North American Rescue Products, Inc. - Stock Option Agreement - 2003

properly addressed, with the US Postal Service; and (d) electronic communication, on the day of transmittal, if given during the normal business hours of the recipient and on the next business day if given after normal business hours on any day, in either event upon confirmation of receipt by electronic means or acknowledgment of recipient.

Article 10 **Incorporation of Plan by Reference.** The Stock Option is granted pursuant to the terms of this instrument. Any dispute with respect to this Stock Option shall be resolved according to the Dispute Resolution provisions of the Stockholder Agreement.

Article 11 **Governing Law.** The validity, construction, interpretation and effect of this instrument shall exclusively be governed by and determined in accordance with the law of Delaware, except to the extent preempted by federal law, which shall to the extent govern.

NARP has caused its duly authorized officers to execute an attest this Agreement of Stock Option, and to apply the corporate seal hereto, and the Optionee has placed his or her signature heron, effective as of the Date of Agreement.

North American Rescue Products, Inc.

By: \_\_\_\_\_  
Robert A. Castellani, President/CEO

Accepted and Agreed to:

\_\_\_\_\_  
P. J. Richardson Optionee

Optionee Notice Address  
\_\_\_\_\_  
\_\_\_\_\_

## North American Rescue Products, Inc. – Stockholder Agreement

This agreement is made and entered into as of the \_\_\_\_\_ day of October, 2004, by and between the persons signing on the signature page(s) hereof as stockholders (individually **Stockholder** and collectively **Stockholders** when no distinction is required), and North American Rescue Products, Inc., a Delaware corporation (**Company**). **THIS AGREEMENT IS SUBJECT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (TITLE 15 CHAPTER 48) OR THE FEDERAL ARBITRATION ACT (9 U.S.C. §§1-16).**

**BACKGROUND.** Stockholders own all the issued and outstanding capital stock of Company, and their respective ownership is reflected adjacent to their names on the signature page(s) below (including any counterpart signature pages). References to **stock**, **capital stock**, or **shares** shall be to capital stock of Company unless the context clearly indicates otherwise. Stockholders wish to provide a market for their shares of the stock in certain events. They wish to restrict ownership of the stock to the present Stockholders and to persons with whom they will easily work and communicate. Stockholders believe that they will be able to do that with each other and that it is in their best interests and in Company's best interests that all corporate activities be controlled by persons who work and communicate easily with each other. To accomplish these objectives, Stockholders and Company, wish to arrange for certain restrictions on the transfer of Stockholders' shares of stock to persons other than the parties to this agreement.

In consideration of the background above, which the parties acknowledge are accurate in all material respects, and the provisions below the parties agree as follows:

### 1. RESTRICTIONS ON TRANSFER OF STOCK

1.1 **Applicability.** Every share of capital stock of Company outstanding, and every share of Company stock issued after the effective date of this agreement, is, and shall be held, subject to the provisions of this agreement.

1.2 **General Restriction; Notice.** No Stockholder shall sell or transfer any rights to or interest in his Company stock without first notifying Company and the other Stockholders in writing of his intent to do so (the **Notice**). The Notice must state the identity of the proposed transferee, and the highest bona fide offer, if any, such prospective transferee has made for the stock involved. A Stockholder providing the Notice may be referred to as the **Transferring Stockholder**.

1.3 **Option to Purchase and Procedure.** Upon receipt of the Notice, Company shall have an option to purchase all of the stock proposed to be transferred by the Transferring Stockholder's, as the case may be, upon the price and terms determined in sections 1.4 and 1.5, respectively. The stock subject to the option may be referred to as the **option shares**. The option shall be for a period of (i) thirty (30) days following receipt of notice per section 1.2 or (ii) ten (10) days following determination of option value by appraisers according to section 1.4, whichever is later. If the Company has not exercised this option, the other Stockholders (**Remaining Stockholders**) shall have the right to purchase the Transferring Stockholder's stock for an additional ten (10) days. The maximum number of shares any Remaining Stockholder shall have the right to purchase is equal to the number of shares owned by the Transferring Stockholder multiplied by a fraction, the numerator of which is the number of shares owned by the purchasing Stockholder, and the denominator of which is the total number outstanding shares of capital stock of Company less the number owned by the Transferring Stockholder. If any

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## North American Rescue Products, Inc. – Stockholder Agreement

Stockholder elects not to exercise this right, the stock to which he would have been entitled to purchase shall be subject to the proportionate rights of the remaining Stockholders.

1.4 Price. The price to be paid for the option shares shall be the fair market value of the option shares (option value) at 12:00 am on the day following the event resulting in the option to purchase set forth in section 1.3 above (trigger event), and shall be determined according to the procedures set forth in this section 1.4 below.

(a) If the Transferring Stockholder proposes to sell the option shares to another person, then Company (and/or the Remaining Stockholders exercising their option) may elect, by written notice to the Transferring Stockholder within the period set forth in section 1.3, to purchase the option shares according to the price and terms of the sale to the other person set forth in the Notice.

(b) Notwithstanding 1.4(a) above, the Company may elect by written notice not to use the price and terms of the sale to the other person, in which case the option value shall be determined according to the procedure set forth below.

(1) No more than ten (10) days after the trigger event the Transferring Stockholder and Company shall in good faith attempt to determine the option value. They may agree, in which case the agreed option value shall be final and binding on the parties.

(2) If the Transferring Stockholder and Company cannot agree on the option value, then within fifteen (15) days of the trigger event the Transferring Stockholder and Company shall, in good faith, attempt to agree upon and appoint an appraiser to determine the option value. For purposes of this agreement an (appraiser) is a person who by qualification and experience is qualified to determine the value of business enterprises and the securities evidencing ownership of such enterprises. If Company and Transferring Stockholder agree on an appraiser, then Company shall bear the expense of the appraiser. If the Transferring Stockholder and Company are unable to agree on an appraiser, then within thirty (30) days of the trigger event the Transferring Stockholder and Company shall each appoint an appraiser, and each party shall bear the expense of their respective appraiser.

(3) The appraiser or appraisers, as the case may be, shall provide a written report of the option value within thirty (30) days of their engagement (the total time for the appraiser's reports from the trigger event shall not exceed sixty (60) days). During the appraisal process the Company shall provide the appraisers with reasonable access to the Company's business records and facilities, subject only to the appraiser's agreeing none exists to reasonable non-disclosure non-exploitation obligations. If there are two appraisers, each is encouraged to communicate with the other about their respective determination of option value and the methodologies used to arrive at such value.

(4) If there is one appraiser his determination of option value shall be final and binding on the parties. If there are two appraisers and their determinations of option value differ by less than twenty percent (20%) (with the lowest as the base for computing the percentage of difference), then the option value shall be the arithmetic mean of the two. If there are two appraisers and their determinations differ by more than twenty percent (20%), then within five (5) days of the last of the two appraiser's determinations they shall appoint a third appraiser (the cost of which shall be shared equally by Company and the Transferring Stockholder) and within ten (10) days following such appointment, the third appraiser shall pick the most valid of the other two appraisers' determinations of option value, which in his opinion is

## North American Rescue Products, Inc. – Stockholder Agreement

in accordance with accepted practice by appraisers at the time of the determinations, and the third appraiser's selection shall be final and binding on the parties.

### 1.5 Terms.

(a) If the price is determined in accordance with section 1.4(a), then the option value shall be paid in exchange for the option shares according to the terms of the bona fide third party offer.

(b) If the option value is determined in accordance with section 1.4(b), then the option value for the option shares shall be paid to the Transferring Stockholder (i) twenty (20%) percent down at closing and (ii) the balance shall be paid in five (5) equal annual installments of principal and interest at three percentage points over the prime rate, as published by the Wall Street Journal on the date closest to the date of the trigger event.

(c) The closing of the purchase of the option shares shall take place at a location agreed upon by the parties to the sale no more than thirty (30) days after the later of (i) dispatch to the Transferring Stockholder of notice of intent to exercise the option granted hereunder by the purchasers, or (ii) delivery to the parties of appraiser(s) determination of option value.

1.6 **Stockholder Rights Upon Refusal.** If a Stockholder gives the Notice, and neither Company nor Stockholders exercise their respective options to purchase the option shares, then upon request, the other Stockholders and Company, by its duly authorized officers, shall execute reasonable instruments providing notification to all other parties to this agreement of their waiver of rights under this agreement, so as to permit the sale of the option shares within thirty (30) days of (i) the closing date set forth in the terms contained in the Notice or (ii) the termination the Company's and Stockholders' option, which ever is later. However, execution and delivery of any waiver of rights under this agreement is expressly conditioned on the transferee becoming a party to this agreement. Anyone acquiring stock of Company shall hold such stock subject to all provisions of this agreement, and shall not transfer the same without complying with the provisions of this agreement.

1.7 **Rights Reserved.** Nothing herein contained shall be construed to prevent any Stockholder from:

(a) Pledging his stock as security for any debt or obligation; provided, however, that before any transfer of said stock shall be effected by the pledgee/creditor or otherwise, Company and subsequently Stockholders shall have the option to purchase said stock or any part thereof at the price and terms provided herein, subject to all terms and conditions set forth herein for transfers. In such case, the required written notice required by section 1.2 shall be given by the pledgee of such stock. In the event that this option is exercised, payment of said price shall be made to the owner and pledgee of said stock as their interests may appear, and such payment shall constitute a complete satisfaction and release of any such pledge. In the event that the option granted herein is not exercised within the prescribed time periods, the person acquiring such stock by foreclosure or otherwise shall hold it subject to all terms and conditions of this agreement.

(b) Assigning or transferring all or part of his stock by way of gift to such Stockholder's spouse, children, or lineal descendants, or to other Stockholders, whether directly or in trust; provided that a majority in interest of the remaining Stockholders shall approve such gratuitous transfer or assignment and all transferees become parties to this agreement.

## North American Rescue Products, Inc. – Stockholder Agreement

### 2. SPECIAL STOCKHOLDER RELATIONSHIPS.

2.1 **Information.** Company's property and books and records shall be open to inspection of Stockholders from time to time upon reasonable notice by the Stockholder requesting the inspection. Company shall permit a Stockholder the right to designate up to three (3) individual(s) (including Stockholder) to inspect. The inspecting Stockholder or designee, as the case may be, may make copies or extracts of the books and records, provided that all the costs of making copies shall be borne by the inspecting Stockholder. Additionally, Company shall make any of its employees and agents (including its independent public accountants) reasonably available to the inspecting Stockholder to discuss Company's affairs, records, finances, and accounts, provided that the reasonable costs of making the employees and agents available shall be borne by the inspecting Stockholder. Company may, in its reasonable discretion, choose a reasonable place to make Company's books, records, employees, and agents available to the inspecting Stockholder other than the place where its books and records are maintained.

(a) **Non-disclosure.** Because of the nature of Company's business, any information that a Stockholder or Stockholder obtains from Company about Company or its business activities (including for example and not limitation information obtained from its books and records) shall be presumed to be Proprietary Information. A Stockholder or Stockholder's designee shall keep the Proprietary Information confidential as long as it remains Proprietary Information, and during such period a Stockholder or Stockholder shall not directly or indirectly disclose any of the Proprietary Information to any third party, unless authorized by Company in writing, or in the case of a Stockholder, which is an officer or director of the Company and it is for the purpose of carrying out his responsibilities to Company. A Stockholder shall notify Company, in writing, of any of the Proprietary Information which he asserts is not subject to these obligations and, with specificity, why it is not subject to such restrictions, prior to any disclosure. If a Stockholder or Stockholder is served with a legally enforceable request for the production of information which may include any Proprietary Information, then the Stockholder or Stockholder shall immediately notify Company and allow Company to take any actions that Company determines necessary to protect the Proprietary Information.

(b) **Proprietary Information Defined.** Proprietary Information means information about Company or its business that derives independent economic value from not being generally known to and ascertainable by other persons who may obtain economic value from its disclosure or use, and Work Product (defined below). Proprietary Information may be written, electronically stored, merged with other information, or memorized. The fact that it may be memorized, however, does not change its character. While some information considered Proprietary Information is not confidential, the form of its compilation or the manner in which it is to be used makes it Proprietary Information. Proprietary Information, however, does not include information which (i) a Person can show by written evidence was in its possession prior to disclosure by Company; (ii) becomes generally available to the public in tangible form other than by acts or omissions of a Person (or persons obtaining Proprietary Information from such Person); and (iii) is lawfully obtained from a third party who is properly in possession of such Proprietary Information, has a right to reveal the same to a Person, and did not obtain the Proprietary Information directly or indirectly from Company with restrictions on disclosure. **Work Product** means all notes, analyses, records, reports, sketches, compilations, plans, photographs (including negatives), memoranda or other documents, whether prepared by the

## North American Rescue Products, Inc. – Stockholder Agreement

Person receiving other Proprietary Information or any of its representatives, which contain, reflect or are based upon, in whole or in part, the other Proprietary Information or arise out of or are related to the other Proprietary Information.

(c) **Use.** A Stockholder shall use the Proprietary Information for the purpose of evaluating his interest in Company, and a Stockholder to carry out his duties as such. A Stockholder's dissemination of the Proprietary Information shall be limited to the employees or agents of the Stockholder whose duties justify the "need to know," and then only after those persons agree to be bound by the terms of this article in writing. A Stockholder shall not use the Proprietary Information to compete against Company in any way.

(d) **Ownership.** All Proprietary Information is and shall continue to be the exclusive property of Company, despite the fact that Proprietary Information is entrusted to a Stockholder, whether in his capacity as a Stockholder, director, officer, or employee. A Stockholder's possession of the Proprietary Information does not confer any license, interest or rights of any kind in or to the Proprietary Information.

**2.2 Supermajority Voting and Effect.** Company and Stockholders hereby agree that notwithstanding any other provision of this agreement or of any other document governing the voting rights and privileges of Stockholders, the affirmative vote of at least two-thirds (2/3) of the issued and outstanding shares of Company shall be required for any merger or share exchange involving Company's stock, any sale or exchange of substantially all of the assets of Company other than in the ordinary course of the business of Company, or the sale of all the issued and outstanding stock of the Company. Upon approval of any action specified in this section 2.2, the failure of any Stockholder to take any actions necessary for carrying out the transactions contemplated by such approval then the defaulting Stockholder shall be deemed to be notice of intent to transfer stock by a Transferring Stockholder and Company and Remaining Stockholders shall have all the rights set forth in article 1 to purchase the Transferring Stockholder's shares, which shall be deemed to be option shares.

**2.3 Co-Sale Rights.** With respect to any proposed transfer by a Transferring Stockholder, if the offered stock constitutes one third (1/3) or more of the stock, then if the Company or Remaining Stockholders do not exercise the option to purchase the option shares, each Remaining Stockholder may elect to participate in the contemplated transfer (or transfers) as a seller by delivering written notice that such Stockholder is exercising the rights granted by this section 2.3 to the Transferring Stockholder(s) and the Company within the time required for exercise of the option provided in section 1.3. If one or more Remaining Stockholders have elected to participate in such sale, the Transferring Stockholder(s) and such Remaining Stockholders shall be entitled to sell in the contemplated sale, at the same price and on the same terms, that number of shares of stock equal to the product of (i) the quotient determined by dividing the percentage of the shares (on a fully diluted basis) held by each such Stockholder, by the aggregate percentage of the shares (on a fully diluted basis) owned by the Transferring Stockholder(s) and all Remaining Stockholders electing to sell multiplied by (ii) the number of shares of stock to be purchased in the contemplated sale. This provision shall not apply to a public offering (defined below).

**2.4 Public Offering.** If an initial public offering of the Company stock is duly approved, the Stockholders will use reasonable efforts to take all necessary or desirable actions in connection with the consummation of such offering. If the public offering is an underwritten

## North American Rescue Products, Inc. – Stockholder Agreement

offering and the managing underwriters advise the Company in writing that in their opinion the existing capital structure of the Company will adversely affect the marketability of the offering, each Stockholder will consent to and vote for a recapitalization, reorganization and/or exchange of the Company and change the stock into securities that the managing underwriters, the Company determine acceptable and will take all other necessary or desirable actions in connection with the consummation of the recapitalization, reorganization and/or exchange; provided that the resulting securities reflect and are consistent with the rights and preferences among the outstanding classes of securities in effect immediately prior to such recapitalization, reorganization or exchange. For purposes of this agreement **public offering** means a public offering and sale of Shareholder Shares pursuant to an effective registration statement under applicable securities laws. Each Stockholder shall be entitled to participate in any registration of outstanding stock in proportion to his ownership. If there is a public offering this agreement shall terminate.

### 3. DISPUTE RESOLUTION

3.1 **General.** If there is any dispute, controversy, or claim related to the this agreement or Stockholder rights as they relate to Company, then the parties shall attempt in good faith to promptly resolve such dispute, controversy, or claim according to the procedures outlined in this section.

3.2 **Notice.** Upon any party becoming aware of a dispute, controversy, or claim (Grievance) between them related to their rights under this agreement or their stock ownership in Company, which they cannot resolve by ordinary commercial means, the aggrieved party (the **Petitioner**) shall, in writing, promptly notify the party against whom the Petitioner has the Grievance (the **Respondent**). The notice, while not required to be in any specific form, shall set forth with reasonable specificity (i) the nature of the Grievance, (ii) the extent commercially reasonable, all relevant documentary information, or references thereto, related to the Grievance, and (iii) the Petitioner's position and (iv) Petitioner's proposed remedy.

3.3 **Response.** Respondent shall, within ten (10) business days, respond, in writing, to the notice by (i) agreeing to the Petitioner's position and remedy or (ii) scheduling a dispute resolution meeting to occur within ten (10) business days of Respondent's response to Petitioner's Grievance. If a meeting is scheduled, then, as a part of its response, the Respondent shall also provide to Petitioner Respondent's position, and, to the extent commercially reasonable, all additional relevant documentary information or references to Respondent's position regarding the Grievance.

3.4 **Dispute Resolution Meeting.** On the date and time of the meeting scheduled according to the preceding section there shall be a meeting, which may be by phone or other means of concurrent communication. Each party shall appoint one or more individuals who have responsibility for and authority to resolve the dispute. Those individuals, and if a party deems it desirable their legal counsel, shall discuss each party's respective position, and attempt, in good faith, to resolve the dispute. They can agree to have additional meetings provided that all such meetings are concluded within twenty (20) business days of the Petitioner's Grievance. If they cannot resolve the Grievance, they shall collectively ascertain the areas where the Petitioner's and Respondent's positions are in agreement and where they cannot be reconciled. At the conclusion of this step the parties shall have (i) resolved the dispute or (ii) determined the areas of agreement and disagreement with respect to the Grievance, and they shall prepare a written



## North American Rescue Products, Inc. -- Stockholder Agreement

summary (no longer than three (3) single spaced type written pages with ordinary margins and type size) outlining the areas of agreement and disagreement.

**3.5 Arbitration.** If the parties are unable to resolve the Grievance by the preceding steps, then either party may initiate arbitration proceedings. The matter shall be settled by arbitration in accordance with the CPR Non-Administered Arbitration Rules in effect on the date of this agreement, by a sole arbitrator, provided, however, that if any party will not participate in the non-arbitration dispute resolution procedures above, then the other party may initiate arbitration before expiration of the above period. The arbitration shall be governed by the South Carolina Uniform Arbitration Act (SC Code Title 15 Chapter 48) or the Federal Arbitration Act (9 U.S.C. §§ 1-16), and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be Greenville, South Carolina. The arbitrator shall be a qualified arbitrator and lawyer licensed in South Carolina with at least fifteen (15) years experience in the areas of closely held business corporations and partnerships selected by the parties to the dispute. If they cannot agree on an arbitrator, then they shall each select one, at their respective cost, and those arbitrators, who shall also be qualified as set forth above, shall among themselves select a single qualified arbitrator. The arbitrator's fees shall be his normal hourly rate for rendering legal or arbitral services. The arbitrator is not empowered to award damages in excess of compensatory damages and each party hereby irrevocably waives all rights to recover such damages with respect to any dispute resolved by arbitration. The statute of limitations of South Carolina applicable to the commencement of a lawsuit shall apply to the commencement of an arbitration hereunder, except that no defenses shall be available based upon the passage of time during any dispute resolution process called for by the preceding sections of this article. Unless all parties to an arbitration agree otherwise the arbitrator shall issue his determination of the dispute within ninety (90) days of his appointment. This provision is not intended to alter the provisions determining option value

**3.6 General Matters Relating to Disputes.** During the pendency of the procedures set forth in this article the parties shall continue to perform, in good faith, their respective obligations under the agreement. All deadlines specified in this procedure may be extended by mutual agreement. The procedures specified herein shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this agreement. All information or communications between the parties to a Grievance in complying with aforementioned procedures shall be considered as compromise negotiation subject to Federal Rule of Evidence 408 and South Carolina Rule of Evidence 408 (both effective as of the date of this agreement).

**3.7 Costs.** If it is necessary to resolve a dispute in arbitration, then the arbitrator shall determine which party to the dispute is most at fault for the dispute and for the necessity to arbitrate. That party shall pay or reimburse, as the case may be, all costs of the arbitration, including the fees of the arbitrator and the reasonable expense of legal representation (including attorney fees) for the other party.

**3.8 Special Deadlock Resolution.** If the directors, shareholders, or those otherwise in control of Company are deadlocked in the management of the corporate affairs and because of the deadlock the business and affairs of the corporation are not being conducted to the advantage

## North American Rescue Products, Inc. - Stockholder Agreement

of Stockholders, then upon written notice a Stockholder or group of Stockholders holding at least twenty percent (20%) of the voting stock may elect in writing to have the deadlock broken. Upon such election, Company's president shall notify the individual last designated at a meeting (or written action) of the directors as the deadlock arbitrator for Company. The arbitrator, within ten (10) business days of notification, shall hear the various issues and review the information related to the deadlock, and within five (5) business days make a decision resolving the deadlock. Company and Stockholders shall reasonably cooperate with the arbitrator. The decision of the arbitrator resolving the deadlock shall be binding on Company, its Stockholders, directors and officers. It is the intention of this section to eliminate the possibility that Stockholders may cause a judicial dissolution by reason of a director or Stockholder deadlock. Initially, the special deadlock arbitrator is Robert A. Dobson, III, and he shall remain in that capacity until he is no longer willing or able to serve in that capacity or until his successor is appointed.

### 4. GENERAL

4.1 **Gender and Definitions.** For convenience the gender of persons described in this agreement will generally be either masculine or neuter. As the context so requires, however, the gender of all words used shall be interpreted to include the masculine, feminine, or neuter. Additionally, the singular of any word shall include the plural and the converse shall also be true. Defined terms shall include words derived from the root of such term.

4.2 **Construction.** Unless otherwise specified, all references to article, section, subsection, or clause are to the appropriate portion of this agreement. The captions used are included for convenience and are not relevant for interpretation.

4.3 **Interpretation.** If one or more provisions of this agreement appear to be in conflict with other provisions, then Company board of directors shall exercise reasonable discretion in interpreting the agreement and to choose which of the conflicting provisions are to control. Wide latitude is given to Company board of directors in interpreting the provisions of this agreement to accomplish the purposes and objectives of Company in the best interests of Stockholders as a group.

4.4 **No Drafting Presumptions.** Each party has received or has had the opportunity to receive independent legal advice with respect to the advisability of executing this agreement and the meaning of its provisions. All provisions shall be construed as to their reasonable meaning, with no presumptions or inferences in favor of or against any party.

4.5 **Notice.** Any notice required under this agreement must be comprehensible and in writing unless oral notice is reasonable under the circumstances (oral notice is not reasonable when written notice is specifically required hereby). Notice may be communicated in person; by telephone, telegraph, teletype, or other form of wire or wireless communication; or by mail or private carrier. Written notice is effective at the earliest of the following: (i) when mailed, if mailed postpaid and correctly addressed to the Stockholder's address shown in Company's current records; (ii) when received; (iii) three (3) days after its deposit in the United States mail, as evidenced by the postmark, if mailed postpaid and correctly addressed; or (iv) on the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee. Oral notice is effective when communicated.

4.6 **Entire Agreement; Superseding.** This agreement constitutes the entire agreement of Stockholders relating to the formation, operation, and dissolution of Company and

## North American Rescue Products, Inc. – Stockholder Agreement

with the exception of any surviving obligations under any subscription agreements supersedes all prior contracts or agreements with respect to Company.

**4.7 Binding Effect.** This agreement is binding on and inures to the benefit of Stockholders and their respective heirs, legal representatives, successors, and assigns. This section does not modify any restrictions on transfer.

**4.8 Effect of Waiver or Consent.** A waiver of or consent to any breach or default by any person in the performance by that person of his obligations under this agreement is not a consent to or waiver of any other breach or default in the performance by that person. Failure on the part of a person to complain of any act or to declare a default with respect to Company or this agreement, irrespective of how long that failure continues, does not constitute a waiver by that person of its rights with respect to that default until the applicable statute-of-limitations period has run.

**4.9 Severability.** If any provision of this agreement or the application thereof to any Person or circumstance is held invalid or unenforceable to any extent, the remainder of this agreement and the application of that provision to other Persons or circumstances shall not be affected, and that provision shall be enforced to the greatest extent permitted by law.

**4.10 Governing Law.** This agreement is governed by and shall be construed in accordance with the law of Delaware, excluding any conflict-of-laws rules or principles. This section specifically contemplates the application of the South Carolina Uniform Arbitration Act or the Federal Arbitration Act with respect to resolution of disputes.

**4.11 Time of Essence.** With regard to all dates and time periods set forth or referred to in this agreement, time is of the essence.

**4.12 Counterparts.** This agreement may be executed in any number of counterparts with the same effect as if all signing parties had signed the same document. All counterparts shall be construed together and constitute the same instrument.

**4.13 Further Actions.** In connection with this agreement and any transactions contemplated Company and each Stockholder shall execute and deliver any additional documents and instruments and perform any additional acts that may be necessary or appropriate to effectuate and perform the intent of the provisions of this agreement and those transactions.

Notice. Any notice required by this agreement shall be deposited with the U.S. Postal Service, postage prepaid, certified or registered mail, or Federal Express, prepaid, addressed to Stockholders' at the addresses held by the secretary of Company, and shall be deemed received two (2) days after being appropriately deposited.

**4.14 Termination.** This agreement shall terminate upon the bankruptcy, receivership or dissolution of Company, or by mutual consent of all parties to this agreement.

**4.15 Restrictive Endorsement.** The parties agree that all certificates representing shares of capital stock of Company shall be stamped or printed with a restrictive endorsement substantially in the following form:

The sale or transfer of the stock represented by this certificate is subject to an agreement between Stockholders and the corporation, a copy of which is on file in the office of the secretary of the corporation.

The securities represented by this certificate are not registered under the Securities Act of 1933 or any state securities laws, and may not be transferred except pursuant to an effective registration statement or an exemption from

**North American Rescue Products, Inc. – Stockholder Agreement**

registration.

4.16 **Successors Bound.** All transferees who obtain an interest by any means of the stock of Company shall take such interest subject to the terms of this agreement. No sale of stock of Company shall be recognized on the records of Company unless and until the transferee becomes a signatory to this agreement, expressly consenting to be bound by the terms hereof. Any sale in violation of this section shall be void.

4.17 **S Corporation Status.** During any period in which Company has in effect an election under section 1362 of the Internal Revenue Code of 1986, or any successor provision, Company shall not be required to recognize any sale of stock of Company in the event that such sale will cause a disqualification of Company's election.

4.18 **Covenant of Assurance by Company and Stockholders.** If Company is unable to take any action required of it hereunder because of the provisions of the applicable statutes or its Articles of Incorporation or Bylaws, Company agrees to make such amendments or provisions as may be necessary to permit it to take such action, and Stockholders agree that they will take such action as may be necessary to allow Company to take the action required of it.

4.19 **Life Insurance.** Any party hereto shall have the right to purchase life insurance on the life of any Stockholder of Company, to the extent reasonably necessary to finance any stock purchases provided for hereinabove. In such case, such insured Stockholder shall cooperate fully by performing all the requirements of the life insurer which are necessary conditions precedent to the issuance of life insurance policies.

4.20 **Amendment.** This agreement may be altered, amended, or terminated by a writing signed by all of Stockholders of Company.

4.21 **Preparation.** This agreement was prepared by Curtis Stodghill of Stodghill Law Firm Chartered as legal counsel to North American Rescue Products, Inc. He also represents Robert A. Castellani individually. The parties acknowledge that they have thoroughly discussed potential conflicts of interest with him or their separate legal counsel, and that they reasonably believe that he can act in without prejudice to his clients, and they waive the potential conflict of interest.

The parties have executed this agreement to be effective the day and year first above written.

COMPANY:

North American Rescue Products, Inc.

By: \_\_\_\_\_  
Robert A. Castellani, President

STOCKHOLDERS:

\_\_\_\_\_  
Robert M. Miller

\_\_\_\_\_  
Robert A. Castellani

North American Rescue Products, Inc. – Stockholder Agreement

NEW STOCKHOLDER SIGNATURE PAGE

The undersigned party has executed and become a party to the North American Rescue Products, Inc. Stockholders Agreement first effective October \_\_\_\_, 2004.

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Address  
\_\_\_\_\_

Manning, Rod

---

From: PJ Richardson [pjr@reevesdecon.com]  
Sent: Wednesday, October 27, 2004 7:24 PM  
To: cstodghill@teleplex.net  
Cc: Manning, Rod; Bob@narescue.com  
Subject: Service Agreement

Curt,

Spoke to Rod today, concerning the status of both the Service Agreement & Option Agreement. Unfortunately, Rod is traveling without his laptop, so he will have to wait until he gets to his office in the AM to send you the current versions. I was hoping to email you the copy I have, but I cannot find on my computer. It's late Wednesday evening and all I have is a hard copy and no fax number for you. It will be just as easy for Rod to email in the AM.

Bob & I are committed to completing both agreements on Friday while in Atlanta. See ya Friday.

Regards,  
PJR

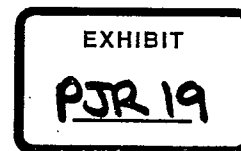
P. J. RICHARDSON, CEO  
THE REEVES GROUP, INC.  
4510 METROPOLITAN COURT  
FREDERICK, MD 21704 USA  
301-698-1596  
800-328-5563  
[pjr@reevesdecon.com](mailto:pjr@reevesdecon.com)  
[www.reevesdecon.com](http://www.reevesdecon.com)

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7/24/2007



DEF\_001697

1046

APP\_1032

29 Oct 64

Bob C  
Curt  
Rod  
H

Need to Have Ed speak with  
Curt.

- ① Speak to Ed re: Bob Contribution  
to ~~Charitable~~ Trust. Will now  
be Reeves/Ed/Billie contribution
- ② 7.5% Stock Option - Not a  
second class of Stock.
- ③ Indemnity Issues. - Provision
- ④ Board Members - Bob, Ed, Billie (Bob  
Billie is an Officer)
- ⑤ Employment Agreement Billie
- ⑥ Call Tony about calling  
Curt

EXHIBIT

PJR 21

DEF\_001818

WRITTEN CONSENT IN LIEU OF  
A MEETING OF  
STOCKHOLDERS AND DIRECTORS OF  
NORTH AMERICAN RESCUE PRODUCTS, INC.

The undersigned, pursuant to Section 228(a) of the General Corporation Law of the State of Delaware, hereby adopts the following resolutions by written consent in lieu of a meeting:

RESOLVED, that the corporation enter into and execute that certain Agreement of Termination, Settlement and Release dated November 5<sup>th</sup>, 2004, between Reeves Manufacturing, Inc., P.J. Richardson, the corporation, and Robert A. Castellani (Release). The President (and such other officers as he designates) is hereby authorized, empowered, and directed to negotiate and take any other action desirable to consummate the Release.

Dated this 5<sup>th</sup> day of November, 2004.

*Robert A. Castellani*

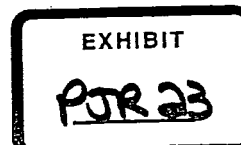
ROBERT A. CASTELLANI  
Shareholder and Director

P.J. RICHARDSON  
Director

*Robert M. Miller*

ROBERT M. MILLER  
Shareholder

1



S001130

1048

APP\_1034



PJ Richardson

From: P.J. Richardson [pjr@reevesdecon.com]  
Sent: Saturday, November 13, 2004 3:50 PM  
To: Bob Castellani (Bob@narescue.com)  
Cc: Rod Manning (rmanning@akerman.com)  
Subject: Option Agreement

Hey Brother,

Confirming our discussion earlier today concerning the 7.5% Option Agreement, I spoke with my estate planning attorney and he advises that the language, already existing in para 2.2 is fine for what I need to do for estate planning purposes. I'm not sure who is supposed to finalize the agreement Rod or Curt? I've copied Rod, maybe you can discuss with Curt and we can move this along. Don't forget to sign the Termination Agreement and return to me.

Regards,  
PJ

P. J. RICHARDSON, CEO  
THE REEVES GROUP, INC.  
4510 METROPOLITAN COURT  
FREDERICK, MD 21704 USA  
301-698-1596  
800-328-5563  
[pjr@reevesdecon.com](mailto:pjr@reevesdecon.com)  
[www.reevesdecon.com](http://www.reevesdecon.com)

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1/4/2007



DEF\_000411

1049

APP\_1035

**Curtis Stodghill**

**From:** Ed Kidner [EdK@mksh.com]  
**Sent:** Thursday, February 24, 2005 12:13 PM  
**To:** 'Curtis Stodghill'  
**Subject:** RE: Reeves

Curt,

will be forwarding info to you shortly. My understanding is that there will be 2 payments to the charity. One as a cash contribution to the charity, and the second as purchase price for the stock. Please advise if this is correct.

Thanks

Ed

-----Original Message-----

**From:** Curtis Stodghill [mailto:cstodghill@teleplex.net]  
**Sent:** Tuesday, February 15, 2005 8:19 AM  
**To:** 'Ed Kidner'  
**Subject:** RE: Reeves

Good morning Ed:

I appreciate the follow up and update. We are eagerly awaiting the information.

Curt

Curtis Stodghill  
 Stodghill Law Firm Chartered  
 PO Box 2431  
 Greenville, SC 29602-2431  
 300 East McBee Avenue, Suite 300  
 Greenville, SC 29601-2899  
 Phone 864.271.0966  
 Fax 864.770.6167  
 Cell 864.419.9976  
 cstodghill@teleplex.net

**From:** Ed Kidner [mailto:EdK@mksh.com]  
**Sent:** Monday, February 14, 2005 5:02 PM  
**To:** 'cstodghill@teleplex.net'  
**Subject:** FW: Reeves

-----Original Message-----

**From:** Ed Kidner  
**Sent:** Monday, February 14, 2005 5:01 PM  
**To:** 'cstodghill@teleplex.com'  
**Subject:** Reeves

Kirk,

We have been attempting to meet with P.J. to wrap-up the computations for Bob. However, he has been traveling, and has been ill. We had to cancel a meeting set for tomorrow due to illness and are trying to reschedule for the end of the week. I will advise as soon as we can proceed.

7/16/2007

S000568



1050

APP\_1036

Regards,

Ed

Edward F. Kidner, JD, CPA  
Partner  
McLean, Koehler, Sparks and Hammond  
11311 McCormick Road, Suite 100  
Hunt Valley, MD 21031  
(410) 296-6200 Fax (443) 589-1165

7/16/2007

S000569

1051

APP\_1037

Manning, Rod

---

From: Curtis Stodghill [curt@stodghill-law.com]  
Sent: Thursday, April 21, 2005 2:17 PM  
To: Manning, Rod  
Subject: Stock Power  
Attachments: stock dobson tape ministries stock power cert 8.doc

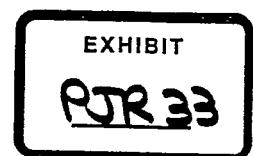
Rod:

This is the proposed form of stock power for the transfer to PJ

Curt

Curtis Stodghill  
Stodghill Law Firm Chartered  
PO Box 2431  
Greenville, SC 29602-2431  
300 East McBee Avenue, Suite 300  
Greenville, SC 29601-2899  
Phone 864.271.0966  
Fax 864.770.6167  
Cell 864.419.9976  
[curt@stodghill-law.com](mailto:curt@stodghill-law.com)

7/24/2007



DEF\_001750

1052

APP\_1038

## IRREVOCABLE STOCK POWER

(assignment separate from certificate)

In consideration of THREE HUNDRED THIRTY SIX THOUSAND DOLLARS (\$336,000) Dobson Tape Ministries, Inc. does hereby sell, assign and transfer to: P. J. Richardson, ONE HUNDRED SEVENTY SIX AND 74/100 (176.74) shares of the common capital stock of North American Rescue Products, Inc., a Delaware corporation, represented by Certificate No. 8 endorsed to Dobson Tape Ministries, Inc. by Robert A. Castellani on April 30, 2005 and which at this time is standing in the name of the Dobson Tape Ministries, Inc. on the books of said company (certificate attached).

Dobson Tape Ministries, Inc. warrants that it is selling, assigning, and transferring all rights title and interests it may have as a consequence of the aforementioned conveyance by Robert A. Castellani. With the exception of the limited warranty of title above this assignment is made "as is, where is" without any further warranties, and P. J. Richardson releases Dobson Tape Ministries, Inc. from any and all claims to the contrary.

---

The undersigned does irrevocably constitute and appoint Curtis Stodghill, attorney to transfer the said stock as the case may be, on the books of the company, with full power of substitution in the premises.

Dated: \_\_\_\_\_

Witness:

Dobson Tape Ministries, Inc.

By: \_\_\_\_\_  
Robert A. Dobson, III

DEF\_001751

1053

APP\_1039

**Manning, Rod**

**From:** Ed Kidner [EdK@mksh.com]  
**Sent:** Friday, April 22, 2005 1:52 PM  
**To:** Manning, Rod  
**Subject:** FW:  
**Attachments:** dobson tape ministries stock power cert 8.doc

---

**From:** Curtis Stodghill [mailto:curt@stodghill-law.com]  
**Sent:** Friday, April 22, 2005 8:27 AM  
**To:** Ed Kidner  
**Cc:** bob@narescue.com  
**Subject:**

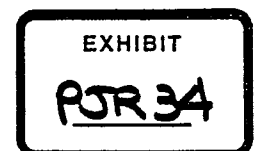
Ed: I trust you received the report I faxed to you yesterday. Additionally, attached is the form of stock power which is intended to convey the 7.5% from the charity to PJ. I have sent same to Rod yesterday. Curt

Curtis Stodghill  
Stodghill Law Firm Chartered  
PO Box 2431  
Greenville, SC 29602-2431  
300 East McBee Avenue, Suite 300  
Greenville, SC 29601-2899  
Phone 864.271.0966  
Fax 864.770.6167  
Cell 864.419.9976  
curt@stodghill-law.com

7/24/2007

1054

APP\_1040



DEF\_001754

## IRREVOCABLE STOCK POWER

(assignment separate from certificate)

In consideration of THREE HUNDRED THIRTY SIX THOUSAND DOLLARS (\$336,000) Dobson Tape Ministries, Inc. does hereby sell, assign and transfer to: P. J. Richardson, ONE HUNDRED SEVENTY SIX AND 74/100 (176.74) shares of the common capital stock of North American Rescue Products, Inc., a Delaware corporation, represented by Certificate No. 8 endorsed to Dobson Tape Ministries, Inc. by Robert A. Castellani on April 30, 2005 and which at this time is standing in the name of the Dobson Tape Ministries, Inc. on the books of said company (certificate attached).

Dobson Tape Ministries, Inc. warrants that it is selling, assigning, and transferring all rights title and interests it may have as a consequence of the aforementioned conveyance by Robert A. Castellani. With the exception of the limited warranty of title above this assignment is made "as is, where is" without any further warranties, and P. J. Richardson releases Dobson Tape Ministries, Inc. from any and all claims to the contrary.

---

The undersigned does irrevocably constitute and appoint Curtis Stodghill, attorney to transfer the said stock as the case may be, on the books of the company, with full power of substitution in the premises.

Dated: \_\_\_\_\_

Witness:

Dobson Tape Ministries, Inc.

By: \_\_\_\_\_  
Robert A. Dobson, III

DEF\_001755

1055

APP\_1041

# IRREVOCABLE STOCK POWER

(assignment separate from certificate)

In consideration of THREE HUNDRED THIRTY SIX THOUSAND DOLLARS (336,000) Dobson Tape Ministry does hereby sell, assign and transfer to: P.J. Richardson, ONE HUNDRED SEVENTY SIX and 74/100 (176.74) shares of the common capital stock of North American Rescue Products, Inc., a Delaware corporation, represented by Certificate No. 8 endorsed to Dobson Tape Ministry by Robert A. Castellani on April 30, 2005, and which at this time is standing in the name of Dobson Tape Ministry on the books of said company (certificate attached).

Dobson Tape Ministry warrants that it is selling, assigning, and transferring all rights, title and interests it may have as a consequence of the aforementioned conveyance by Robert A. Castellani. With the exception of the limited warranty of title above, this assignment is made "as is, where is" without any further warranties, and P.J. Richardson releases Dobson Tape Ministry from any and all claims to the contrary.

The undersigned does irrevocably constitute and appoint Curtis Stodghill, attorney to transfer the said stock as the case may be, on the books of the Company, with full power of substitution in the premises.

Dated: Apr. 13, 2005

Dobson Tape Ministry

By Robert A. Dobson, III  
Robert A. Dobson, III

Witness:

Curtis Stodghill

EXHIBIT

PJR 37

1056

S001207

APP\_1042



**PJ Richardson**

**From:** "Bob Castellani" <bob@narescue.com>  
**To:** "PJ Richardson" <pjr@extolgroup.com>  
**Cc:** "Curt Stodghill" <curt@stodghill-law.com>; "James Harris" <charris@saul.com>  
**Sent:** Thursday, May 12, 2005 9:43 AM  
**Subject:** RE: Conference Call

Hey PJ,

I had people in town and they are leaving today. I'll ask Curt about a conference call but I'm starting to have concerns about the cost and the complexity of getting this done to both of our satisfaction. The original "hand shake" agreement worked so well because it was simple. This is becoming anything but simple and has the potential cost us both a great deal of money, time and hair. I just got the bill from Curt for the last few months which totaled about \$12,000. These expenses are directly related to memorializing our original intentions of our hand shake agreement.

My concern is we had a great deal on the table which addressed every aspect of the original agreement while allowing me to donate all the funds to support missionary work and us additional tax breaks. In my opinion it was the "perfect agreement" and it never really got off the ground. Here is my suggestion.

Since it's clear the NARP's stock price is going to rise which will nullify our original proposal and I've liquidated stock to cover some of the most time critical pledges I've made with "my share" of the sell of Reeves we can slow down. Once I get the new appraisal, I'll follow as closely as I can the old "hand shake" agreement as the template for any new agreement. This will give us a clean starting point with clear rolls and responsibilities. You will be able to move forward as an investor (you) and I as a share holder who is selling stock. We then can react to each other request with a bias to getting this deal done.

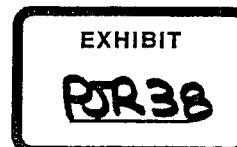
Just so you know, nothing has changed in my mind about getting this done for you and Billie. I just believe this is getting very complicated and it's getting to be a distraction with the potential to become very distracting. I also understand your concerns about investing money in NARP. Since I writing this very fast please don't read into it a change in position or tone. Please forgive the bad grammar. I spoke with Curt about your request to have access to the outside appraiser. If I understood correctly he has no problem with that just have your attorney contact him.

Best Bob

Robert A. Castellani  
President  
North American Rescue Products, Inc.  
481 Garlington Road, Suite A  
Greenville, SC 29615-4619  
Phone: 864.675.9800  
Fax: 864-675.9880  
<http://www.NARescue.com>

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**From:** PJ Richardson [mailto:pjr@extolgroup.com]  
**Sent:** Wednesday, May 11, 2005 8:27 PM  
**To:** Bob Castellani  
**Cc:** Curt Stodghill; James Harris



5/12/2005

DEF\_001847

1057

APP\_1043

**Subject:** Conference Call

Bob,

I know we are trying to wrap this up as quickly as possible. I left you a voice mail yesterday about setting up a conference call for the four of us. I didn't hear from you today in response to yesterdays message. Can you let me know when you and Curt are available?

IN HIM,  
PJ

P.J.RICHARDSON  
EXTOL GROUP, INC.  
6905 WIMBLEDON, COURT  
NEW MARKET, MD 21774  
301-865-4403 VOICE  
301-865-9825 FAX  
301-639-8704 CELL  
[pjr@extolgroup.com](mailto:pjr@extolgroup.com)  
[www.extolgroup.com](http://www.extolgroup.com)

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5/12/2005

DEF\_001848

1058

APP\_1044

*Stodghill Law Firm Chartered*

6 December 2005

Eric G. Orlinsky  
Saul Ewing, LLP  
100 South Charles Street, Suite 1500  
Baltimore, Maryland 21201

Reference: Richardson/North American Rescue Products, Inc.

Dear Eric:

It was July when I last heard from you, and you mentioned that you were formulating a plan about the referenced. If my recollection serves me, when we had our more detailed telephone conversation I had suggested that P.J. Richardson merely retain the proceeds of the sale of Reeves and disclaim any purported rights to purchase NARP stock. I am assuming that since we have heard nothing further from you or Mr. Richardson about this, the two of you have reached the same conclusion.

If I am incorrect in my assumption, please let me know.

With kind regards, I am

Very truly yours,



Curtis Stodghill

P.O. Box 2431 Greenville, SC 29602-2431 • 300 East McBee Avenue, Suite 300 Greenville, SC 29601-2899  
Phone 864.271.0966 • Fax 864.770.6167 • Cell 864.419.9976 • E-mail cstodghill@teleplex.net

EXHIBIT

**PJR41**

DEF\_001849

1059

APP\_1045

SAUL  
EWING  
Attorneys at Law  
A Delaware LLP

Celebrating 85 years of service.

To Bob  
675-9880

FYI Curt

Eric G. Orlinsky  
Phone: (410) 332-8687  
Fax: (410) 332-8688  
EOrlinsky@saul.com  
www.saul.com  
Our File: 948773.2

January 4, 2006

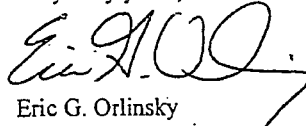
Curtis Stodghill, Esq.  
Stodghill Law Firm Chartered  
P.O. Box 2431  
Greenville, SC 29602-2431

Re: Richardson/North American Rescue Products, Inc.

Dear Curtis:

I apologize for the delay in responding, but I have been extremely busy closing a number of year-end transactions. These transactions explain not only my delay in responding to your letter, but the delay in getting back to you with a plan since our last communication in July. In response to your letter of December 6, 2005, I would not assume that the suggestion made back in July and referenced in your letter is a final conclusion that the Richardsons have reached. Now that my schedule has improved, I hope to have further discussions with P.J. and Billie on this subject during the first quarter of 2006 and expect to get back to you accordingly.

Very truly yours,

  
Eric G. Orlinsky

EGO/ap

cc: Mr. & Mrs. P.J. Richardson

EXHIBIT

PJR42

Lockwood Place • 500 East Pratt Street • Baltimore, MD 21202-3171

Phone: (410) 332-8600 • Fax: (410) 332-8862

BALTIMORE CHESTERBROOK HARRISBURG NEWARK PHILADELPHIA PRINCETON WASHINGTON WILMINGTON

A DELAWARE LIMITED LIABILITY PARTNERSHIP

874297.1 1/5/06

S001191

1060

APP\_1046



Eric G. Orlinsky  
Phone: (410) 332-8687  
Fax: (410) 332-8688  
EOrlinsky@saul.com  
www.saul.com

April 17, 2007

Curtis Stodghill, Esq.  
The Stodghill Law Firm, Chartered  
P.O. Box 2431  
Greenville, SC 29602-2431

Re: Richardson/North American Rescue Products, Inc.

Dear Mr. Stodghill:

This letter is a follow-up to my letter to you of January 4, 2006. In that letter, I advised you that we intended to contact you during 2006 to further discuss Mr. Richardson's interest in North American Rescue Products, Inc. ("NARP"). Since that time, Mr. Richardson has been involved in resolving various disputes with DHS Technologies LLC ("DHS") and Reeves Emergency Management Systems, LLC ("EMS") arising out of the sale of the Reeves Manufacturing business to EMS.

As you may be aware, one of the reasons that we have been reluctant to proceed in addressing our interest in NARP was due to non-compete restrictions that Mr. Richardson had entered into with DHS and EMS. As we hope you will appreciate, we were trying, among other things, to protect NARP and Mr. Castellani from becoming involved in any issues with DHS or EMS. As a result of the settlement of all of the claims among Mr. Richardson, Extol Group, Inc., DHS and EMS, Mr. Richardson has now been released entirely from any non-compete obligations to DHS and EMS.

Accordingly, Mr. Richardson now desires to exercise his option to purchase seven and one-half percent (7.5%) of the common stock of NARP. Under the terms of the October 4, 2004 Option Agreement between Mr. Richardson and NARP, Mr. Richardson is entitled to purchase those shares at a price of \$0.01 per share. In order that Mr. Richardson may formally exercise this stock option, we would appreciate receiving information as to the number of shares currently outstanding so that we may calculate the number of shares to which Mr. Richardson is entitled under this option and the purchase price that he is required to tender for the shares.

EXHIBIT

PJR 45

500 East Pratt Street • Baltimore, MD 21202-3133 • Phone: (410) 332-8600 • Fax: (410) 332-4862  
BALTIMORE CHESTERBROOK HARRISBURG NEWARK PHILADELPHIA PRINCETON WASHINGTON WILMINGTON  
A DELAWARE LIMITED LIABILITY PARTNERSHIP

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APP\_1047

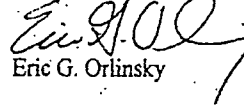
Curtis Stodghill, Esq.

April 17, 2007

Page 2

If you have any questions, please call me. We look forward to your prompt response.

Very truly yours,

  
Eric G. Orlinsky

EGO/ap

cc: Mr. P. J. Richardson

922761.1 4/17/07

DEF\_000413

1062

APP\_1048



17 May 2007

Eric G. Orlinsky  
Saul Ewing, LLP  
Lockwood Place  
500 East Pratt Street  
Baltimore, MD 21202-3171

Reference: PJ Richardson/North American Rescue Products, Inc.

Dear Eric:

This letter is in response to yours of 17 April 2007. Before responding to your demand, I am going to share NARP's perspective which I hope you will find informative.

For years Bob and PJ each had a 25% interest in the other's business according to a document which outlined the business relationship between Reeves and NARP. PJ and Bob agreed to reduce their respective interests to 7.5% each. This reduction was mutual, although it was primarily motivated by PJ's decision to sell Reeves, and the prospect of a 25% reduction to the amount he would realize on the sale was unacceptable. Again, the decision was mutual, so Bob was amenable. In addition, during this period and up to the time of the Reeves sale, NARP compensated Reeves and its principals for services Reeves and the principals provided on behalf of NARP.

During PJ's negotiations to sell Reeves, he determined that even Bob's reduced 7.5% interest would reduce the sales proceeds to much. This concern was amplified because the proposed purchase was cast in the form of an asset transaction, and the tax strategies PJ intended to use would be more difficult to implement with Bob receiving a ratable amount of the proceeds.

Bob and PJ agreed (at a meeting I attended with PJ's other counsel in Atlanta) that they would release their respective ownership rights in the other's company. In that same meeting there were discussions about what Bob and PJ wanted to accomplish after the release and the Reeves sale.

It was Bob's hope that PJ would make a donation to a charity of Bob's choice. Bob hoped that the donation would be about 7.5% of the amount realized from the Reeves sale. This would help PJ's tax situation, and accomplish Bob's charitable objectives. With Bob and PJ sharing similar points of view, Bob would then look very favorably upon PJ being able to purchase up to 7.5% of NARP stock at a favorable price, or having an option to do that. In the meeting it was unequivocally stated that those hopes were precatory and based upon the years of trust, goodwill, and shared vision they held, and would not be an enforceable agreement.

PJ's counsel then prepared a document titled "Agreement of Termination, Settlement, and Release" which included language which purports to give PJ the option to purchase 7.5% of

201 East McBee Avenue, Suite 300 A, Greenville, SC 29601 • P.O. Box 2431, Greenville, SC 29602

Phone: 864.271.0986 • Fax: 864.770.6167 • [www.stodghill-law.com](http://www.stodghill-law.com)

EXHIBIT

AJR 46

S000545

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Letter to Erick G. Orlinsky

17 May 2007

Page 2 of 3

NARP stock according to an "Option Agreement." The document calls for Bob to release all rights in Reeves, and at the same time purports to give PJ some right to purchase 7.5% NARP stock by an agreement which, on the face of the release, was not yet in existence. I want to emphasize that the "Option Agreement" referred to in the release does not exist; there were discussions about an option, but there is not and never has been an option for PJ or any of his affiliates to purchase NARP stock. As an aggravating factor, PJ's lawyer, by design or otherwise, did not provide me a draft of the document to review before it was submitted to Bob for signature.

Bob was still willing to discuss carrying out the desires they articulated in the meeting even after PJ's attempted contravention of their understanding. There were, as it turns out, substantive income tax concerns about the use of options - the effect the option may have on NARP's S-Corporation status and the adverse income tax treatment to PJ of an option exercise. So, we had discussions and undertook to implement a different set of possibilities to accommodate those tax concerns.

The new plan called for Bob to contribute 7.5% of NARP stock to a charity. PJ would then have the opportunity to purchase the stock from the charity. The contribution and purchase were to be effected at fair market value. Arrangements were made with an independent qualified 501(c)(3) charity. This was a particularly opportune time for the purchase because of a substantial reduction in value we expected. The value reduction was the consequence of NARP's business transition necessitated by the sale of Reeves (Reeves would no longer provide the operational support to NARP, and had to be constructed by Bob from scratch). Fair market value, determined by an independent valuation expert, turned out to be approximately what Bob would have realized from the 7.5% interest in Reeves had it not been previously released. However, PJ and his counsel decided not to go forward with the purchase, and Bob did not make the charitable contribution.

Shortly after the Reeves closing, we heard that disputes began to arise. We were told about DHS disputes related to certain of the representations made pursuant to the sale of the business by PJ. Attorneys from your office asked for us to let them know if DHS made any information requests, which we were pleased to do. We also were made aware of a dispute between PJ and Golden Seasons, a supplier which NARP also uses, related to PJ or Reeves failing to make good on an agreement to purchase some type of tents. My understanding was that Reeves ordered tents to be produced overseas which were subject to IP protection in the US. Bob interceded with Golden Seasons on PJ's behalf, and mitigated the problem financially and by convincing Golden Seasons to provide documents which were helpful for PJ's defense. I believe that at least one of the tents is still in NARP's warehouse today. The final dispute we were aware of relates to Reeves controller, who alleged that he was entitled to some share of the sale proceeds.

Other than the hand in resolving the Golden Seasons matter, neither Bob nor I know how the other matters were resolved. Neither Bob nor NARP had any interest in those disputes, other than hoping that PJ resolved them favorably to his interest. Additionally, other than stated above, there was no concern about Bob or NARP discussing or being involved in any of those matters. They were PJ's disputes, and there were no claims of wrongdoing by Bob or NARP.

S000546



Letter to Erick G. Orlinsky  
17 May 2007  
Page 3 of 3

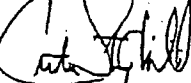
Bob and NARP vigorously dispute PJ's rights to purchase NARP stock as claimed in your letter. Bob and NARP expressly reject your demand on behalf of PJ to purchase 7.5% of NARP stock for \$.01 per share. I previously stated to you or other members of your firm that if PJ wished to purchase NARP stock, it would be at the price and on the terms appropriate at the time of the purchase. PJ had the opportunity to make a very advantageous purchase of NARP stock in the spring of 2005, which he rejected. I want to reiterate there is no option agreement, and PJ does not have the right to purchase NARP stock.

Since it is apparent from your letter that PJ believes that he has some right to purchase NARP stock and we believe he does not, we have filed a declaratory judgment action so that a court may resolve this disagreement. I have enclosed a copy of the pleading for your convenience. Since it was filed only today, service has not yet been completed.

If PJ is sincerely interested in pursuing a purchase of NARP, I will be happy to discuss the most recent valuation information upon receipt of an executed confidentiality agreement, which I am also enclosing with this letter.

With kind regards, I am

Very truly yours,

  
Curtis Stodghill

Enclosures

C: Robert A. Castellani  
Bernie Ellis

S000547

1065

APP\_1051

# Nelson Mullins

Nelson Mullins Riley & Scarborough LLP  
Attorneys and Counselors at Law  
104 South Main Street / Ninth Floor / Greenville, SC 29601  
Tel: 864.250.2300 Fax: 864.232.3925  
www.nelsonmullins.com

Lane W. Davis  
Tel: 864.250.2245  
lane.davis@nelsonmullins.com

August 4, 2008

Bernie W. Ellis, Esquire  
Post Office Box 447  
Greenville, SC 29602

RE: North American Rescue Products, Inc. v. P.J. Richardson  
CA No. 2007-CP-23-3266  
NMRS File No. 30528/01500

Dear Bernie:

During last Thursday's hearing before the Court, North American Rescue Products, Inc. ("NARP") took the position that P.J. Richardson never offered to pay Robert Castellani his share of the proceeds from the sale of the assets of Reeves Manufacturing, Inc. ("Reeves"). As you know, Mr. Castellani's 7.5% share of the Reeves' sale totals \$415,988. Prior to now, Mr. Richardson believed that Mr. Castellani would only accept his ongoing share of the proceeds through Dobson Ministries. However, Dobson Ministries' involvement in the parties' contractual relations proved highly troubling and problematic.

Based upon NARP's most recent position at the hearing, it now appears as if Mr. Castellani does (or did) not object to receiving payment directly. Accordingly, if Mr. Castellani now seeks direct payment for his 7.5% equity interest in Reeves, P.J. Richardson hereby tenders payment of the \$415,988 pursuant to the parties' original contract (as amended in Charleston) and under the parties' agreement arising out of the Atlanta meeting. Mr. Richardson has long since set aside these funds for disbursement to Mr. Castellani. Please let us know where to send the check (i.e., to you or Bob Castellani).

It is our hope that Mr. Richardson's efforts in this regard might clear up another piece of the parties' three-pronged agreement. Only P.J. Richardson's ongoing interest in NARP would then remain unresolved.

Very truly yours,

*LWD*  
Lane W. Davis

LWD:ap

EXHIBIT

PJR 47

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APP\_1052

  
**STODGHILL Law Firm**  
Uncommon Business Sense

6 October 2008

By Hand Delivery  
C/O Rivers S. Stillwell, Esquire  
Lane W. Davis, Esquire  
A. Marvin Quattlebaum, Esquire  
Nelson Mullins  
104 South Main Street  
Greenville, SC 29601

Reference: North American Rescue Products, Inc. v. P.J. Richardson  
Judgment of Specific Performance

Gentlemen:

By delivery of this letter to you on behalf of your client P.J. Richardson, and in accord with the referenced, North American Rescue, Incorporated (NAR) will tender seven and one-half percent (7.5%) of the outstanding common capital stock of NAR (the Stock) to Mr. Richardson at my offices located in the NBSC Building, 201 E. McBee Avenue, Suite 300-A; Greenville, SC 29601; Friday 10 October 2008 at 4:00 p.m. EDT.

An accurate photo static copy of fully executed properly issued stock certificate number 29 for 118,32 shares representing the Stock is enclosed with this letter. Also enclosed is an accurate photo static copy of the North American Rescue Products, Inc. Stockholder Agreement and First Amendment along with Fourth New Stockholder Signature Page.

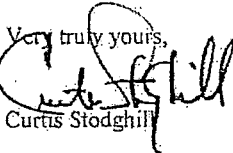
If Mr. Richardson intends to receive the Stock pursuant to the referenced, then he must tender (i) Two Million Nine Hundred Thirty Six Thousand Three Hundred Dollars (\$2,936,300); and (ii) the fully executed and completed Fourth New Stockholder Signature Page, which is included with this letter, by delivery to me of both (i) and (ii) at the designated location and time of NAR's Stock tender. If Mr. Richardson intends to pay by check, it must represent collected funds.

Please note that NAR served its notice of appeal related to the referenced, which will be withdrawn if Mr. Richardson accepts NAR's tender as described herein.

Please govern yourself accordingly.

With kind regards, I am

Very truly yours,

  
Curtis Stodghill

C: Robert A. Castellani  
Bernie W. Ellis

201 East McBee Avenue, Suite 300 A, Greenville, SC 29601 • P.O. Box 2431, Greenville, SC 29602

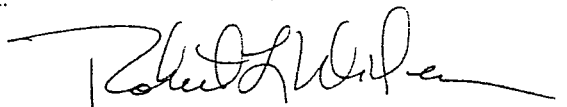
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1067

APP\_1053

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material. I also certify that this Record is in compliance with the August 13, 2007 order of the South Carolina Supreme Court.



Robert L. Widener  
McNAIR LAW FIRM, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

Bernie W. Ellis  
McNAIR LAW FIRM, P.A.  
Post Office Box 447  
Greenville, South Carolina 29602  
(864) 271-4940

ATTORNEYS FOR  
APPELLANT/RESPONDENT

August 20, 2010

**THE**  
**WORLD'S**  
**GREATEST**  
**TRAVEL**  
**AGENCY**



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## STATEMENT OF ISSUES

1. The trial court erred in denying Appellant-Respondent's directed verdict motion because, viewing the evidence in favor of Respondent-Appellant, there is no evidence of any enforceable agreement or promise, written or oral, allowing Respondent-Appellant to have or purchase any stock in Appellant-Respondent.
2. The Termination Agreement between the parties is unambiguous, and any ambiguity must be construed in favor of Appellant-Respondent because Respondent-Appellant drafted the Termination Agreement.
3. The merger clause in the Termination Agreement between the parties precludes any consideration or enforcement of any oral or written agreement or understanding that may have existed at the time of or prior to the execution of the Termination Agreement.
4. There is no evidence of any enforceable agreement, written or oral, reached after the Termination Agreement between the parties.
5. Any option agreement to purchase stock from Appellant-Respondent failed as a matter of law, because it was not in a writing approved by the Board of Directors as required by controlling principles of Delaware law, nor did it meet the other requirements imposed by controlling Delaware law, including but not limited to: the amount of stock, the duration of the option, and the consideration to be paid for the stock.
6. There is no evidence supporting Respondent-Appellant's claim of promissory estoppel and, assuming any such evidence based on conduct prior to the parties' Termination Agreement, any such claim is precluded by the merger clause in the parties' Termination Agreement.
7. There is no evidence supporting any claim of promissory estoppel based on conduct occurring after the parties' Termination Agreement.

## STATEMENT OF CASE

This contract action arises from an alleged option to purchase stock in a Delaware Corporation. It involves two written contracts, the "2000 Agreement" and the subsequent "Termination Agreement."

Under the 2000 Agreement, the Defendant (PJ) originally was to receive 25% of the stock in Plaintiff (NARP) in exchange for NARP's principal (Bob) receiving 25% of the stock in PJ's company, Reeves Manufacturing, Inc. (RMI). (R. 923-924). It is undisputed these percentages were later reduced to 7.5%. (R. 306). It is also undisputed the parties never exchanged stock as contemplated by this contract. (R. 312).

PJ began negotiating with a third-party for the sale of RMI, and ultimately sold all of its assets and goodwill. (R. 342). At the same time, the parties began discussing alternatives to the 2000 Agreement whereby the interests set forth therein might be preserved or replaced. These discussions included a written "Stock Option Agreement" forwarded by NARP to PJ for his consideration. Unbeknownst to anyone, including NARP and Bob, PJ signed this agreement, dated it as October 4, 2004, stuck it in a drawer or file, and never advised NARP or Bob that he had signed or accepted this agreement. (R. 290-292; 355-356; 926-929). He continued to discuss other alternatives with NARP and proposed agreements that differed from the October 4, 2004 agreement. In response to this October 4 "option agreement" that PJ secretly signed, PJ's attorney sent NARP's attorney a counterproposal that contained terms different from that of the October 4 "option agreement." (R. 316-317; 930-952; 953-977). Discussions continued at an October 29 meeting in Atlanta, which is the principal source of PJ's claims of an oral agreement that he would have an option to purchase NARP's stock.

PJ's attorney drafted an "Agreement of Termination, Settlement and Release." (the Termination Agreement). (R. 383; 924a-924e). PJ signed this Agreement on November 4, 2004, gave it an effective date of November 4, 2004, and forwarded it to Bob, requesting that he sign it on behalf of NARP. In so doing, PJ did not disclose the existence of the secretly-signed October 4 agreement. Bob signed the Termination Agreement as requested by PJ on November 8, 2004, without suggesting or making any changes to the language used by PJ. The Termination Agreement provided:

1. The 2000 Agreement and any agreements, understandings, undertakings, or arrangements relating to or arising out of the 2000 Agreement were terminated.
2. Any and all claims or potential claims of any nature whatsoever and in any manner related to the 2000 Agreement were settled.
3. PJ and RMI released NARP and Bob from any claim or demand that could be or might be asserted that arose out of or related to the 2000 Agreement. NARP and Bob likewise released PJ and RMI.
4. The Termination Agreement did not release the parties from "that certain, separate Option Agreement dated 15 Dec, 2004" under which PJ could buy 7.5% of NARP.
5. The Termination Agreement set forth the entire agreement of the parties and merged all prior discussions and agreements, oral or written, between the parties.

(R. 924a-924b, ¶¶ 1-4, 6). Nothing in the Termination Agreement made it or any of its terms conditional upon any past, present, or future event. No written option agreement, dated December 15, 2004, or otherwise, existed at the time of the Termination

Agreement. The parties never entered an option agreement dated December 15, 2004, or otherwise. PJ inserted this December 15 date in the Agreement prior to sending it to Bob for his execution.. In January 2005, PJ sold 100% of RMI to the third-party under separate agreements for RMI's assets and its goodwill. (R. 342).

The parties continued to discuss the terms of a potential agreement whereby PJ might obtain an ownership interest in NARP. During these discussions, NARP made numerous proposals to PJ but he never accepted any of them and never said he believed there already was a binding agreement between the parties. Throughout these discussions, PJ continued to keep his secret of having signed the October 4, 2004 option agreement. PJ admitted the parties never reached an executed agreement. (R. 385).

On December 6, 2005, NARP's attorney wrote PJ's attorney and asked whether PJ had agreed to abandon the discussions and any attempt to purchase NARP's stock. (R. 1059). PJ's attorney responded with a January 6, 2006 letter stating PJ had not reached any such conclusion and planned to "get back" to NARP in the first quarter of 2006. (R. 1060). Again, no mention was made of the secretly-signed October 4 agreement or any belief by PJ that the parties had some existing agreement that allowed him to purchase or acquire 7.5% of NARP's stock.

Fifteen months later, PJ's attorney "got back" to NARP in a "follow-up" letter dated April 17, 2007 letter. After offering several reasons for the delay in getting back to NARP to "discuss" PJ's interest in NARP, the letter advised that PJ "now desires to exercise his option to purchase" 7.5% of NARP's stock "[u]nder the terms of the [secretly-signed] October 4, 2004 Option Agreement" between PJ and NARP at one penny per share. (R. 1061-1062). NARP's attorney responded with a May 17, 2007 letter

that denied PJ had any right to any ownership interest in NARP and forwarded a courtesy copy of the complaint for declaratory judgment used to commence the present action. (R. 1063-1065).

PJ counterclaimed and later filed amended counterclaims that set forth evolving theories of how and why he had an ownership interest in NARP. In his original counterclaim, PJ made the following contract claims:

1. The parties entered a written option agreement on October 4, 2004, granting PJ the right to purchase 7.5% of NARP's stock at one penny per share [this being the secretly-signed agreement noted above]; NARP refuses to perform; and PJ is entitled to specific performance of this October 4, 2004 Option Agreement. (R. 13-15, ¶¶ 39-43, 52-55).
2. If the Option Agreement is not enforceable, then PJ is entitled to return to his prior position under the 2000 Agreement. (R. 15, ¶ 57).

In making these claims, PJ admitted the execution of the Termination Agreement but alleged the October 4 Option Agreement was kept fully intact under the Termination Agreement. (R. 14, ¶ 48).<sup>1</sup>

PJ subsequently served an amended counterclaim in response to an amended complaint, in which he made the following different contract counterclaims:

1. In October 2004, prior to entering the November 2004 Termination Agreement, the parties entered a "new arrangement" with the following terms: (a) Bob released his interest in RMI in exchange for 7.5% of the proceeds from the sale of RMI, which was expected to occur soon; and (b)

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<sup>1</sup> Contrary to this allegation, the Termination Agreement did not mention or reserve the October 4 Option Agreement. Rather, it excepted the non-existent December 15, 2004 agreement from the operation of the release provisions in the Termination Agreement.

PJ released his interest in NARP in exchange for an option to purchase 7.5% of NARP's stock at one penny per share. (R. 28-29, ¶ 53).

2. The parties memorialized the "option" portion of this "new arrangement" with the [secretly signed] October 4, 2004 Option Agreement. (R. 29, ¶ 54). NARP has refused to perform this Option Agreement, and PJ is entitled to specific performance of it. (R. 30-31, ¶¶ 63-66, 69).
3. If the "new arrangement" and October 4 Option Agreement are not enforceable, then PJ is entitled to return to his prior position under the 2000 Agreement. (R. 31, ¶ 71).

In making these claims, PJ again admitted the execution of the Termination Agreement but alleged it specifically reserved his option right to purchase 7.5% of NARP's stock. (R. 29-30, ¶ 60).<sup>2</sup>

In his (final) revised amended counterclaim, PJ asserted the following contract claims, without any mention of, reliance on, or assertion of the October 4, 2004 Stock Option Agreement:

1. In October 2004, prior to entering the November 2004 Termination Agreement, the parties entered an "overall" agreement with the following terms: (a) Bob released his interest in RMI in exchange for 7.5% of the proceeds from the sale of RMI, which was expected to occur soon; and (b) PJ released his interest in NARP in exchange for an option to purchase 7.5% of NARP's stock at one penny per share. (R. 41, ¶¶ 53-54).

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<sup>2</sup> Contrary to this allegation, the Termination Agreement did not make this general reservation. Rather, it excepted the non-existent December 15, 2004 agreement from the operation of the release provisions in the Termination Agreement.

2. The November 2004 Termination Agreement was part of this "overall," unwritten October 2004 agreement and, as contemplated by this "overall" agreement, the Termination Agreement "specifically reserved [PJ's] option right to purchase 7.5% of the outstanding NARP stock." (R. 41, ¶ 57).<sup>3</sup>
3. If this "overall" agreement failed, then the parties reverted to the 2000 Agreement whereby PJ owned 7.5% of NARP's stock. (R. 43, ¶ 68).

The Termination Agreement does not mention this "overall" agreement, nor does it except this "overall" agreement from the operation and effect of its merger clause, nor is the Termination Agreement made contingent upon any other agreement or event (past, present, or future). In this final version of his counterclaim, PJ did not mention or specifically allege any rights under the secretly-signed October 4, 2004 Option Agreement. He specifically disavowed this agreement at trial, admitting it had never been finalized or fully executed. (R. 290-292; 355-356). He also admitted the parties never entered a fully executed option agreement of any date. (R. 290; 524). At trial, PJ did not assert or pursue any rights or remedies under the October 4 agreement.

The trial judge submitted the case to the jury under a special verdict form. The jury found that the parties had entered the Termination Agreement but PJ nevertheless had an option to purchase 7.5% of NARP's stock for \$2,936,300.00. (R. 2-5). Thereafter, the trial court entered judgment granting PJ specific performance of the \$2.9 Million contract found by the jury. (R. 1). Both parties timely appealed. NARP submits the trial

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<sup>3</sup> Contrary to this allegation, the Termination Agreement did not make this general reservation. Rather, it excepted the non-existent December 15, 2004 agreement from the operation of the release provisions in the Termination Agreement.

court erred in denying its directed verdict motion that there is no promise, agreement, contract or option between PJ and NARP allowing PJ to purchase 7.5% of NARP.

## STANDARD OF REVIEW

NARP challenges the denial of its directed verdict motion. In reviewing this issue, the evidence is viewed in the light most favorable to PJ. This does not mean the court should ignore facts unfavorable to PJ (most notably the express terms of the Termination Agreement). The question is whether a verdict for PJ is reasonable when the evidence is viewed in his favor. *Love v. Gamble*, 448 S.E.2d 876 (S.C. App. 1994).

## ARGUMENTS

- I. **The trial judge erred in denying Plaintiff's (NARP's) directed verdict motion on all contract claims, because there is no evidence that Defendant (PJ) had an existing ownership interest in NARP or had a contractual right to purchase an ownership interest in NARP.**

**Background Legal Principles and Related Arguments:** The question of whether a contract is ambiguous is a question of law for the court. *Laser Supply and Services, Inc. v. Orchard Park Assocs.*, 676 S.E.2d 139 (S.C. App. 2009). The existence of an ambiguity is to be determined from the language used in the four corners of the contract. *Id.* When that language plainly sets forth the parties' rights and obligations, there is no ambiguity and the courts must enforce the contract as written, regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. *Id.* Courts do not exist to and cannot relieve parties from the results of their unambiguous contract. *Id.* Here, the merger clause of the Termination Agreement plainly captures and extinguishes all prior written and oral undertakings. *Wilson v. Landstrom*, 315 S.E.2d 130, 134 (S.C. App. 1984) (merger clause renders the agreement fully integrated and extinguishes contemporaneous and prior agreements). Thus, nothing that



happened before the Termination Agreement is relevant here and PJ cannot rely on such to establish any claim against NARP.

PJ (through his counsel) drafted the Termination Agreement in its entirety. Thus, if there is any ambiguity in the Agreement, including the scope and effect of the merger clause, (and there is not), it must be “construed liberally and interpreted strongly in favor of the non-drafting party [NARP].” *Southern Atl. Fin. Servs., Inc. v. Middleton*, 590 S.E.2d 27, 29 (S.C. 2003); *accord Springs and Davenport, Inc. v. AAG, Inc.*, 683 S.E.2d 814 (S.C. App. 2009). As the drafting party, PJ had “the greater opportunity to prevent mistakes in meaning [and is therefore] responsible for any ambiguity and should be the one to suffer from the shortcomings.” *Id.* If PJ believed or intended that some present or past written or oral undertaking or understanding was to survive the Termination Agreement, it was his duty to make this clear in the Termination Agreement. Having failed to include any such “outward expression,” he cannot now rely on any such “secretly held intention.” *Blakeley v. Rabon*, 221 S.E.2d 767, 769 (S.C. 1976)

The Termination Agreement excepted the “December 15 Option Agreement” from its terms. It is uncontested, however, that no such agreement existed at the time of the Termination Agreement. Again, if this creates any ambiguity (and it does not), PJ must suffer the consequences as the drafter of the agreement. At most, given the non-existence of the “December 15 Option Agreement,” this provision of the Termination Agreement indicated an agreement to agree in the future. Such agreements, however, are not enforceable if, as here, the material terms are left to future determination. *Ellis v. Taylor*, 449 S.E.2d 487, 489 (S.C. 1994). It is undisputed the parties never entered an

option agreement after the Termination Agreement, be it dated December 15 or otherwise.

In short, as argued more fully below, the merger clause of the Termination Agreement drafted by PJ precluded any claim by PJ based on anything that happened prior to the Termination Agreement. Any right or claim that PJ might have to any stock or interest in NARP, therefore, had to arise after the Termination Agreement. There is no evidence to support any such right or claim.

- A. The November 2004 “Agreement of Termination, Settlement and Release” (the Termination Agreement) unambiguously and unequivocally terminated all rights held by anyone under the “2000 Agreement.”

It would be difficult, if not impossible, to draft an agreement that more clearly and more unambiguously terminated and ended forever a prior agreement than did the Termination Agreement in this case. In Paragraph 1, the Termination Agreement expressly and plainly “terminated” the 2000 Agreement and “*any and all* agreements, understandings, undertakings or arrangements that *in any way* arose or may have arisen out of or relate *in any manner* to the” 2000 Agreement. (R. 924a at ¶ 1) (emphasis added). In Paragraph 2, the Termination Agreement expressly and plainly settled, compromised and released “[a]ll claims and potential claims of *any nature whatsoever* that have been, could have been, or in the future could be asserted by the parties arising out of or relating *in any manner* to the” 2000 Agreement. (R. 924a at ¶ 2) (emphasis added). In paragraph 4 of the Termination Agreement, PJ and RMI expressly and plainly “remit[d], release[d] and forever discharge[d]” NARP and Bob “from *all*, and *all manner of*” claims and demands “arising out of or relating to the 2000 [Agreement] from the beginning of time to the date of this [Termination] Agreement.” (R. 924b, ¶ 4)

(emphasis added).<sup>4</sup> Finally, and perhaps most importantly, paragraph 6 of the Termination Agreement set forth a classic merger or integration clause:

This [Termination] Agreement sets forth the *entire* agreement and understanding of the parties relating to the subject matter contained herein, and *merges all* prior discussions and agreements, *both* oral and written, between the parties.

(R. 924b, ¶ 6) (emphasis added). Notably, nothing in the Termination Agreement made it or any part thereof contingent upon any past, present, or future event.

In short, the Termination Agreement plainly and unambiguously terminated and forever ended any and all rights that PJ had or may have had to own or purchase any NARP stock under the 2000 Agreement or under any agreement or discussion, oral or written, that pre-dated the Termination Agreement. Thus, as a matter of law, any purported right held by PJ could only exist under some other agreement that was excepted from the Termination Agreement or entered after the Termination Agreement.

B. The “option agreement” referenced in the Termination Agreement did not exist at the time of the Termination Agreement and never came into existence after the Termination Agreement.

In releasing any and all claims in any manner related to the 2000 Agreement, the November 2004 Termination Agreement expressly excepted “that *certain, separate* Option Agreement *dated 15 Dec, 2004* pursuant to which NARP and [Bob] have granted [PJ] an option to purchase 7.5% of the capital stock of NARP.” (R. 924a-924b, ¶¶ 3 and 4) (emphasis added). This is the only limitation on the effect of the November 2004 Termination Agreement. It does not set forth the terms of this December 15 agreement or otherwise establish an enforceable December 15 agreement. To the extent any of this

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<sup>4</sup> In the preceding paragraph 3, NARP and Bob gave the same release to PJ and RMI. (R. 924a-924b, ¶ 3).

creates an ambiguity, it must be construed against PJ as the person who drafted the Termination Agreement and inserted the December 15 date.

The December 15 date is not a clerical error. PJ admitted that no option agreement had been executed at the time of the Termination Agreement, nor had one been executed prior to the Termination Agreement, nor was one executed after the Termination Agreement. PJ rejected the numerous proposals made by NARP in the hope that he would get the deal he wanted. This hope, however, does not change the effect of the Termination Agreement, which was not made conditional upon the realization of this hope. *McMaster v. Strickland*, 409 S.E.2d 440, 442 (S.C. App. 1991) (the decision to take a chance on something happening in the future which will make a current contract more favorable or palatable is not a basis for invalidating that contract if the future event does not take place unless a condition or contingency to that effect is placed in the contract).

It is undisputed that no December 15, 2004 option agreement existed at the time of the execution of the November 2004 Termination Agreement. It is undisputed that the parties never entered an option agreement dated December 15 or otherwise. Thus, as a matter of law, the parties never entered the option agreement referenced in the Termination Agreement. Again, nothing in the Termination Agreement made its effect conditional upon any event, including but not limited to the existence or execution of any option agreement, dated December 15 or otherwise.

C. PJ never entered an enforceable contract or option agreement with NARP to purchase its stock after the Termination Agreement.

After the Termination Agreement, the parties continued to discuss the possibility of PJ either purchasing or having an option to purchase NARP's stock. PJ admitted these

discussions never resulted in an executed agreement. (R. 290; 385; 524). Thus, there is no contract between PJ and NARP.

NARP is a Delaware corporation. Thus, as a matter of law, any option to purchase stock from NARP had to be in a writing that was approved by NARP's Board of Directors and set forth the specific terms of the option (*e.g.*, amount of stock, the duration of the option, the consideration paid for the option).<sup>5</sup> It is undisputed that PJ and NARP never entered a written option agreement meeting these requirements. More importantly, PJ admitted that, after the Termination Agreement, the parties never reached the option agreement referenced in the Termination Agreement, be it dated December 15 or otherwise, nor did they ever reach any other agreement whereby he could purchase stock in NARP (R. 385). PJ also knew there was no option or other agreement granting him the right to purchase NARP's stock at the time he asked Bob to sign the Termination Agreement. For each of these reasons, as a matter of law, there was no contract between PJ and NARP whereby PJ owned, purchased, or had the option or right to purchase any stock from NARP.

D. Summary

Regardless of whether the 2000 Agreement granted PJ an existing ownership interest in NARP, or whether it granted PJ an option to purchase an ownership interest in NARP, any such right was terminated, settled, and released under the express and

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<sup>5</sup> Under Delaware law, an option to purchase stock from a corporation must meet these requirements. 8 Del. C. § 157; *Grimes v. Alteon, Inc.*, 804 A.2d 256 (Del. 2002). South Carolina law has statutorily adopted the "internal affairs doctrine," which precludes South Carolina from regulating the internal affairs of a foreign corporation authorized to do business in South Carolina, like NARP here. S.C. Code Ann. § 33-15-105(c). An option to purchase stock from a corporation is firmly established as an internal affairs matter. *Mariasch v. Gillette Co.*, 521 F.3d 68, 72 (1<sup>st</sup> Cir. 2008), *citing, quoting, and applying inter alia* *Rogers v. Guaranty Trust Co. of New York*, 288 U.S. 123, 129 (1933) and *Beard v. Elster*, 160 A.2d 731, 735 (Del. 1960). Thus, the requirements of Delaware law for options to purchase stock from a corporation must be met in South Carolina, and it is undisputed such did not happen in this case.

unambiguous terms of the Termination Agreement authored by PJ and presented to NARP for its execution. Regardless of whether there was any other written or oral understanding that PJ owned or could purchase any stock of NARP, any such agreement, right, or claim was captured and extinguished by the merger clause in the Termination Agreement drafted by PJ.

The parties never entered the December 15 option agreement referenced in the Termination Agreement drafted by PJ, nor did this agreement exist at the time of the execution of the Termination Agreement. Nothing in the Termination Agreement made it conditional upon the existence of this December 15 agreement or any other agreement for PJ to own or have the right to purchase any NARP stock.

The parties never entered a contract allowing PJ to own or purchase an interest in NARP after the execution of the Termination Agreement. Thus, as a matter of law, PJ had no ownership in and no right to acquire any ownership interest in NARP. Accordingly, the trial court erred in denying NARP's directed verdict motion on any contractual or option agreement claim by PJ against NARP.

**II. The trial judge erred in denying NARP's directed verdict motion on promissory estoppel, because there is no evidence of all elements of that claim, and any such promise made before the Termination Agreement was captured and extinguished by the merger clause in the Termination Agreement, which PJ drafted unilaterally.**

PJ pled promissory estoppel, contending that NARP had promised that PJ would be able to purchase 7.5% of NARP's stock at one penny per share. (R. 43-44). Promissory estoppel arises only upon proof of the following elements: (1) an unambiguous promise by the promisor, *i.e.*, NARP here; (2) reasonable reliance on the promise by the promisee, *i.e.*, PJ here; (3) reliance by the promisee (PJ) was expected by

and foreseeable to the promisor (NARP); and (4) injury caused to the promisee (PJ) by his reasonable reliance, *i.e.*, detrimental reliance. *Rushing v. McKinney*, 633 S.E.2d 917 (S.C. App. 2006).

There could be no promissory estoppel prior to the execution of the Termination Agreement. Until that time, PJ had a contractual right under the 2000 Agreement to demand 7.5% of NARP's stock in exchange for RMI issuing 7.5% of its stock to Bob. This was still possible prior to the Termination Agreement, because PJ had not yet sold RMI's assets and goodwill.

Moreover, given the adversarial nature of the discussions and negotiations, which included representation by attorneys and the exchange of draft written agreements, PJ could not have reasonably relied on any oral promise. In addition, any promises and reliance occurring before the execution of the Termination Agreement were captured and extinguished by the merger clause of that Agreement, which PJ drafted and presented, and he is bound by the plain meaning of the language he used in the merger clause. As a matter of law, in light of the plain language of the merger clause, any reliance on pre-Agreement "promises" would be unreasonable and would not be expected by or foreseeable to NARP. Thus, for each of the foregoing reasons, there can be no promissory estoppel claim based on conduct before the execution of the Termination Agreement.

There is no evidence of all elements of promissory estoppel after the execution of the Termination Agreement. PJ's promissory estoppel claim rested upon evidence of "promises" allegedly made before the execution of the Termination Agreement, which failed for the reasons noted above. Assuming there were any evidence of "promissory

estoppel" after the Termination Agreement, PJ could not have reasonably relied on any such oral promise. By this time, the adversarial nature of the discussions, the involvement of attorneys, and the use of written draft agreements had increased significantly, and no reasonable person could believe an oral promise was binding. These same circumstances establish that NARP would not expect or foresee that PJ would rely on any oral statements. Moreover, there is no evidence of any detrimental reliance on any promise made after the Termination Agreement, *i.e.*, there is no evidence that PJ suffered any injury in reliance on any "promises" made after the Termination Agreement.

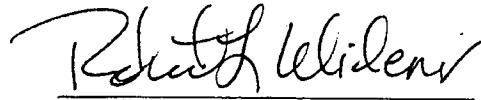
In short, there is no evidence of all elements of promissory estoppel either before or after the Termination Agreement. PJ's claim rested on conduct occurring before the Termination Agreement, and any such claim was captured and extinguished by the merger clause, which PJ drafted. If he held some intention that an oral promise would survive the Termination Agreement, it was his duty to make this clear in the Termination Agreement that he drafted. Any secretly held intention to the contrary was no more effective than his secret signing of the October 4 Option Agreement.

## CONCLUSION

For all of the foregoing reasons, the appealed judgment should be reversed and the case should be remanded for the entry of judgment in favor of NARP.



Respectfully Submitted,



Robert L. Widener  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

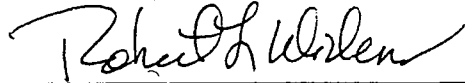
Bernie W. Ellis  
McNair Law Firm, P.A.  
Post Office Box 447  
Greenville, South Carolina 29602  
(864) 271-4940

Attorneys for Appellant-Respondent

September 10, 2010  
Columbia, SC

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Appellant's Brief of Appellant-Respondent complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.



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Robert L. Widener  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 07-CP-23-3206

North American Rescue Products, Inc., ..... Appellant-Respondent

v.

P. J. Richardson, ..... Respondent-Appellant

FINAL RESPONDENT'S BRIEF OF APPELLANT-RESPONDENT

Robert L. Widener  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

Bernie W. Ellis  
McNair Law Firm, P.A.  
Post Office Box 447  
Greenville, South Carolina 29602  
(864) 271-4940

Attorneys for Appellant-Respondent

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## STATEMENT OF ISSUES

1. PJ does not have standing to pursue his appeal, because he does not claim to be aggrieved by the appealed order.
2. Because PJ does not claim to be aggrieved by the appealed order, this Court does not have appellate jurisdiction to consider the appeal.
3. PJ's appellate arguments are raised for the first time on appeal and, therefore, his arguments are not preserved for appeal.
4. PJ's appellate arguments are barred by the law of the case doctrine.
5. PJ's appeal has no merit, and his appellate arguments are not properly before this Court.
6. PJ correctly cites the standard of review, but it is irrelevant to this appeal and the jury's factual findings are not subject to any challenge on appeal.
7. PJ's brief ignores controlling South Carolina law on the meaning of judgments.
8. Any attempt by PJ to "construe" the appealed judgment is not properly before this Court for review, because PJ did not make a post-trial motion to clarify the appealed order.
9. The judgment is not ambiguous and can only mean that PJ has the right to buy 7.5% of NARP's stock for \$2,936,300.00.
10. Assuming any "ambiguity" exists in the appealed judgment, the record conclusively demonstrates the trial judge intended to enter a judgment that PJ could buy the stock for \$2,936,300.00 as found by the jury.

## STATEMENT OF CASE

This is a breach of contract case. The fundamental question presented at trial was whether the Respondent-Appellant (PJ) had the right to acquire 7.5% of the stock of the Appellant-Respondent (NARP) and, if so, at what price. The trial judge submitted this question to the jury under a verdict form that asked these specific questions. (R. 5). The jury found PJ was entitled to receive the NARP stock, but he should pay \$2,936,300.00 for the stock. (Id.). The trial judge granted specific performance of the contract found by the jury. (R. 1).

NARP appealed, contending the trial judge erred in denying its directed verdict motion and that the case should be remanded for entry of judgment in its favor. (See App. Br. of App-Resp.). PJ cross-appealed and argues this Court should affirm the judgment that he appealed, contending that the stock price is \$415,988.00, a number that does not appear anywhere in the verdict form or judgment. (R. 1-5, *passim*). The only number appearing in the judgment is \$2,936,300.00.

## INTRODUCTION

The merits of PJ's appeal presents a single question: What is the meaning of the judgment? His arguments hinge on the following analysis: (1) the parties originally agreed to exchange a 25% stock interest in NARP and PJ's company (RMI) under the 2000 Agreement; (2) the parties later met in Charleston and orally modified the 2000 Agreement to reduce the percentage from 25% to 7.5%, and they further orally modified the 2000 Agreement to provide that, rather than exchange the stock, NARP would accept 7.5% of the after-tax proceeds from the sale of RMI's assets as payment for 7.5% of NARP's stock; and (3) this is the contract that the trial court ordered be performed.



It is undisputed that the parties reduced the stock-swap percentage to 7.5%, and it is undisputed the parties never swapped the stock. PJ testified at times that NARP, through its president and principal owner (Bob), had agreed to accept a direct cash payment for NARP's stock measured by 7.5% of the after-tax proceeds from the sale of RMI's assets. Bob, however, denied that he agreed to accept a cash payment measured by 7.5% of the proceeds received by PJ in his sale of RMI's assets. (R. 276-277; see also R. 139-141; 164-165; 188-189; 278-279; 284-285; 662-663).<sup>1</sup> On appeal, PJ ignores the conflicting testimony from Bob, and he acts as if the jury (and/or the trial judge) resolved this conflict in his favor.<sup>2</sup> Nothing in the judgment or attached verdict form, however, supports this assumption by PJ. No question in the verdict form even presents this question except Question 8, which asks what price PJ must pay for the stock and which the jury answered with a price of \$2,936,300.00, not the \$415,988.00 argued by PJ.

Under PJ's theory and argument, the trial judge intended the following enforcement procedure for the appealed order: (a) ignore the jury's expressly stated stock price; (b) order the trial transcript; (c) review the disputed testimony; (d) resolve that dispute; and (e) determine the terms of the contract, including the price. Nothing in the judgment hints at any such intent by the trial judge. To the contrary, the judgment plainly grants specific performance of the attached special verdict form, which plainly states PJ is entitled to buy the stock for \$2,936,300.00. It is inconceivable the trial judge intended to order specific performance of a disputed contract without setting forth the price in the

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<sup>1</sup> Bob offered PJ several alternatives to acquire the stock, but these alternatives involved donations to a charity of Bob's choosing, and the donation was to be based on the fair market value of 7.5% of NARP's stock at the time of the donation. (R. 160-163; 168-171; 176-177). PJ rejected all of these alternatives. (R. 172-174; 351-352; 387-388).

<sup>2</sup> PJ goes even further and erroneously argues there is no dispute over this issue. (Init. App. Br. of Resp. App. at 8).

judgment, which is what PJ argues to avoid the plainly stated price of \$2,936,300.00. Moreover, as shown later, the record conclusively demonstrates the trial judge intended that the jury would decide all questions in this case, including the price for the stock, and that the trial judge ordered specific performance at the price set by the jury.

The trial judge submitted the case to the jury under a verdict form that asked numerous contract questions, which the jury answered as follows:

Did [NARP and PJ] give each other right to acquire 7.5% of each other's stock?  
YES.

Do you find that [NARP] agreed to let [PJ] acquire 7.5% of [NARP's stock] in exchange for money rather than the issuance of 7.5% of capital stock?  
YES.<sup>3</sup>

Can both parties perform under the 2000 Agreement as amended in Charleston?  
YES.

Did the parties[NARP and PJ] enter into a contract, that is the November 2004 [Termination Agreement]?  
YES.

If the [Termination Agreement] is a contract, does it end both parties' rights to acquire 7.5% of the capital stock of each other?  
NO.

Is [PJ] entitled to receive 7.5% of the outstanding capital stock of [NARP]?  
YES.<sup>4</sup>

[If so], what should [PJ] pay to [NARP] for 7.5% of the common capital stock?  
\$2,936,300.00<sup>5</sup>

(R. 2-5, Questions 1-5 and 8) (appended footnotes added).<sup>6</sup> If PJ's appellate

<sup>3</sup> PJ argues the jury made this finding "due to the sale of Reeves," i.e., PJ's sale of RMI's assets. (Init. App. Br. of Resp-App. at 3). There is no such finding by the jury, and no such question was on the verdict form.

<sup>4</sup> PJ never mentions this question and answer.

<sup>5</sup> PJ never mentions this question and answer.

<sup>6</sup> Questions 1-5 and 8 related to the contract issues and are the only questions relevant to this appeal. Questions 6-7 related to NARP's fiduciary claim against PJ, which the jury rejected and which NARP does not appeal. Question 9 related to PJ's alternative claim for damages rather than specific performance, which the jury did not reach under the instructions in the verdict form, because the jury found a contract and price. PJ's appeal does not challenge the failure to award any damages.

theory were correct, the jury would have found PJ "should pay" \$415,988.00 not \$2,936,300.00, but the jury did not make any such finding. Moreover, the trial judge did not make any such ruling. He simply attached the verdict form to a Form 4 Judgment and ordered specific performance. As shown later in Arguments II(D) and (E), *infra*: (1) the only reasonable reading of the judgment is that PJ's right to acquire 7.5% of NARP's stock is subject to a price of \$2,936,300.00; and (2) the trial record conclusively demonstrates the trial judge intended to order specific performance of the stock price found by the jury.

### APPELLATE PROCEDURAL HISTORY

NARP appealed and PJ cross-appealed. NARP then tendered performance of the judgment by offering to deliver 7.5% of NARP's stock for payment of the \$2,936,300.00 found by the jury and ordered by the trial court. PJ refused the tender, and NARP moved this Court for a limited remand to make a motion under Rule 60(b)(5), SCRCP, to have the judgment marked satisfied based upon PJ's refusal of the tender. PJ's return to the motion included a multi-faceted attack to which NARP filed a detailed reply. This Court denied the remand motion.

PJ served and filed his initial appellant's brief based on his "\$415,988.00" theory. His brief also revealed the reason for his frantic opposition to the remand motion: he could not risk that "for some reason the trial court [would] agree with NARP's" reading of the judgment. (Init. App. Br. of Resp-App. at 5). The trial court would have had this issue before it in the remand motion, but PJ was unwilling to let the trial court declare the meaning of its own judgment. This is not surprising, since the trial court had already denied PJ's post-verdict motion on the amount found by the jury. Rather than appeal this

denial, however, PJ now acts as if the trial court granted the motion, reformed the verdict after resolving factual disputes not presented to the jury, and entered a judgment of specific performance based on PJ's "\$415,988.00" theory. Armed with this fiction, PJ then took the extraordinary step of arguing for *affirmance* (not reversal) in his *appellant's* brief, *i.e.*, he appealed the judgment but never argued there was any error in the judgment. To support this bizarre appellant's argument, he goes outside the four corners of the judgment and reviews disputed evidence that is nowhere mentioned in the verdict or judgment, *i.e.*, PJ's testimony (disputed by Bob) that the parties agreed in Charleston that PJ could buy the NARP stock for 7.5% of the after-tax proceeds from PJ's sale of RMI's assets.

After receiving PJ's brief of appellant and finally learning the basis for PJ's "appeal," NARP moved to dismiss PJ's appeal because he did not claim to be "aggrieved" by the order as required by the Constitution, statute, court rule, and case law. Acting Judge Cureton denied the motion to dismiss in a single-judge order, and NARP petitioned for a full panel review. PJ responded that rehearing was never available for a single-judge order and moved to strike the rehearing petition. At PJ's invitation, Chief Judge Few undertook to resolve the issue and held a conference with counsel. At that conference, NARP contended a full panel of the Court should decide the "aggrieved" issue or, in the alternative, NARP should be permitted to present the issue in its brief of respondent. PJ objected to any rehearing or review by a full panel but agreed the issue could be presented in NARP's brief of respondent. Chief Judge Few denied the petition for full panel review but ordered that the "aggrieved" issue could be presented in the instant brief.

## ARGUMENTS

### I. PJ's appeal is barred by law.

- A. PJ does not have standing to pursue his appeal, because he does not claim to be aggrieved by the appealed order.

"Only a person aggrieved by a ruling may appeal." *Burns v. Gardner*, 493 S.E.2d 356, 361 (S.C. App. 1997) (emphasis added), *applying* Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.") and S.C. Code Ann. § 18-1-30 (1976) ("Any party aggrieved may appeal in the cases prescribed in this Title."). The right to appellate review "is restricted to persons or parties aggrieved by the decision below." *Bivens v. Knight*, 173 S.E.2d 150, 152 (S.C. 1970) (emphasis added); *accord First Union Nat'l Bank of S.C. v. Soden*, 511 S.E.2d 372, 378 (S.C. App. 1998) and *Burns v. Gardner*, 493 S.E.2d 356, 361 (S.C. App. 1997). Appellate courts have a "duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court." *Cisson v. McWhorter*, 177 S.E.2d 603, 605 (S.C. 1970) (emphasis added); *accord Carson v. Adgar*, 486 S.E.2d 3, 6-7 (S.C. 1997). A party is "aggrieved in a legal sense" if the order causes injury to his person or property by denying some personal or property right or by imposing a burden or obligation upon the party. *Bivens v. Knight*, 173 S.E.2d 150, 152 (S.C. 1970), *citing Parker v. Brown*, 10 S.E.2d 625 (S.C. 1940) and *Bowles v. Dannin*, 2 A.2d 892 (R.I. 1938); *accord Powell v. Bank of America*, 665 S.E.2d 237, (S.C. App. 2008).

If an appellant takes a position on appeal that renders him not aggrieved by the appealed order, then he has no right to appeal and the appeal must be dismissed. *Bivens*, 173 S.E.2d at 152. PJ's position on appeal is that the appealed order should be affirmed, thereby rendering him not aggrieved by the appealed order. If a reversal of the trial

court's judgment would not benefit or improve the appellant's position, then the appellant is not aggrieved and cannot appeal. *Cisson v. McWhorter*, 177 S.E.2d 603, 605 (S.C. 1970); *accord Knight v. Autumn*, 245 S.E.2d 602, 604 (S.C. 1978) and *Bivens*, 173 S.E.2d at 152. PJ does not seek reversal; he argues only that this Court should affirm.

PJ admits (9 times) that his dispute with NARP over the meaning of the appealed order is the basis for his appeal. (PJ's Init. App. Br. at 2, 5 & n.1, 10- 12, 14, 18). This is not the stuff of appeals. As an appellant, PJ's only permissible dispute is with the appealed order, and PJ never argues there is anything wrong with the order. His brief reads like a respondent's brief, but no issue over the meaning of the appealed order is properly before this Court. This issue has never been presented to the trial court, nor has it been raised in NARP's Brief of Appellant (which is limited to questions of whether the trial court erred in denying NARP's directed verdict motions). PJ cannot thrust this issue upon this Court by filing an appellant's brief in which he never claims to be aggrieved by the appealed order.

- B. Because PJ does not claim to be aggrieved by the appealed order, this Court does not have appellate jurisdiction to consider his appeal.

The South Carolina Constitution defines the jurisdiction of the appellate courts. As to the jurisdiction of the Supreme Court, the Constitution provides in pertinent part:

The [Supreme] Court shall have appellate jurisdiction only in cases of equity, and such appeals they shall review the findings of fact as well as the law, *except in cases where the facts are settled by a jury and the verdict not set aside*. The Supreme Court shall constitute a court for the correction of errors as law *under such regulations as the General Assembly may prescribe*.

S.C. Const. art. V, § 5 (all emphasis added). As to this Court, the Constitution provides in pertinent part: "The Court of Appeals shall have such jurisdiction *as the General Assembly shall prescribe by general law.*" S.C. Const. art. V, § 9 (all emphasis added).

Title 18 of the South Carolina Code contains the "regulations" and "general law" for appeals authorized by the above-quoted sections of the Constitution. Chapter 1 of Title 18 contains "General Provisions" applicable to all appeals. Section 18-1-10 (1976) specifies that, subject to other code provisions not applicable here: "The *only mode* of reviewing a judgment or order in a civil or criminal action . . . *shall be as prescribed by this Title [18].*" (Emphasis added). Section 18-1-30 (1976) prescribes: "Any party *aggrieved* may appeal in the cases prescribed in this Title [18]." (Emphasis added). Section 18-1-170 (1976) mandates that the plain language of the provisions of Title 18 is to be applied to all appeals: "The rule of the common law that statutes in derogation of that law are to be strictly construed has no application to this Title [18]."

As demonstrated earlier, PJ does not claim to be aggrieved by the appealed order as required by § 18-1-30. Therefore, this Court does not have appellate jurisdiction over PJ's appeal, because he does not meet the "general law" prescribed under Article V, Section 9 of the South Carolina Constitution, which defines the jurisdiction of this Court.

The South Carolina Constitution also provides that all court rules are to be promulgated by the Supreme Court and submitted to the General Assembly for its review and approval. S.C. Const. art. V, § 4A. The Supreme Court promulgated and submitted the SCACR to the General Assembly. Chapter 9 of Title 18 governs appeals to this Court and the Supreme Court. Section 18-9-10 (Supp. 2009) prescribes in pertinent part: "The procedure for taking an appeal is as provided by the South Carolina Appellate Court

Rules [SCACR].” Rule 201(b), SCACR prescribes: “*Only* a party aggrieved by an order, judgment, sentence or decision *may appeal*.” (Emphasis added). Since PJ does not claim to be aggrieved by the appealed order, this Court does not have appellate jurisdiction to entertain his appeal because:

- (1) § 18-1-10 prescribes that the “*only mode* of [appellate review] *shall be as prescribed by this Title [18]*” (emphasis added);
- (2) § Section 18-9-10 prescribes that the “procedure for taking an appeal is as provided by the South Carolina Appellate Court Rules [SCACR]”;
- (3) Rule 201(b), SCACR prescribes that “[*o*]*nly* a party aggrieved by an order, judgment, sentence or decision *may appeal*” (emphasis added); and
- (4) all of this is part of the “general law” prescribed by the General Assembly in defining this Court’s jurisdiction under Article V, Section 9 of the South Carolina Constitution.

In short, because PJ does not claim to be aggrieved by the appealed order, his appeal does not meet the jurisdictional threshold imposed by the General Assembly under its constitutional authority to define this Court’s appellate jurisdiction. Accordingly, PJ’s appeal must be dismissed.

**II. PJ’s appeal has no merit, and his appellate arguments are not properly before this Court.**

A. PJ’s appellate arguments are not preserved for appeal or properly before this Court.

It is axiomatic that an appellant cannot raise an issue for the first time on appeal. *Pye v. Estate of Fox*, 633 S.E.2d 505, 510 (S.C. 2006). PJ never raised his appellate arguments to the trial court and, therefore, they are not before this Court. Accordingly, for this reason alone, PJ cannot prevail in his appeal.

It is axiomatic that an unchallenged ruling by the trial court is the law of the case and, right or wrong, is controlling and determinative on appeal. *Buckner v. Preferred*



*Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970). After the jury's verdict, PJ challenged the finding that his right to buy NARP's stock was subject to a price of \$2,936,300.00:

[W]e'd ask for JNOV based on the 13<sup>th</sup> jury doctrine for the Court to reform the verdict in that the basis for the number [*i.e.* \$2,936,300.00] is something that I can't see already in evidence.

(R. 866-867). The trial court denied this motion, and PJ does not mention or challenge the trial court's ruling on appeal. Thus, the trial court's ruling is the law of the case and precludes PJ's appellate arguments. Accordingly, for this reason alone, PJ cannot prevail in his appeal.

PJ cites the correct standard of review, to-wit: whether there is any evidence supporting the verdict. (Init. App. Br. of Resp-App. at 10). At times throughout his brief, PJ seemingly argues there is no evidence to support the verdict. This argument is misplaced, because PJ did not make a directed verdict motion on this issue and has not challenged the trial court's denial of his post-verdict motions. Accordingly, there is not and cannot be any "sufficiency of the evidence" issue before this Court. *Evan v. Wabash Life Ins. Co.*, 148 S.E.2d 153, 153 (S.C. 1966) (absence of directed verdict motion precludes appellate challenge to sufficiency of evidence); *Buckner, supra* (failure to challenge ruling of trial court makes that ruling the controlling law of the case).

B. PJ's brief ignores controlling South Carolina law on the meaning of judgments.

PJ's entire "appeal" presents the sole question of the meaning of the trial court's judgment. A trial court's judgment is to be construed like any other written instrument. *Petition of White*, 385 S.E.2d 211, 215 (S.C. App. 1989); *Weil v. Weil*, 382 S.E.2d 471, 474 (S.C. App. 1989). The controlling inquiry is the intent of the authoring judge. *O'Banner v. Westinghouse Elec. Corp.*, 459 S.E.2d 324, 327 (S.C. App. 1995). That

intent must first be gleaned from the judgment itself, read as a whole and giving effect to every word in the judgment, not just isolated parts. *Eddins v. Eddins*, 403 S.E.2d 164, 166 (S.C. App. 1991); *Management Recruiters, Inc. v. R.J.R. Mechanical, Inc.*, 404 S.E.2d 908, 909 (S.C. App. 1991). If the judgment is not ambiguous, there is no room for construction and the judgment must be enforced as written. *Petition of White*, 385 S.E.2d at 215; *Weil*, 382 S.E.2d at 474. If the judgment is ambiguous, then the court may go beyond the four corners of the judgment to determine the authoring judge's intent. *Id.*

PJ never argues the appealed order is ambiguous. Rather, he claims the appealed order is unambiguous. Thus, PJ has specifically disavowed the necessary predicate for his appellate arguments based on the evidence presented at trial, an ambiguous order. *Reading v. Ball*, 354 S.E.2d 397, 399 (S.C. App. 1987) (if order is ambiguous, may resort to record to construe it); *Drawdy v. Drawdy*, 328 S.E.2d 133, 135 (S.C. App. 1985) (same). Therefore, PJ's attempt to go outside the judgment to show its meaning is manifestly without merit.

C. Any attempt by PJ to "construe" the appealed judgment is not properly before this Court for review, because PJ did not make a post-trial motion to clarify the appealed order.

It is noteworthy and telling that PJ finds it necessary to go outside the judgment and review the disputed evidence at trial to support his "reading" of the judgment. The only way to get outside the judgment, however, is to first find the appealed judgment is ambiguous. *Petition of White* and *Weil*, both *supra*. Thus, by going outside the judgment, PJ necessarily argues the appealed judgment is ambiguous, but this issue is not properly before this Court.

It is axiomatic that an appellant cannot argue the meaning of an ambiguous or unclear judgment unless he first raised the issue in the trial court by post-trial motion. See, e.g., *Revis v. Barrett*, 467 S.E.2d 460, 462-463 (S.C. App. 1996) (absent motion to clarify discrepancy in order, issue cannot be addressed on appeal); *Nellums v. Cousins*, 403 S.E.2d 681, 681-682 (S.C. App. 1991) (if order unclear, must move to clarify or issue is not preserved for appeal). PJ never made any such motion in the trial court. Thus, he cannot make any such argument on appeal. This is why PJ argues the order is unambiguous but he necessarily treats the order as ambiguous when he goes outside the four-corners of the judgment to argue its meaning. Accordingly, for this reason alone, PJ cannot prevail in his appeal.

D. The judgment is not ambiguous and can only mean that PJ has the right to buy 7.5% of NARP's stock for \$2,936,300.00.

PJ's entire appeal hinges on the meaning of the judgment.<sup>7</sup> The first step in answering this question is to read the judgment without consideration of anything else. The only reasonable reading of the judgment, indeed the only conceivable reading of the judgment, is that the court ordered PJ could buy 7.5% of NARP's stock but only upon paying \$2,936,300.00, the price found by the jury.

PJ's "appeal" rests upon an impermissible bootstrap. He goes outside the judgment to attempt to create an ambiguity, and this attempt rests upon disputed evidence. Any ambiguity, however, must first appear on the face of the judgment itself. Then, and only then, can there be any resort to anything outside the four corners of the

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<sup>7</sup> PJ devotes large portions of his brief to the argument that he was ready, willing, and able to pay the \$415,988. This is simply irrelevant. The merits of PJ's appeal are controlled by a single question: What is the meaning of the judgment? His willingness, etc. to pay \$415,988.00 has no bearing on this question. Moreover, Bob testified that PJ never offered this sum at any time prior to trial, and PJ never told Bob prior to trial (during all of their negotiations) that they already had an agreement for \$415,988.00, so there was nothing to negotiate. (R. 164; 172; 178-179; 186; 187-188).

judgment. There is no such ambiguity and, therefore, there can be no resort to anything outside the face of the judgment.

Moreover, assuming there is any ambiguity within the four-corners of the judgment, resolution of the ambiguity depends on the trial judge's intent, not the competing evidence submitted by the parties at trial. PJ never addresses this controlling inquiry (thereby precluding his "appeal") and, as demonstrated below in Argument II(E), the record conclusively demonstrates the trial judge intended that PJ's right to buy 7.5% of NARP's stock was subject to him first paying \$2,936,300.00 as found by the jury.

PJ's Brief of Appellant reveals why he does not address the controlling question of the trial judge's intent. He boldly states that he appealed "in case for some reason the trial court" were to agree the judgment and verdict required him to pay \$2,936,300.00 for the stock. (Init. App. Br. of Resp-App. at 5). The trial judge clearly intended this result and, rather than present this question to the trial judge and appeal the inevitable adverse ruling, PJ skips the trial judge and comes directly to this Court as an appellant seeking to affirm his nonsensical reading of the judgment and verdict. This he cannot do under axiomatic principles of law, which require him to first present issues to the trial court and, upon receiving an answer that aggrieves him, appeal and seek a reversal of the trial court.

After the jury found that PJ was entitled to receive NARP's stock upon paying \$2,936,300.00, PJ made the following motion:

[W]e'd ask for JNOV based on the 13<sup>th</sup> jury doctrine for the Court to reform the verdict in that the basis for the number [*i.e.* \$2,936,300.00] is something that I can't see already in evidence.

(R. 866) (all emphasis added). This motion is telling. PJ's own "plain reading" of the jury's verdict was that he must pay \$2,936,000.00 rather than the \$415,988.00 he now argues on appeal. Had the verdict been what he now argues on appeal, he would have had no reason to make this motion.

The trial judge denied PJ's motion. (R. 867). PJ does not appeal this ruling, or even mention it on appeal, thereby making it the law of this case. One must ask why PJ did not appeal this ruling. The answer is simple. His motion did not and could not preserve any issue for appeal, and therein lies the impetus for PJ's bizarre appeal, to-wit: an appellant seeking affirmance of an order that he appealed.

First, PJ sought JNOV, but such was not available to him because he had not made a directed verdict motion at the close of the evidence on the issue of the price he must pay for the stock. A JNOV motion is not available unless first made in a directed verdict motion at the close of the evidence. Rule 50(b), SCRCP; *Freeman v. A&M Mobile Home Sales, Inc.*, 359 S.E.2d 532, 535 (S.C. App. 1987).

Second, PJ asked the trial judge to reform (reduce) the price using his 13<sup>th</sup> juror power. It is axiomatic, however, that a trial court cannot reduce or reform a verdict using its 13<sup>th</sup> juror power. *Bailey v. Peacock*, 455 S.E.2d 690, 692 (S.C. 1995). The only relief available under the 13<sup>th</sup> juror doctrine is a new trial. *Id.* PJ never moved for a new trial.

In short, PJ's motion mixed three different concepts (JNOV, 13<sup>th</sup> juror, and *nisi remittitur*) in a single motion that did not and could not present any proper issue to the trial court or preserve any issue for appeal. To overcome this procedural morass, PJ seeks to turn the appellate process on its head and, as appellant, asks this Court to affirm an order that he appealed. He does this to disguise his real intent, which is to seek

reversal of the trial court's denial of his post-trial motion, something he could not do under fundamental principles of appellate practice law.

E. Assuming any "ambiguity" exists in the appealed judgment, the record conclusively demonstrates the trial judge intended to enter a judgment that PJ could buy the stock for \$2,936,300.00.

At the very beginning of the trial, the judge made it crystal clear that the jury would decide this case. In his preliminary charge to the jury, he told the jury that this was a contract case with "competing claims" between the parties and that the jury was "called upon to sit through that and come up with a verdict" in the case. (R. 58). He thereafter admonished the parties to discuss settlement because "[o]nce a jury resolution comes about in this particular case, somebody's going to be happy [and] somebody's going to be sad." (R. 78). The judge immediately followed this comment to the parties with further preliminary instructions to the jury that it would render the verdict in this case. (R. 79-83, *passim*).

After the end of the evidence on the first day of trial, the judge told the parties that if the jury found the parties did not enter the Termination Agreement, then they would be back under the 2000 Agreement. (R. 192). The jury, however, found that the parties did enter the Termination Agreement. (R. 2, Ques. 4). Thus, the judge could not have intended to put the parties back under the 2000 Agreement as argued by PJ on appeal. Any doubt about this is resolved against PJ under the conclusive evidence of the judge's intent in the subsequent trial proceedings.

A question arose during the proceedings on the propriety of permitting PJ to present expert testimony on the fair market value of NARP's stock. The trial judge ruled the expert could testify. In so ruling, the judge specifically noted the jury would have to

decide whether PJ had the right to acquire NARP's stock and, if so, the price he would have to pay for that stock. (R. 582-583). In denying both parties' directed verdict motions at the close of the evidence, the trial judge repeatedly ruled that the jury would decide all questions in this case. (See R. 683; 686-690, and 693-697, *passim*).

The trial judge's jury charge also conclusively demonstrates his intent that the jury would decide all questions in this case. First, he charged the jury that it would decide the facts of the case and then apply the law to those facts. (R. 822). He then charged the jury that it was to decide whether any contract between the parties was ambiguous and was also to decide the terms of any contract between the parties. (R. 828-829; 831-833; 844-845). Finally, the judge instructed the jury it would decide the question of specific performance of any contract found by the jury:

Another area you'll have to look at is the area of specific performance. Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties. In order to have specific performance, you have to find there was clear evidence of a valid agreement.

(R. 844). The judge then concluded his charge: "All right, ladies and gentlemen, I told you the law that you have to apply to the facts of this case." (R. 844-845).

During its deliberations, the jury sent a question to the trial judge. Question 8 on the verdict form asked whether PJ was entitled to receive 7.5% of NARP's stock and, if so, what PJ should pay for the stock. (R. 5, Ques. 8). The jury asked that if it found PJ was entitled to receive NARP's stock, was PJ "required to purchase [the] stock at current market value." (R. 922) (emphasis in original). The trial court advised the jury that it "must assign some value for the stock if" PJ was entitled to receive the stock. (Id.). Here again, the trial judge made it clear that the jury would decide all questions in this case,

including the price to be paid by PJ, just as he had done earlier in the trial. (See R. 582-583).

The jury returned its verdict at 3:05 p.m. on August 29, 2008, finding that PJ was entitled to receive the stock upon paying \$2,936,300.00. (R. 859; 5, Ques. 8). The parties made several post-verdict motions. In denying these motions, the trial judge repeatedly held that there was sufficient evidence to support the jury's verdict, including the purchase price of \$2,936,300.00. The trial judge also held there was nothing inconsistent about any of the jury's answers to any of the questions in the verdict form. (R. 864-868). Thereafter, and on the same day as the jury's verdict, the trial judge entered judgment by simply attaching the verdict form to a judgment form and wrote thereon: "Judgment for the Defendant [PJ] under specific performance doctrine." (R. 1-5). This judgment form, with the attached verdict form, was then entered as the judgment of the court.

The fundamental question in this case was whether PJ had the right to acquire 7.5% of NARP's stock and, if so, at what price. The verdict form unambiguously says PJ had this right, and the price was \$2,936,300.00. Assuming any ambiguity in the judgment (and there is none), the record conclusively demonstrates the trial judge intended to enter a judgment of specific performance on this right and this price as found by the jury. Accordingly, PJ's "appeal" is manifestly without merit.

## CONCLUSION

The judgment below should be reversed and the case remanded for judgment in favor of NARP for the reasons set forth in NARP's Brief of Appellant and Reply Brief, which would moot all issues presented in PJ's appeal. In the alternative, this Court should reject PJ's appellate arguments and find the only relief granted PJ was to buy



**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Respondent's Brief of Appellant-Respondent complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.



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Robert L. Widener  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

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Case No. 07-CP-23-3206

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North American Rescue Products, Inc.,.....Appellant-Respondent,

v.

P. J. Richardson,.....Respondent-Appellant.

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FINAL REPLY BRIEF OF APPELLANT-RESPONDENT

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Robert L. Widener  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

Bernie W. Ellis  
McNair Law Firm, P.A.  
Post Office Box 447  
Greenville, South Carolina 29602  
(864) 271-4940

Attorneys for Appellant-Respondent

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## REPLY ARGUMENTS

**I. Substantial parts of PJ's Brief of Respondent are completely irrelevant to the issues presented in NARP's Brief of Appellant.**

Respondent-Appellant (PJ) sets forth a seven-part "Summary of Argument" in his Respondent's Brief. (Init. Resp. Br. of Resp-App. at 12-13). His first two points are that reversal under Appellant-Respondent's (NARP's) arguments would require ignoring the jury's findings and the trial court's judgment of specific performance based on those findings. (Id. at 12). He later argues that NARP failed to make a new trial motion based on inconsistency in the jury's verdict. (Id. at 20-21). These "arguments" are spurious and reflect a fundamental misunderstanding of the issue presented in NARP's Brief of Appellant.

The only issue raised in NARP's appeal is that the trial court erred in denying NARP's directed verdict motions, *i.e.*, the question presented in NARP's appeal is whether the trial court erred in submitting the case to jury. The findings of the jury, the judgment based on those findings, and post-trial motions regarding those findings are not and cannot be relevant to this question. If the trial court had granted NARP's directed verdict motions (as it should have), there would not have been any jury findings. Thus, reversal based on NARP's appellate arguments *a priori* nullifies and is unaffected by the jury's findings, the judgment, and any assumed necessity for any motions regarding the jury's findings.

Throughout his Brief of Respondent, PJ makes reference to issues raised in his Appellant's Brief and makes arguments on the meaning of the trial court's judgment. (Init. Resp. Br. of Resp-App., *passim*). Again, these matters are irrelevant to the issues raised in NARP's appeal. Reversal based on NARP's appellate arguments *a priori*

nullifies the trial court's judgment, moots any question on its meaning, and also moots all issues raised in PJ's Brief of Appellant.

**Note:** At the time of this Reply Brief, NARP's motion to dismiss PJ's appeal remained undecided and pending before this Court. That motion was based on the following grounds: (1) PJ appeals to seek affirmance of the order that he appeals; (2) in so doing, he claims he is not aggrieved by the order that he appeals; and (3) therefore, he has no standing to appeal, because only a party aggrieved by an order may appeal that order. In the event this Court does not grant this motion to dismiss, NARP incorporates herein the grounds and arguments made in its Motion to Dismiss, Reply to Return to Motion to Dismiss, and its Brief of Respondent (to be filed in response to PJ's Brief of Appellant if necessary).

**II. The Termination Agreement is not ambiguous and should be enforced as written.**

PJ never specifically identifies any ambiguity in the four-corners of the Termination Agreement. This is not surprising, because PJ admitted at trial that there was nothing unclear in the Termination Agreement. (R. 332-334). Moreover, a plain and simple reading of the Termination Agreement reveals there is no ambiguity in it. This ends the inquiry under South Carolina's firmly established law on the interpretation and enforcement of written contracts. (See App. Br. of App-Resp. at 10-16). For this reason, the trial court erred in denying NARP's directed verdict motion.

PJ's only argument that even approaches the question of an ambiguity within the Termination Agreement is his observation that the Termination Agreement references a December 15 option agreement. (See R. 924b, ¶¶ 3-4; Init. Resp. Br. of Resp-App. at 9, 20). The Termination Agreement, however, simply and plainly states that it has no

impact on this completely separate agreement. Nothing in the Termination Agreement makes the existence or enforcement of the Termination Agreement contingent upon this "certain, *separate* Option Agreement dated 15 Dec," including but not limited to the complete termination and release of any matter in any way pertaining to the 2000 Agreement. (See R. 924a- 924b, ¶¶ 1-4) (emphasis added).

PJ also "argues" that the parties' differing views of the Termination Agreement created a jury question on the parties' intent. (Init. Resp. Br. of Resp-App. at 15). He cites no authority for this argument, and there is none. The parties' "views" of the Termination Agreement are relevant if, and only if, the Termination Agreement is first found to contain an ambiguity. It does not. Accepting PJ's argument would result in a rule of law that would preclude the enforcement of any agreement as written unless the parties testified that they agreed on its meaning. If they so agreed, there would be no lawsuit. In other words, under PJ's proposed rule of law, every contract case would go to the jury on the meaning of the contract.<sup>1</sup>

PJ attempts to create the impression that NARP's president and owner (Bob) admitted at trial that an agreement was reached in Charleston that the 2000 Agreement would be amended to 7.5% of stock and that NARP would accept a direct cash payment in lieu of stock in RMI, that cash payment being an amount equal to 7.5% of the proceeds of PJ's sale of RMI. (See Init. Resp. Br. of Resp-App. at 7-8). There was no such admission at trial. In fact, the references to the trial testimony cited in PJ's Brief do not show any amendment in Charleston whereby PJ could buy 7.5% of NARP's stock by paying RMI sales proceeds (in whatever amount) directly to NARP or its president. (See citations to Record on Appeal in part "b." of Init. Resp. Br. of Resp-App. at 7-8).

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<sup>1</sup> As noted later, PJ misreads and misapplies South Carolina case law to "support" this argument.



NARP's president and owner (Bob) specifically and expressly testified that there was never an agreement whereby he or NARP would accept a cash payment from PJ in exchange for 7.5% of NARP's stock. (R. 140-141; 165-167; 277). At times, PJ seemed to testify to such an agreement but would later admit on cross-examination that he thought or assumed this, or that he was referring to some later point in time that involved some other agreement that was discussed but never reached. (*Compare* R. 375-377 with R. 387-388; *accord* R. 303-304; 351-352; 495; 539-541; 552; see also R. 154-161). PJ never testified specifically that NARP or its president specifically agreed in Charleston (or at any other time) that PJ could buy 7.5% of NARP's stock by delivering 7.5% of the proceeds from PJ's sale of RMI directly to NARP or its president.

In its Brief of Appellant, NARP sets forth and applies fundamental principles of South Carolina law on contract interpretation and enforcement, including: (1) any explanation of a contract is contingent upon first showing an ambiguity within the contract itself; (2) agreements to agree in the future are not enforceable; and (3) hopes that a signed agreement would prove fruitful in the future are irrelevant to enforcing the contract as written. (App. Br. of App-Resp. at 10-16). PJ never mentions nor discusses any of these legal principles or cases in his Brief of Respondent.

PJ cites numerous cases on the interpretation and enforcement of written contracts. His citations generally include a correct quotation or parenthetical description of the holdings of those cases. As demonstrated below, however, those cases do not support PJ's arguments or his fundamental attempt to ignore and skip the first critical step in contract interpretation, *i.e.*, the existence of an ambiguity within the four-corners of a

written contract. Due to PJ's creative use of these cases, it is necessary to discuss them at some length.

1. Soil Remediation Co. v. Nu-Way Environmental, Inc.,  
482 S.E.2d 554 (S.C. 1997).

PJ cites this case for the proposition that the "differing views of the parties as to the force and effect of the [Termination Agreement] created a jury issue as to the parties' intent." (Init. Resp. Br. of Resp-App. at 15-16; see also *id.* at 14-15). In *Soil Remediation*, however, the Supreme Court found that conflicting language within the four corners of the written agreement created an ambiguity that permitted the fact-finder to consider the differing views of the parties to that contract. 482 S.E.2d at 555-556. There is no such ambiguity here.

2. Simpson v. MSA of Myrtle Beach, Inc.,  
644 S.E.2d 663 (S.C. 2007).

Wilson Group, Inc. v. Quorum Health Res., Inc.,  
880 F. Supp. 416 (D.C.S.C. 1995).

PJ cites these cases in support of his argument that any ambiguities in the Termination Agreement should not be construed against him, despite the fact that he drafted the Termination Agreement and asked NARP to sign it. (Init. Resp. Br. of Resp-App. at 16). First, PJ does not identify any ambiguity within the four corners of the Termination Agreement. Rather, he cites these cases in response to NARP's argument that "IF" there is any ambiguity in the Termination Agreement, it must be construed against PJ as the drafting party. (App. Br. of App-Resp. at 11) (all emphasis added) (also noting "there is not" any ambiguity). Thus, PJ's argument is irrelevant unless and until he first identifies an ambiguity in the Termination Agreement, something he has failed to

do. Second, and again “if” there is an ambiguity, PJ’s cited authorities do not support his argument.

In *Simpson*, the court refused to enforce an adhesion contract. NARP does not argue the Termination Agreement was an adhesion contract. More importantly, there is no ruling in *Simpson* that the rule of construing ambiguities against the drafter only applies to adhesion contracts. Indeed, *Simpson* has nothing to do with this rule. Rather, the court found the contract was an adhesion contract and therefore refused to enforce an “inconspicuous” arbitration clause because: (1) it was “drafted by the superior party”; (2) it was “violative of ... statutory law” and “an unconscionable waiver of statutory rights”; (3) it was “oppressive”; and (4) it was an “unconscionable and unenforceable violation of public policy.” See 644 S.E.2d at 670, 671, 672, and 673. In short, the court in *Simpson* did not find any ambiguity in the contract or even construe the contract. To the contrary, the court refused to enforce the plain and unambiguous terms of the contract (arbitration clause) based on an entirely different set of rules regarding the enforcement of adhesion contracts. Here, the enforcement of the express provisions of the Termination Agreement as set forth in NARP’s Brief of Appellant is not constrained by the rules in *Simpson*.

In *Wilson Group*, the court found there was no ambiguity in the contract (release) and enforced it as written. In rejecting an argument that the contract was ambiguous and the ambiguity should be construed against the drafter, the court stated in *dicta* that “this rule of construction is not *automatically* applied when there is no evidence of adhesion or unequal bargaining power.” 880 F. Supp. at 426, n.10 (emphasis added). PJ cites this *dicta*. (Init. Resp. Br. of Resp-App. at 16). Several things are notable about this ruling in *Wilson Group*.

First, it is *dicta*; the holding of the court was that there was no ambiguity in the contract (release). 880 F. Supp. at 426. Second, the court did not hold the rule of construing ambiguities against the drafter applied only to contracts “of adhesion or unequal bargaining power,” which is the proposition for which PJ cites it here. Third, the court in *Wilson Group* cited only one case for this proposition of law, that being *International Wood Processors v. Power Dry, Inc.*, 593 F. Supp. 710 (D.S.C. 1984), *aff’d*, 792 F.2d 416 (4<sup>th</sup> Cir. 1986). See 880 F. Supp. at 426, n.10. In *International Wood*, the district court cited only a Second Circuit (federal) opinion and a Connecticut Supreme Court opinion. 593 F. Supp. at 734. In other words, the ruling in *Wilson Group* upon which PJ here relies was not supported by any citation to South Carolina law, and PJ does not cite any supporting South Carolina law. Fourth, PJ never addresses the more salient rulings by this Court and the South Carolina Supreme Court, which NARP cited in its Brief of Appellant for the South Carolina rule that ambiguities are construed against the drafter and in favor of the non-drafting party. (App. Br. of App-Resp. at 11, citing *Southern Atl. Fin. Servs., Inc. v. Middleton*, 590 S.E.2d 27, 29 (S.C. 2003) and *Springs and Davenport, Inc. v. AAG, Inc.*, 683 S.E.2d 814 (S.C. App. 2009).

Finally, in *Wilson Group*, the court rejected an argument that the appellant “did not intend to provide a general release” in the contract under consideration. In rejecting this argument, the district court held “the subjective intention of parties to a clear and unambiguous contract do [sic] not control its meaning. Any other principle would allow a party to avoid the legal effect of a release by claiming it did not believe it was releasing its rights.” 880 F. Supp. at 426, n.9. The same rationale applies here regarding PJ’s attempt to avoid the plain and unambiguous language in the Termination Agreement.

which NARP argued in its Brief of Appellant and for which NARP cited controlling South Carolina law. (App. Br. of App-Resp. at 11, citing *Blakeley v. Rabon*, 221 S.E.2d 767, 769 (S.C. 1976)). See also n.1 and accompanying text, *supra*.

In short, PJ cites *Simpson* and *Wilson Group* to cobble together an argument that, under South Carolina law, ambiguities are not construed against the drafter unless there is an adhesion contract or unequal bargaining power. There is no such rule in South Carolina, and neither of PJ's cited cases supports this rule.

3. *Ashe v. Carolina & N.W. Ry. Co.*,  
43 S.E. 393 (S.C. 1903).

In *Ashe*, the parties entered a written contract whereby the defendant railroad agreed to haul the plaintiff's lumber for a specified price, the price being based upon a specified number of railroad cars being used for a specified number of hours. The written contract was silent on when the contract price was to be paid.

Prior to loading the first portion of the lumber, a dispute arose as to when the contract price was to be paid. The plaintiff said he would not pay in advance but would pay upon delivery. Apparently consenting to this arrangement, the railroad agent permitted the plaintiff to load some lumber and began transporting it. Prior to reaching the contracted destination, the train was pulled to the side and full payment in advance was demanded. The plaintiff refused. The train again departed and, upon arriving at the contracted destination, the plaintiff offered to pay the pro rata share of the contract price then due based upon the number of cars and hours used to make this initial delivery. The railroad refused this payment and refused to surrender the lumber. The plaintiff sued and the trial court granted a nonsuit (directed verdict) to the railroad, finding that when a man deals with a railroad, it is a cash transaction that must be paid in advance. The plaintiff

appealed and the Supreme Court reversed, holding that since the written contract was silent on when the contract price was to be paid, parol evidence was permissible to show a separate oral agreement on the timing (not the amount) of payment.

PJ correctly quotes *Ashe*: "When the written evidence of the contract *does not contain all the terms* of the transaction between the parties, parol evidence (*not contradicting or varying the writing*) is admissible for the purpose of showing a *contemporaneous* independent agreement entered into between the parties." 43 S.E. at 394 (emphasis added) (parenthetical in original). PJ, however, misapplies this quotation. The contractual "silence" in *Ashe* (time of payment) created an ambiguity that permitted the introduction of parol evidence to establish an agreement to fill the "silence." There is no such silence in the Termination Agreement at issue here, nor is there any other ambiguity in the Termination Agreement. Moreover, PJ seeks to enforce a non-contemporaneous agreement that, unlike *Ashe*, contradicts and varies the express terms of the Termination Agreement in violation of the rule applied in *Ashe* and cited by PJ.<sup>2</sup>

4. City of Greenville v. Washington American League Baseball Club, 32 S.E.2d 777.(S.C. 1945).

In *City of Greenville*, the city leased a vacant lot to the defendant for the purpose of playing professional baseball.<sup>3</sup> The written lease required the defendant to make numerous improvements to the vacant lot for that purpose at its own expense. It further provided that should the defendant discontinue baseball operations, the lease terminated

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<sup>2</sup> PJ seeks to enforce the 2000 Agreement as orally modified (allegedly) in July 2004. The November 2004 Termination Agreement expressly terminated the 2000 Agreement and any other agreements in any manner related to or arising out of the 2000 Agreement, and it also released NARP from any claims PJ might have against NARP that related in any manner to the 2000 Agreement. (R. 924a-924b, ¶¶ 1-4).

<sup>3</sup> The lease was originally between the city and a third-party. The third-party later assigned the lease to the defendant, who assumed all responsibilities under the lease. For ease of reference, the third-party and the defendant are referred to jointly as "defendant."

automatically. The lease was silent on ownership of the improvements upon termination of the lease.

The defendant made the necessary improvements, including the erection of light poles for night games, and began conducting baseball operations. The defendant later terminated the lease and a dispute arose as to ownership of the lights and reflectors (lighting equipment) that were attached to the light poles. The city sued for a decree of ownership of the lighting equipment, contending there was a separate oral agreement whereby the defendant had agreed to leave the lighting equipment upon termination of the lease. The trial court agreed and awarded ownership to the city. The defendant appealed.

The Supreme Court held that the lease's "silence" on ownership of the lighting equipment (and the other improvements) created an ambiguity that permitted proof of a separate agreement to fill this silence. The defendant had admitted that the city owned most of the other improvements despite the absence of any provision to that effect in the lease agreement. Thus, as PJ correctly but incompletely describes *City of Greenville*, the Supreme Court found the trial court did not err in reviewing the circumstances of the parties and going outside the terms of the lease to determine the intent of the parties as to ownership of the lighting equipment. (Init. Resp. Br. of Resp-App. at 17-18). Here, unlike *City of Greenville* (and unlike the earlier discussed decision in *Ashe, supra*), there is no silence in the Termination Agreement that creates an ambiguity, nor is there any other ambiguity in the Termination Agreement. Thus, there is no basis for allowing PJ to prove or enforce an agreement that is completely opposite to the express terms of the Termination Agreement. (See n.2, *surpa*).

5. Harbour Town Yacht Club v. Safe Berth Management, Inc.,  
421 F. Supp. 2d 908 (D.C.S.C. 2006).

In *Harbour Town*, the plaintiff owned dredging equipment that it leased to defendant under a Lease Agreement so that defendant could perform a dredging contract (Dredging Agreement) with a third-party association. The plaintiff was also a member of the third-party association, and the dredging operations were also for the benefit of the plaintiff. The Lease Agreement referenced the Dredging Agreement and also referenced that the third-party association would have to obtain the necessary permits for the dredging operations.

The defendant began the dredging operations with the leased equipment under the obtained permits. The dredging operations halted when the South Carolina Department of Health and Environmental Control (DHEC) issued a permit violation notice and ultimately assessed civil penalties for those violations. Federal authorities also commenced a criminal investigation related to the dredging operations. As a result of the cessation of the dredging operations, the defendant stopped making lease payments to the plaintiff for the dredging equipment. The plaintiff sued for breach of the Lease Agreement and sought summary judgment, arguing the Lease Agreement unambiguously required the defendant to make the lease payments even though the dredging operations had been halted by state and federal authorities.

The district court denied summary judgment under the following analysis: (1) the Lease Agreement did not contain an integration clause; (2) the Lease Agreement referenced the Dredging Agreement and specified the purpose of the Lease Agreement was to facilitate the dredging operations under the Dredging Agreement; (3) thus, the Lease Agreement was not a complete statement of the understanding between the parties



as to the Lease Agreement; and (4) therefore, the Lease Agreement was ambiguous as to whether or not the duty to make payment was contingent upon the continued dredging under the Dredging Agreement. The defendant's evidence created a question of fact as to whether the Lease Agreement was part of a joint venture by the plaintiff and defendant that precluded a demand for payment despite the cessation of dredging operations.

PJ's citation of this case is remarkable in that PJ simply ignores the recitation of controlling principles of South Carolina law that are completely contrary to PJ's appellate arguments:

Under South Carolina law, the parol evidence rule generally excludes evidence which would give a *perfectly clear agreement* a *different meaning or effect* that that indicated by the *plain language of the agreement*. Also, if the writing *on its face appears to express the whole agreement*, parol evidence *cannot be admitted to add another term* thereto. The parol evidence rule is *particularly applicable where the writing in question has an integration clause*.

421 F. Supp. at 911 (emphasis added) (citations omitted).<sup>4</sup> Here, PJ attempts to give the Termination Agreement a "different meaning or effect" and attempts to "add another term" to it, despite the fact that Termination Agreement is a "perfectly clear agreement" and "on its face appears to express the whole agreement" and "has an integration clause."

In *Harbour Town*, the district court allowed parol evidence because: (1) the lease agreement "contains no integration clause"; and (2) "*according to its own terms*, the Lease Agreement is *not the whole and complete agreement* between the parties." 421 F. Supp. 2d at 911-912 (all emphasis added). Thus, the court found that "parol evidence (*not contradicting or varying the writing*)" was admissible. *Id.* at 912 (emphasis added)

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<sup>4</sup> The district court in *Harbour Town*, unlike the district court in *Wilson Group*, *supra*, cited South Carolina cases for its ruling. These citations included *Wilson v. Landstrom*, 315 S.E.2d 130 (1984), which NARP cited in its Brief of Appellant (but PJ has completely ignored) on the effect of a merger (integration) clause in a written agreement. (See App. Br. of App-Resp. at 11).

6. Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.,  
232 S.E.2d 20 (S.C. 1977).
- Ellie, Inc. v. Miccichi,  
594 S.E.2d 485 (S.C. App. 2004).
- Housing Authority of Columbia v. Cornerstone Housing, LLC,  
588 S.E.2d 617 (S.C. App. 2003).
- Bishop Realty & Rentals, Inc. v. Perk, Inc.,  
355 S.E.2d 298 (S.C. App. 1987).

Each of these cases involved more than one written agreement between the same parties regarding the same subject, and the courts read the written agreements together to determine the intent of the contracting parties. That is not the situation here. PJ relies on an oral agreement to “construe” the Termination Agreement out of existence. No case supports this. Indeed, no case stands for the proposition that even a written agreement can be used to construe another related written agreement out of existence. Thus, PJ’s reliance on these cases is wholly misplaced. (See Init. Resp. Br. of Resp-App. at 19-20).

The general rule of construing written instruments together is subject to the proviso of “in the absence of anything indicating a contrary intention.” *Klutts*, 232 S.E.2d at 24; *accord Café Assocs., Ltd. v. Gerngross*, 406 S.E.2d 162, 164 (S.C. 2004). Here, the Termination Agreement not only “indicates” but conclusively establishes a “contrary intention.” It expressly terminates the 2000 Agreement and any agreements, understandings, etc. in any way related to the 2000 Agreement. (See n.2, *supra*).<sup>6</sup> Thus,

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<sup>6</sup> PJ cites *Klutts* and, as noted above, it expressly states this proviso. (See Init. Resp. Br. of Resp-App. at 19-20). PJ also cites three opinions from this Court for the general rule of construing multiple written contracts together. *Id.* These opinions do not expressly state this proviso, but each of them cites a Supreme Court opinion that expressly does so. *Ellie*, 594 S.E.2d at 492, *citing Café Assocs., supra*; *Housing Authority*, 588 S.E.2d at 621, *citing Klutts, supra*; and *Bishop Realty*, 355 S.E.2d at 300, *citing Klutts, supra*. This Court did not note this proviso in these cases, because there was no issue relating to it. See *id.*

and even if one assumes the general rule is applicable to an alleged oral agreement relating to a written agreement, the rule does not apply here.<sup>7</sup>

### III. Promissory Estoppel.

PJ does not argue there is any evidence of any agreement or enforceable promise after the date of the Termination Agreement. He relies solely on his theory of an enforceable agreement that pre-dated and survived the Termination Agreement. Thus, his promissory estoppel theory succeeds or fails depending on whether the Termination Agreement is effective. As demonstrated herein, and in NARP's Brief of Appellant, the Termination Agreement plainly and unambiguously captured and terminated all discussions, etc. that pre-dated the Terminated Agreement. Thus, PJ's promissory estoppel arguments also fail.

## CONCLUSION

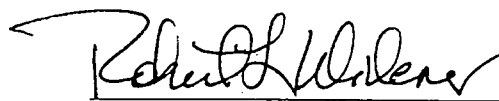
This case is a shining example of why courts enforce contracts as written and do not permit explanations of a contract that is unambiguous on its face. NARP executed the Termination Agreement at the request of PJ, who then used the extinguishment of the 2000 Agreement to facilitate the sale of his company unfettered by any potential claim of interest by NARP under the 2000 Agreement and any matters related to the 2000 Agreement. The Termination Agreement clearly and unambiguously terminated and released everything possibly related to the 2000 Agreement, including any amendments thereto in Charleston or otherwise. Nothing in the Termination Agreement makes any of its provisions contingent upon any event, including but not limited to the separate

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<sup>7</sup> As noted earlier, PJ's only attempt to show an ambiguity in the Termination Agreement is its reference to the December 15 agreement. In making this reference, however, the Termination Agreement plainly states that it has no impact on that separate agreement, *i.e.*, the Termination Agreement again expresses a "contrary intention" that it not be construed in conjunction with the December 15 agreement. See text accompanying n.1, *supra*.

December 15 referenced in the Termination Agreement. There is no evidence that the parties reached any agreement after the Termination Agreement; even PJ admits this. Thus, the trial court erred in denying NARP's directed verdict motions. Accordingly, it is respectfully submitted that this Court should reverse and remand for entry of judgment in favor of NARP on all claims by PJ.

Respectfully Submitted,



Robert L. Widener  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

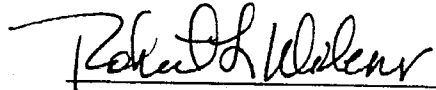
Bernie W. Ellis  
McNair Law Firm, P.A.  
Post Office Box 447  
Greenville, South Carolina 29602  
(864) 271-4940

Attorneys for Appellant-Respondent

September 10, 2010  
Columbia, SC

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Reply Brief of Appellant-Respondent complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.



Robert L. Widener  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

RECEIVED

SEP 14 2010

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

SC Court of Appeals

Case No. 2007-CP-23-3206

North American Rescue Products, Inc., ..... Appellant/Respondent

v.

P.J. Richardson, ..... Respondent/Appellant

**FINAL BRIEF OF RESPONDENT/APPELLANT P.J. RICHARDSON**

C. Mitchell Brown  
William C. Wood, Jr.  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

Attorneys for P.J. Richardson

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Statement of Issues

- I. Did the trial court properly order the remedy of specific performance following the jury's determination that a binding and enforceable contract existed between the parties?
- II. Did the trial court properly enter the form of the judgment in this case—specific performance—based on the jury's answers to the interrogatories on the special verdict the trial court submitted to the jury?

### Statement of the Case

This case involves a dispute over P.J. Richardson's ("Richardson") entitlement to a 7.5% stock ownership stake in North American Rescue Products, Inc. ("NARP"). The trial court granted Richardson specific performance of the parties' agreement, giving Richardson such an ownership stake. NARP has appealed. Richardson has cross-appealed to contest NARP's attempt to limit and impose conditions upon the judgment granting specific performance.

NARP filed suit on May 17, 2007, seeking a declaration that Richardson was not entitled to purchase 7.5% of the stock of NARP at one cent per share. (Compl.; R. p. 6.) NARP amended the complaint to assert a claim of breach of fiduciary duty against Richardson, a former member of the NARP board. (Amend. Compl.; R. p. 18.)

Richardson answered and counterclaimed. (Rev. Amended Answer & Counterclaim; R. p. 34.) In his first counterclaim, Richardson alleged breach of contract and sought specific performance of one of two alternate agreements giving him a 7.5% ownership position in NARP, or alternatively, money damages for NARP's failure to honor the agreements. (*Id.* at ¶¶ 38-69; R. pp. 39-43.)

The matter was tried before a jury August 25-29, 2008. At the close of the evidence, Richardson amended his pleadings to conform to the evidence presented at trial. (Tr. pp. 719-727; R. pp. 670-678.) Counsel for Richardson presented the motion to amend stating "the claim that we would like to pursue is that the 2000 agreement was modified orally in Charleston." (Tr. p. 719-720; R. pp. 670-671.) The modification of the agreement in Charleston "changed the amount of the respected [sic] shares from

25 percent . . . to 7.5.” (Tr. p. 719-720; R. pp. 670-671.) Further, the modification of the contract “was done in the context of the pending sale of Reeves.” (Id.) In his motion, counsel went on to state:

And in that context, therefore, Mr. Castellani promised to give seven and a half percent of shares in his—of the shares of his company, however that would be styled, in return for 7.5 percent of the proceeds of the sale of Reeves.

(Tr. p. 720; R. p. 671.) The trial court granted Richardson’s motion to amend stating “[i]n looking at the revised amended answer and counterclaim, I’m not sure it’s even necessary to grant the motion, it might very well be encompassed in that but I am granting the motion to amend the pleadings to conform to the proof.” (Tr. p. 727; R. p. 678.)

The matter was submitted to the jury on a special verdict form posing specific fact questions and requiring the jury to give categorical answers. (Special Verdict Form; R. p. 2.) Neither party objected to the form of the special verdict.

The jury answered the questions posed. It concluded, among other things, that NARP had given Richardson the right to 7.5% of its stock and that Richardson had, in turn, given NARP the right to 7.5% of the stock of Reeves Manufacturing, Richardson’s former company. The jury concluded that Richardson could fulfill his part of this agreement by giving a cash equivalent, rather than actual Reeves Manufacturing stock, due to the sale of Reeves. The jury found that the parties could perform under the 2000 agreement, as later modified, and that none of the parties’ later agreements terminated the right of Richardson to acquire 7.5% of NARP’s stock. (Special Verdict Form; R. p. 3.) Specifically on these items, the Special Verdict Form provided:

1. Did North American Rescue Products, Inc. and P.J. Richardson give each other the right to acquire 7.5% of each other's stock?
2. Do you find that North American Rescue Products agreed to let P.J. Richardson acquire 7.5% of the capital stock of North American Rescue Products, Inc. in exchange for money, rather than the issuance of 7.5% of capital stock?
3. Can both parties perform under the 2000 Agreement as amended in Charleston?
4. Did the parties (North American Rescue Products, Inc. and P.J. Richardson) enter into a contract, that is the November 2004 Termination, Settlement, and Release Agreement?

(Special Verdict Form at ¶ 1-4; R. p. 2.) The jury answered each of the above special interrogatories in the affirmative. (Id.) Moreover, the special verdict form inquired as to whether any other agreement “end[ed] both parties’ rights to acquire 7.5% of the capital stock of each other?” (Id. at ¶ 5; R. p. 3.) The jury answered “No.” (Id.) Based on the jury’s answers to the special interrogatories, the trial court then entered judgment in favor of Richardson “under the specific performance doctrine.” (Judgment; R. p. 1.)

Post-trial motions for judgment notwithstanding the verdict and to alter or amend the verdict were made immediately after the return of the verdict. (Tr. pp. 912-18; R. pp. 863-869.) The trial court denied all such motions. (Id.) The trial court prepared the judgment that day and judgment was entered September 2, 2008. (Judgment; R. p. 1.)

NARP moved to alter or amend the judgment by motion served and filed September 15, 2008. (NARP Motion to Alter or Amend; R. p. 46.) Among other things, in its motion NARP claimed that the jury did not find that NARP had breached any contract and that Richardson failed to demonstrate that he was ready to pay for the

7.5% stake in NARP. (Id.) However, NARP withdrew the motion by notice filed September 23, 2008. (Notice of Withdrawal of Motion to Alter or Amend; R. p. 49.) NARP served and filed its notice of appeal on October 3, 2008, which was received by Richardson on October 6, 2008. (NARP Notice of Appeal; R. p. 50.)

In conjunction with its notice of appeal and under an incorrect interpretation of the judgment rendered by the trial court, NARP sent to counsel for Richardson a purported tender of NARP stock on October 6, 2008, with a demand that Richardson tender \$2,936,300.00 as payment for such stock no later than October 10, 2008, at 4 p.m., supposedly as required by NARP's view of the trial court's judgment for specific performance.<sup>1</sup> (October 6, 2008 letter from Curtis Stogdhill; R. p. 1067.) This demand was rejected by Richardson. Richardson cross-appealed on October 13, 2008, to challenge NARP's mischaracterization of the trial court's judgment reflected in the October 6 demand letter out of an abundance of caution, in case for some reason the trial court or this Court were to agree with NARP's counsel's mischaracterization. (Richardson's Notice of Cross-Appeal; R. p. 51.) As shown herein, the judgment in favor of Richardson ordering NARP to specifically perform the contract—the agreement as modified in Charleston giving Richardson a 7.5% stake in NARP and

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<sup>1</sup> This demand letter was not presented to the trial court and no motion was ever made by NARP to the trial court asking the trial court to modify its judgment for Richardson "under specific performance doctrine"—all that is stated in the judgment—into a different judgment requiring Richardson to pay \$2,936,300.00 for NARP stock or requiring Richardson to pay for or accept such stock within any arbitrary time limits NARP might choose to impose. Although this letter was not presented to the trial court, it is part of the appellate record because it was attached as an exhibit to NARP's motion for limited remand (which was denied), dated November 19, 2008 and filed in this Court. (Motion for Limited Remand; R. p. 53; Order Denying Motion; R. p. 56.) Hence, NARP's erroneous characterization of the trial court's judgment set forth in this letter is the basis for Richardson's cross appeal.

allowing him to exchange the cash derived from the sale of the Reeves Company for the 7.5% share in NARP—should be affirmed.

#### Statement of the Facts

NARP sued Richardson seeking to extinguish Richardson's rights in an agreement executed between Robert Castellani ("Castellani") and NARP, on one hand, and Richardson and Reeves Manufacturing, Inc. ("Reeves"), on the other. Richardson and Castellani met in 1994 and quickly became friends. At the time when Richardson and Castellani first met, Richardson owned Reeves, an established company, which manufactured various health care and safety products for first responders, homeland security, and some military uses. (Tr. pp. 116-117; *see generally* Tr. pp. 338-717; R. pp. 125-126; 289-668.) At the time, NARP was a fledgling business with no infrastructure, no employees, and was being operated out of Castellani's home. (Tr. pp. 143-144; 652-653; Richardson Ex. 1 – Reeves Manufacturing, Inc. Castellani Computation; R. pp. 152-153; 603-604; R. p. 1026.)

As the friendship between Castellani and Richardson grew, so did the business relationship between the friends' two companies. Reeves began providing infrastructure and support to NARP. This included the nuts and bolts of NARP such as Mr. Richardson's wife, Billie Richardson, keeping the books and monitoring receivables and payables. (Tr. pp. 118; 652-653; R. pp. 127; 603-604.) At the same time, Mrs. Richardson was also a full-time employee of Reeves. (Tr. pp. 655-656; R. pp. 606-607.) Castellani used Reeves' plant in Maryland for storage and warehousing. (Tr. pp. 143-144; R. pp. 152-153.) Reeves similarly provided other services to NARP in addition to administrative services, including supplies and selling various NARP

products. (Tr. pp. 357-359; R. pp. 308-310.) During this time-frame, the companies also began cross-selling each other's products. (Tr. p. 359; 433; R. pp. 310; 384.)

a. Richardson and Castellani Exchanged a 25% Interest in Each Other's Companies.

Due to the shared interests between the two companies and the importance of cross-selling their products between various customers, Castellani (for himself and NARP) and Richardson (for himself and Reeves) executed an agreement on January 1, 2000 ("2000 Agreement"). The 2000 Agreement formalized the business relationship between the two companies, and allowed Castellani to offset some of his personal risk associated with his fledgling company. (2000 Agreement; R. p. 923.) Under the 2000 Agreement, NARP and Reeves agreed to pay each other commissions equal to 25% of the taxable income of their companies for cross-selling each other's respective products. (2000 Agreement; R. p. 923.)

In paragraph 7 of the 2000 Agreement, Richardson and Castellani agreed to issue 25% of their companies' respective capital stock to each other. Paragraph 7 states:

7. Restricted Stock: [Reeves] shall issue [Castellani] and NARP shall issue [Reeves] capital stock to 25% (fully diluted) of its issued stock of all classes. Such stock shall be subject to a right by either company to purchase the issued [sic] if the commission arrangement between RMI and RAC or NARP and PJR is terminated. The right shall be exercised by notice to the holder of the stock. In the instance the terminating company shall pay \$100.00 to the person for such stock. If a company exercises its right to purchase the stock and it enters into an agreement to sell or consummate a transaction to sell a material portion of its property other than in the ordinary course of its business or PJR in the case of RMI and RAC in the case of NARP (directly or indirectly through related parties or a series of related transitions) enter into an agreement to sell or otherwise consummate a transaction selling the capital stock they hold in RMI and NARP, respectively, then the

terminated stockholder shall be paid a portion of any consideration received as if they still owned the stock; this provision shall be for a period of the two years from the date of the stock purchased at the \$100.00 price.

(Id.)

The parties performed under the 2000 Agreement for four years, cooperatively assisting each other in growing both NARP and Reeves. No dispute exists that Castellani and Richardson considered each other a 25% owner of the other's company under the 2000 Agreement.)

**b. Richardson and Castellani Reduced Their Ownership Interests to 7.5% and Amended their Agreement Orally.**

On July 29, 2004, Castellani and both Richardsons met in Charleston, South Carolina ("Charleston Meeting"). During this meeting, the parties again affirmed their respective ownership interests but agreed to modify the 2000 Agreement. They agreed to reduce their percentage of ownership from 25% to 7.5%. (Tr. pp. 237-238; R. pp. 233-234.) The agreement was modified because Richardson was about to sell Reeves to DHS (now called EMS). (Tr. pp. 378-380; R. pp. 329-331.) Thus, the parties agreed that Richardson could acquire his 7.5% ownership interest in NARP from proceeds from the pending sale of Reeves. (Tr. pp. 601; 664-666; R. pp. 552; 615-617.) These facts are undisputed and both Castellani and Richardson testified an agreement was reached. (Tr. pp. 237-238; 342-343; 355; R. pp. 233-234; 293-294, 306.)

The terms of the agreement as modified in Charleston are simple and clear. The parties orally amended their agreement in Charleston to reduce the percentage that each could acquire of the other company from 25% to 7.5%. They further agreed that



Richardson could exchange the cash equivalent of the 7.5% interest from the proceeds from the sale of Reeves. As was testified to at trial, Richardson stated that the 2004 amendment of the agreement modified the percentage share from 25% to 7.5%. (Tr. pp. 355-356; R. pp. 306-307.) The parties' amendment was aimed at making the exchange of ownership shares easier in light of the sale of Reeves. (Tr. pp. 420; 540-544; R. pp. 371; 491-495.) At trial, Castellani testified that the meeting in Charleston resulted in a reduction of the percentage of shares from 25% to 7.5%—a “like for like” exchange. (Tr. p. 238; R. p. 234.) Castellani stated that “[w]e agreed to this in Charleston.” (Tr. p. 331; R. p. 284.) Richardson also agreed that there was a “meeting of the minds in Charleston.” (Tr. p. 585; R. p. 536.)

Rather than honor the parties' agreement, Castellani, on behalf of NARP, sued Richardson, alleging various causes of action related to the parties' ongoing relationship, and seeking to extinguish Richardson's rights thereunder. Damages were also sought damages based on the alleged malfeasance of Richardson. (Compl.; R. p. 6.) As a result, Castellani and NARP never performed under the agreement and failed to tender Richardson the shares in exchange for the proceeds from the sale of Reeves” (which proceeds amounted to \$415,988). (Tr. pp. 136-139; 344-349; 425-426; 587; Reeves Manufacturing Inc. Castellani Computation; R. pp. 145-148; 295-300; 376-377; 538.)

At trial, Richardson stated that he remained ready, willing, and able to perform the contract as modified. Richardson stated that “[m]y intention was to carry out and honor this agreement with Bob [Castellani] by paying out with the proceeds of the sale of Reeves. (Tr. pp. 372-373; R. pp. 323-324.) Richardson further stated that “I am

bound now to honor that agreement.” (Tr. p. 586; R. p. 537.) Richardson knew he only had to deliver a check to NARP for the proceeds from the sale of Reeves to comply with the amended agreement. (Tr. p. 588; R. p. 539.) Richardson stated “that’s what it was, write him a check.” (Tr. p. 608; R. p. 559.) Richardson admitted that “we’ve never hesitated or changed our position of what Bob [Castellani] is entitled to. He was entitled to 7½ percent of what we sold Reeves for . . . .” (Tr. p. 592; R. p. 543). Moreover, Richardson testified that the money from the sale of Reeves was in his account and he could “cut a check for that money to Bob [Castellani] today if he would take it” – that is, if Castellani would give Richardson his 7.5% interest in NARP. (Tr. p. 609; 590; R. pp. 560; 541.)

Based on the evidence presented at trial, the jury found that the parties’ could perform under the 2000 agreement as modified in 2004 in Charleston. (Special Verdict Form; R. p. 2.) Based on this finding by the jury, the Court ordered the remedy of specific performance in favor of Richardson. (Judgment; R. p. 1.) Because of the position that NARP has taken as to the meaning of judgment as entered by the Court, Richardson filed this cross-appeal out of an abundance of caution.

#### Standard of Review

In an action tried by a jury, where the circuit court concurs in the jury’s findings of fact, the appellate court must affirm those findings if there is any evidence reasonably supporting the jury’s conclusions. Thigpen v. Thigpen, 217 S.C. 322, 60 S.E.2d 621 (1950).

### Law/Analysis

- I. The trial court properly ordered the remedy of specific performance following the jury's determination that a binding and enforceable contract existed between the parties.

Following the entry of the judgment in this action, NARP took the position that in order for Richardson to obtain his 7.5% interest in NARP, he had to pay \$2,936,300.00 (two million, nine hundred and thirty six thousand and three hundred and 00/100 dollars) for his shares of stock. (October 6, 2008 letter from Curtis Stogdhill; R. p. 1067.) However, NARP's position ignores the claim for specific performance of the contract between the parties as orally amended in Charleston. As a result of NARP's misapprehension of the judgment in this case, Richardson filed this cross-appeal.

As is shown herein, the trial court properly entered judgment in favor of Richardson and lawfully ordered NARP to specifically perform its obligations under the parties' 2000 agreement as orally amended following the 2004 meeting in Charleston, South Carolina. The jury found that a contract existed. The terms of the contract are clear. The trial court ordered the parties to specifically perform that contract. Therefore, the judgment in favor of Richardson must be affirmed as set forth herein.

In order to award the remedy of specific performance, a party must show: "(1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract." Campbell v. Carr, 361 S.C. 258, 264-65, 603 S.E.2d 625, 628 (Ct. App. 2004) (citing Guignard v. Atkins,

282 S.C. 61, 64, 317 S.E.2d 137, 140 (Ct. App. 1984)). “Whether to grant specific performance is a matter committed to ‘sound judicial discretion.’” Ex parte Bland, 380 S.C. 1, 16, 667 S.E.2d 540, 547 (2008) (quoting Summer v. Bankhead, 119 S.C. 78, 111 S.E. 891 (1922)). Absent an abuse of discretion, the trial court’s judgment must be upheld: Id. “An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support.” Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). No such errors exist in this case and the judgment is supported by the evidence. The jury found that a contract existed as orally modified and both parties were capable of performing. The judgment should be affirmed as set forth herein, and not in the manner interpreted by NARP.

**A. The Record contains clear evidence of a valid agreement.**

The Record contains clear evidence that a valid and enforceable agreement existed. In the year 2004, the parties modified their agreement that was previously identified as the “Outline of the Business Relationship Between North American Rescue Products, Inc. and Reeves Manufacturing.” (Agreement dated January 1, 2000; Tr. p. 206; R. p. 923; R. p. 202.) The modified agreement provided that Richardson could acquire a 7.5% share of NARP in exchange for the proceeds of the sale of Reeves—\$415,988. (Tr. pp. 355-356; 585; 420; 540-544; 238; 331; R. pp. 306-307; 536; 371; 491-495; 234; 284.) Richardson presented evidence that this was the agreement of the parties and the jury found that this agreement existed and could be performed. (Special Verdict Form; R. p. 2.) Thus, the position taken by NARP as to their interpretation of

the judgment must be rejected and the judgment ordering specific performance affirmed as set forth herein.

In finding a valid contract sufficient to fulfill the first requirement for an award of specific performance as set forth in Campbell v. Carr, South Carolina's courts recognize that "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Clardy v. Bodolosky, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) (quoting Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis in original)). Thus, "[s]pecific performance will not be ordered unless the contract expresses the true intent of the parties and is fair, just and equitable." Amick v. Hagler, 286 S.C. 481, 484, 334 S.E.2d 525, 527 (Ct. App. 1985) (citing McChesney v. Smith, 105 S.C. 171, 176, 89 S.E. 639, 641 (1916)).

The evidence at trial supports the fact that the parties orally amended their agreement in Charleston to reduce the percentage that each could acquire of the other company from 25% to 7.5% and that Richardson could exchange the cash equivalent of the 7.5% interest from the proceeds from the sale of Reeves. As was testified to at trial, Richardson stated that the 2004 amendment of the agreement modified the percentage share from 25% to 7.5%. (Tr. pp. 355-356; R. pp. 306-307.) Richardson also testified that he was seeking to have the court enforce his right to acquire 7.5% of the stock of NARP. (Id.; Tr. p. 585; R. p. 536.) Richardson stated that the amendment was aimed at making the exchange of ownership shares easier in light of the sale of Reeves. (Tr. pp. 420; 540-544 R. pp. 371; 491-495.) Castellani, on behalf of NARP,

testified that the meeting in Charleston resulted in a reduction of the percentage of shares from 25% to 7.5%—a “like for like” exchange. (Tr. p. 238; R. p. 234.) Castellani also agreed that the parties “did that deal and then [ ] hugged and kissed and sealed the deal[.]” (*Id.*) Later, at trial, Castellani testified that “[w]e agreed to this in Charleston.” (Tr. p. 331; R. p. 284.) Richardson also agreed that there was a “meeting of the minds in Charleston.” (Tr. p. 585; R. p. 536.) Thus, the parties’ agreement was clear and both understood the agreement.

As a result, the record contains ample evidence that the parties had a valid and enforceable agreement that the jury found was capable of being performed. Thus, this Court should reject NARP’s mischaracterization of the judgment and affirm the judgment as entered by the trial court—ordering specific performance of the contract as modified in Charleston under which Richardson has a right to a 7.5% interest share in NARP in exchange for \$415,988.

**B. The agreement had been partly carried into execution on one side with the approbation of the other.**

Richardson has performed his part of the contract. Richardson sold Reeves Company and has set aside the proceeds from the sale of Reeves which the contract provided he could exchange for a 7.5% share in NARP. (Tr. pp. 355-356; R. pp. 306-307.) However, NARP has failed to perform by not tendering the shares for the proceeds from Reeves. Thus, NARP stands in the way of executing the contract.

The second requirement that must be fulfilled before a court can order specific performance is that the agreement has been partly carried into execution by one party based on the agreement with the other party. Campbell v. Carr, 361 S.C. at 264-65,

603 S.E.2d at 628. In Gibson v. Hryzikos, 293 S.C. 8, 358 S.E.2d 173 (Ct. App. 1987), the court granted the request for specific performance finding that certain actions constituted part performance, which took the contract out of the statute of frauds and satisfied the second element of the specific performance test. Id. at 13-16, 358 S.E.2d at 175-77. Recently, this Court noted in Clardy that “[t]he doctrine of substantial performance was conceived for the case where a plaintiff’s partial performance has already given to a defendant substantially all that he bargained for and is of such a nature that it cannot be returned.” Clardy v. Bodolosky, 383 S.C. 418, 427, 679 S.E.2d 527, 531 (Ct. App. 2009) (quoting Coastal Seafood Co., Inc. v. Alcoa S.C., Inc., 298 S.C. 466, 467-68, 381 S.E.2d 502, 503 (Ct. App. 1989)) (holding that the Clardys had satisfied the second element by their substantial performance with the consent of the other party).

After the sale of Reeves, Richardson kept the proceeds from the sale in order to pay NARP and Castellani for the 7.5% share in the company. (Tr. p. 590; R. p. 541.) At trial and now, Richardson has the funds ready to pay to NARP and Castellani if the shares are tendered. (Tr. pp. 609; 590; R. pp. 560; 541.) Richardson kept those funds in order to perform his obligations under the agreement. (Tr. pp. 435-436; 540-544; R. pp. 386-387; 491-495.) Richardson’s actions were undertaken as a result of the understanding and agreement reached with Castellani on behalf of NARP. (Tr. pp. 341-344; 608-609; R. pp. 292-295; 559-560.) Thus, Richards acted on the approval of the agreement by Castellani and had every expectation that NARP and Castellani would perform their part of the agreement. (Tr. pp. 514; 518; 530; R. pp. 465; 469; 481.)

As a result, Richardson properly demonstrated that he has performed as envisioned under the parties' agreement with the approval of NARP after the contract was modified. Further, Richardson's actions in saving those proceeds and his stated a tender of them in open court to exchange for the stock shares demonstrate that he partly performed his part, as envisioned under the agreement. This Court should affirm the trial court's judgment accordingly.

**C. The party who comes to compel performance must have performed his or her part, or be and remain able and willing to perform his or her part of the contract.**

Richardson demonstrated that he performed under the contract and that he remains ready, willing, and able to perform his part of the contract. Nonetheless, NARP did not tender the 7.5% of stock as required under the agreement. Based on Richardson's demonstration to perform, this Court should affirm the trial court's judgment.

The party seeking specific performance must be able to demonstrate that he was ready and willing to perform his part of the contract. Gibson v. Hrysikos, 293 S.C. at 13-14, 358 S.E.2d at 176. In a case finding that a party failed to meet its burden in requesting the remedy of specific performance, the South Carolina Supreme Court noted that a party requesting specific performance:

[M]ust aver that he has performed his part of the contract or that he is willing and ready to perform it, and that he has performed all conditions precedent to the taking effect of the obligation of the defendant, including the payment to be made thereon, or some valid excuse for his failure to perform or offer to perform.

Ingram v. Kasey's Assocs., 340 S.C. 98, 106-07, 531 S.E.2d 287, 291 (2000) (quoting 71 Am. Jur. 2d Specific Performance § 201 (1973)). Thus, the South Carolina courts



have found that pleading an ability to immediately tender money to fulfill the terms of a contract is sufficient to demonstrate that a party is "ready, able, and willing to perform his part of the contract." See Elliott v. Dew, 264 S.C. 40, 47-48, 212 S.E.2d 421, 424 (1975) (affirming the recommendation of specific performance and noting that "[i]t was sufficient for the respondent to plead a tender of the purchase money and to offer by his complaint to pay whatever amount of money was necessary to consummate the transaction and to pay that sum when determined by the court.").

As was shown at trial, Richardson was ready willing and able to perform the contract as modified, and the pleadings were amended to conform with the evidence at trial. Richardson averred that "[m]y intention was to carry out and honor this agreement with Bob [Castellani] by paying out with the proceeds of the sale of Reeves." (Tr. pp. 372-373; R. pp. 323-324.) Richardson further stated that "the only memorialization we had of it was the oral agreement, meaning the 2000 agreement . . . I am bound now to honor that agreement." (Tr. p. 586; R. p. 537.) Richardson knew he only had to deliver a check to NARP for the proceeds from the sale of Reeves to comply with the amended agreement. (Tr. p. 588; R. p. 539.) Specifically, Richardson testified that "we would write a check for whatever that number was, yet to be determined, and we would pay it." (Tr. p. 589; R. p. 540.) That was all Richardson had to do to perform—"that's what it was, write him a check." (Tr. p. 608; R. p. 559.) Richardson admitted that "we've never hesitated or changed our position of what Bob [Castellani] is entitled to. He was entitled to 7½ percent of what we sold Reeves for . . . ." (Tr. p. 592; R. p. 543). Moreover, Richardson testified that the money from the sale of Reeves was in his account and he could "cut a check

for that money to Bob [Castellani] today if he would take it” if Castellani would give Richardson his 7.5% interest in NARP. (Tr. p. 609; 590; R. pp. 560; 541.)

Accordingly, NARP’s position as to the remedy the judge ordered is not consistent with the judgment in this case. When asked “[c]an [b]oth parties perform under the 2000 Agreement as amended in Charleston?” the jury answered “Yes.” (Special Verdict Form at ¶ 3; R. p. 2.) Thus, Richardson was willing and remains willing to perform. As a result, he met his burden in demonstrating his entitlement to the remedy of specific performance as to each element under the law. Hence, this Court should affirm the trial court’s judgment ordering NARP to specifically perform under the contract as orally modified in Charleston, South Carolina.

**II. The trial court properly entered the form of the judgment in this case—specific performance—based on the jury’s answers to the interrogatories on the special verdict the trial court submitted to the jury.**

As detailed above, the trial court submitted a special verdict form to the jury. (Special Verdict Form; R. p. 2.) That verdict form contained written questions for findings which might properly be made under the pleadings and evidence. (*Id.*) The trial court then entered the form of the judgment based on the jury’s answers to the interrogatories contained on the special verdict form. (Judgment; R. p. 1.) Based on the pleadings and the answers to the interrogatories, the trial court entered judgment in favor of Richardson “under the doctrine of specific performance.” (*Id.*)

Examining the Rules of Civil Procedure in the context of the actions of the trial court in this case, it is clear that the trial court properly ordered relief—by way of specific performance—in favor of Richardson. The starting point of the examination is

Rule 49 of the South Carolina Rules of Civil Procedure which provides in pertinent part:

(a) **Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court *may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence*; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. . . .

Rule 49(a), SCRCP (emphasis added).

Following the jury's return of the special verdict, the trial court is charged with preparing the form of the judgment. Rule 58, SCRCP. It is well settled that "[a] judgment is effective only when reduced to writing and entered into the record."

Johnson v. S.C. Dep't of Prob., 372 S.C. 279, 284, 641 S.E.2d 895, 898 (2007)

(citing Rule 58(a)(2), SCRCP). Rule 58 provides:

(a) **Entry Upon Verdict or Decision.** Subject to the provisions of Rule 54(b): . . .

(2) upon a decision by the court granting other relief, or *upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly prepare the form of the judgment*, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court, *and after review and approval by the court, the clerk shall promptly enter it.*

*Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record.* Entry of the judgment should not be delayed for the taxing of costs.

Rule 58, SCRCP (emphasis added).

Here, the trial court submitted a special verdict form containing written questions as to factual findings that might be made under the evidence presented at trial. On the special verdict form, the trial court inquired of the jury “[c]an [b]oth parties perform under the 2000 Agreement as amended in Charleston?” (Special Verdict Form at ¶ 3; R. p. 2.) The jury responded, “Yes.” The trial court also inquired as to whether any other agreement “end[ed] both parties’ rights to acquire 7.5% of the capital stock of each other?” (Id. at ¶ 5; R. p. 3.) To which the jury answered “No.” (Id.) On the same day the jury answered the special interrogatories, the trial court entered judgment for Richardson under the specific performance doctrine. (Judgment; R. p. 1.)

The trial court correctly and lawfully entered a judgment in favor of Richardson under the doctrine of specific performance. As shown above, ample evidence existed regarding the contract as modified in Charleston. Moreover, the pleadings and the record clearly indicate that Richardson sought the remedy of specific performance and outlined the contract he wanted to be performed. Specifically, in his amended counterclaim Richardson alleged that he was “entitled to specific performance of the overall agreement and the Option Contract along with money damages accruing during the interim period during which Plaintiff [NARP] failed to perform.” (Rev. Amended Answer & Counterclaim at ¶ 66; R. p. 42.) In addition, Richardson amended his counterclaim at trial to conform to the evidence presented, stating that the modification of the agreement in Charleston “changed the amount of the respected shares from 25 percent . . . to 7.5.” (Tr. p. 720; R. p. 671.) Further, the modification of the contract

“was done in the context of the pending sale of Reeves.” (Id.) In his motion, counsel went on to state:

And in that context, therefore, Mr. Castellani promised to give seven and a half percent of shares in his—of the shares of his company, however that would be styled, in return for 7.5 percent of the proceeds of the sale of Reeves.

(Tr. p. 720; R. p. 671.) The trial court granted Richardson’s motion to amend. (Tr. p. 727; R. p. 678.)

The evidence and the pleadings support the trial court’s decision to enter the form of the judgment it did here—specific performance—based on the jury’s answers to the special interrogatories the trial court asked. Hence, this Court should affirm the decision of the trial court to grant Richardson the remedy of specific performance and this Court should not disturb the trial court’s sound decision. Ex parte Bland, 380 S.C. 1, 16, 667 S.E.2d 540, 547 (2008) (quoting Summer v. Bankhead, 119 S.C. 78, 111 S.E. 891 (1922)) (stating “[w]hether to grant specific performance is a matter committed to ‘sound judicial discretion.’”).

#### Conclusion

Accordingly, this Court should affirm the trial court’s judgment ordering the parties to specifically perform under the 2000 Agreement as modified at the Charleston meeting. Thus, Richardson has a right to a 7.5% interest share in NARP in exchange for \$415,988—the proceeds from his sale of Reeves Company, and this Court should so rule.

*Signature Page Attached*

Respectfully submitted,

By:

Will Wood  
C. Mitchell Brown  
William C. Wood, Jr.  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

Attorneys for P.J. Richardson

9/14, 2010  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2007-CP-23-3206

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SEP 14 2010

SC Court of Appeals

North American Rescue Products, Inc., ..... Appellant/Respondent

v.

P.J. Richardson, ..... Respondent/Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b),

SCACR.

By:

*William C. Wood, Jr.*  
C. Mitchell Brown  
William C. Wood, Jr.  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

Attorneys for P.J. Richardson

9/14, 2010

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North American Rescue Products, Inc., ..... Appellant/Respondent,

v.

P.J. Richardson, ..... Respondent/Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent/Appellant P.J. Richardson, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

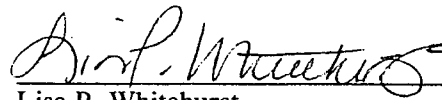
Final Brief of Respondent/Appellant P.J. Richardson

Counsel Served:

Robert L. Widener, Esquire  
McNair Law Firm, PA  
Post Office Box 11390  
Columbia, SC 29211



Bernie W. Ellis, Esquire  
McNair Law Firm, PA  
Post Office Box 447  
Greenville, SC 29602



Lisa P. Whitehurst  
Administrative Assistant

September 14, 2010

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
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SEP 14 2010

S.C. SUPREME COURT

North American Rescue Products, Inc. . . . . Appellant/Respondent

P. J. Richardson . . . . . Respondent/Appellant

FINAL RESPONSIVE BRIEF OF RESPONDENT/APPELLANT P.J.  
RICHARDSON

C. Mitchell Brown  
William C. Wood, Jr.  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

Attorneys for P.J. Richardson

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Statement of Issues

- I. Did the trial court properly deny NARP's motion for directed verdict because evidence demonstrated that Richardson possessed a contractual right to purchase 7.5% of NARP's stock and that right had not been terminated?
- II. Did the trial court properly deny NARP's directed verdict motion as to promissory estoppel because evidence existed that Richardson relied on NARP's promise to sell Richardson 7.5% of NARP stock?

### Statement of the Case

This case involves a dispute over P.J. Richardson's ("Richardson") entitlement to a 7.5% stock ownership stake in North American Rescue Products, Inc. ("NARP"). The trial court granted Richardson specific performance in light of the jury verdict. NARP has appealed, contending the trial court erred in denying it a directed verdict. Richardson has cross-appealed to contest NARP's attempt to limit and impose conditions upon the judgment granting specific performance.

NARP filed suit on May 17, 2007, seeking a declaration that Richardson was not entitled to purchase 7.5% of the stock of NARP at one cent per share. (Compl.; R. p. 6.) NARP amended the complaint to assert a claim of breach of fiduciary duty against Richardson, a former member of the NARP board. (Amend. Compl.; R. p. 18.)

Richardson answered and counterclaimed. (Rev. Amended Answer & Counterclaim; R. p. 34.) In his first counterclaim, Richardson alleged breach of contract and sought specific performance of one of two alternate agreements giving him a 7.5% ownership position in NARP, or alternatively, money damages for NARP's failure to honor the agreements. (Id. at ¶¶ 38-69; R. p. 39-43.)

The matter was tried before a jury August 25-29, 2008. At the close of the evidence, Richardson amended his pleadings to conform to the evidence presented at trial. (Tr. pp. 719-727; R. p. 670-678.) Counsel for Richardson presented the motion to amend stating "the claim that we would like to pursue is that the 2000 agreement was modified orally in Charleston." (Tr. p. 719-720; R. p. 670-671.) The modification of the agreement in Charleston "changed the amount of the respected [sic] shares from 25

percent . . . to 7.5.” (Tr. p. 719-720; R. p. 670-671.) Further, the modification of the contract “was done in the context of the pending sale of Reeves.” (Id.) In his motion, counsel went on to state:

And in that context, therefore, Mr. Castellani promised to give seven and a half percent of shares in his—of the shares of his company, however that would be styled, in return for 7.5 percent of the proceeds of the sale of Reeves.

(Tr. p. 720; R. p. 671.) The trial court granted Richardson’s motion to amend stating “[i]n looking at the revised amended answer and counterclaim, I’m not sure it’s even necessary to grant the motion, it might very well be encompassed in that but I am granting the motion to amend the pleadings to conform to the proof.” (Tr. p. 727; R. p. 678.)<sup>1</sup>

The matter was submitted to the jury on a special verdict form posing specific fact questions and requiring the jury to give categorical answers. (Special Verdict Form; R. p. 2.) Neither party objected to the form of the special verdict.

The jury answered the questions posed. It concluded, among other things, that NARP had given Richardson the right to 7.5% of its stock and that Richardson had, in turn, given NARP the right to 7.5% of the stock of Reeves Manufacturing, Richardson’s former company. The jury concluded that Richardson could fulfill his part of this agreement by giving a cash equivalent, rather than actual Reeves Manufacturing stock, due to the sale of Reeves. The jury found that the parties could perform under the 2000 agreement, as later modified, and that none of the parties’ later agreements terminated the right of Richardson to acquire 7.5% of NARP’s stock.

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<sup>1</sup> This ruling permitting the amendment is unchallenged.



(Special Verdict Form; R. p. 3.) Specifically on these items, the Special Verdict Form provided:

1. Did North American Rescue Products, Inc. and P.J. Richardson give each other the right to acquire 7.5% of each other's stock?
2. Do you find that North American Rescue Products agreed to let P.J. Richardson acquire 7.5% of the capital stock of North American Rescue Products, Inc. in exchange for money, rather than the issuance of 7.5% of capital stock?
3. Can both parties perform under the 2000 Agreement as amended in Charleston?
4. Did the parties (North American Rescue Products, Inc. and P.J. Richardson) enter into a contract, that is the November 2004 Termination, Settlement, and Release Agreement?

(Special Verdict Form at ¶ 1-4; R. p. 2.) The jury answered each of the above special interrogatories in the affirmative. (*Id.*) Moreover, the special verdict form inquired as to whether any other agreement “end[ed] both parties’ rights to acquire 7.5% of the capital stock of each other?” (*Id.* at ¶ 5.) The jury answered “No.” (*Id.*) Based on the jury’s answers to the special interrogatories, the trial court then entered judgment in favor of Richardson “under the specific performance doctrine.” (Judgment; R. p. 1.)

Post-trial motions for judgment notwithstanding the verdict and to alter or amend the verdict were made immediately after the return of the verdict. (Tr. pp. 912-18; R. p. 863-869.) The trial court denied all such motions. (*Id.*) The trial court prepared the judgment that day and judgment was entered September 2, 2008. (Judgment; R. p. 1.)

NARP moved to alter or amend the judgment by motion served and filed September 15, 2008. (NARP Motion to Alter or Amend; R. p. 46.) Among other things, in its motion NARP claimed that the jury did not find that NARP had breached

any contract and that Richardson failed to demonstrate that he was ready to pay for the 7.5% stake in NARP. (*Id.*) However, NARP withdrew the motion by notice filed September 23, 2008. (Notice of Withdrawal of Motion to Alter or Amend; R. p. 49.) NARP served and filed its notice of appeal on October 3, 2008, which was received by Richardson on October 6, 2008. (NARP Notice of Appeal; R. p. 50.)

In conjunction with its notice of appeal and under an incorrect interpretation of the judgment rendered by the trial court, NARP sent to counsel for Richardson a purported tender of NARP stock on October 6, 2008, with a demand that Richardson tender \$2,936,300.00 as payment for such stock no later than October 10, 2008, at 4 p.m., supposedly as required by NARP's view of the trial court's judgment for specific performance.<sup>2</sup> (October 6, 2008 letter from Curtis Stodghill; R. p. 1067.) This demand was rejected by Richardson. Richardson then cross-appealed on October 13, 2008, to challenge NARP's mischaracterization of the trial court's judgment reflected in the October 6 demand letter out of an abundance of caution, in case for some reason the trial court or this Court were to agree with NARP's counsel's mischaracterization. (Richardson's Notice of Cross-Appeal; R. p. 51.) As shown herein, the judgment in favor of Richardson ordering NARP to specifically perform the contract—the

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<sup>2</sup> This demand letter was not presented to the trial court and no motion was ever made by NARP to the trial court asking the trial court to modify its judgment for Richardson "under specific performance doctrine"—all that is stated in the judgment—into a different judgment requiring Richardson to pay \$2,936,300.00 for NARP stock or requiring Richardson to pay for or accept such stock within any arbitrary time limits NARP might choose to impose. Although this letter was not presented to the trial court, it is part of the appellate record because it was attached as an exhibit to NARP's motion for limited remand (which was denied), dated November 19, 2008 and filed in this Court. (Motion for Limited Remand; R. p. 53; Order Denying Motion; R. p. 56.) Hence, NARP's erroneous characterization of the trial court's judgment set forth in this letter is the basis for Richardson's cross appeal.

agreement as modified in Charleston giving Richardson a 7.5% stake in NARP and allowing him to exchange the cash derived from the sale of the Reeves Company<sup>3</sup> for the 7.5% share in NARP—should be affirmed.

NARP's arguments on appeal surround its contention that the trial court erred in denying NARP's directed verdict motions because Richardson's right to ownership of 7.5% of stock purportedly terminated. But as set forth below, the trial court properly denied the directed verdict motions.

#### Statement of the Facts

NARP sued Richardson seeking to extinguish Richardson's rights in an agreement executed between Robert Castellani ("Castellani") and NARP, on one hand, and Richardson and Reeves Manufacturing, Inc. ("Reeves"), on the other. At the time when Richardson and Castellani first met, Richardson owned Reeves, an established company, which manufactured various health care and safety products for first responders, homeland security, and some military uses. (Tr. pp. 116-117; R. p. 125-126; *see generally* Tr. pp. 338-717; R. p. 289-668.) At the time, NARP was a fledgling business with no infrastructure, no employees, and was being operated out of Castellani's home. (Tr. pp. 143-144; 652-653; Richardson Ex. 1 - Reeves Manufacturing, Inc. Castellani Computation; R. p. 152-153; 603-604; R. p. 1026.)

As the relationships grew, Reeves began providing infrastructure and support to NARP. This included the nuts and bolts of NARP such as Mr. Richardson's wife, Billie Richardson, keeping the books and monitoring receivables and payables. (Tr.

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<sup>3</sup> Reeves Manufacturing, Inc., as further described herein, was a company owned by P.J. Richardson.

pp. 118; 652-653; R. p. 127; 603-604.) At the same time, Mrs. Richardson was also a full-time employee of Reeves. (Tr. pp. 655-656; R. p. 606-607.) Castellani used Reeves' plant in Maryland for storage and warehousing. (Tr. pp. 143-144; R. p. 152-153.) Reeves similarly provided other services to NARP in addition to administrative services, including supplies and selling various NARP products. (Tr. pp. 357-359; R. p. 308-310.) During this time-frame, the companies also began cross-selling each other's products. (Tr. pp. 359; 433; R. p. 310; 384.)

a. Richardson and Castellani Exchanged a 25% Interest in Each Other's Companies.

Due to the shared interests between the two companies and the importance of cross-selling their products between various customers, Castellani (for himself and NARP) and Richardson (for himself and Reeves) executed an agreement on January 1, 2000 ("2000 Agreement"). The 2000 Agreement formalized the business relationship between the two companies, and allowed Castellani to offset some of his personal risk associated with his fledgling company. (NARP Ex. 2 (Richardson Ex. 3); Tr. p. 231-32; R. p. 923; 227-228.) Under the 2000 Agreement, NARP and Reeves agreed to pay each other commissions equal to 25% of the taxable income of their companies for cross-selling each other's respective products. (NARP Ex. 2 (Richardson Ex. 3); R. p. 923.)

In paragraph 7 of the 2000 Agreement, Richardson and Castellani agreed to issue 25% of their companies' respective capital stock to each other. Paragraph 7 states:

7. Restricted Stock: [Reeves] shall issue [Castellani] and NARP shall issue [Reeves] capital stock to 25% (fully diluted) of its issued

stock of all classes. Such stock shall be subject to a right by either company to purchase the issued [sic] if the commission arrangement between RMI and RAC or NARP and PJR is terminated. The right shall be exercised by notice to the holder of the stock. In the instance the terminating company shall pay \$100.00 to the person for such stock. If a company exercises its right to purchase the stock and it enters into an agreement to sell or consummate a transaction to sell a material portion of its property other than in the ordinary course of its business or PJR in the case of RMI and RAC in the case of NARP (directly or indirectly through related parties or a series of related transitions) enter into an agreement to sell or otherwise consummate a transaction selling the capital stock they hold in RMI and NARP, respectively, then the terminated stockholder shall be paid a portion of any consideration received as if they still owned the stock; this provision shall be for a period of the two years from the date of the stock purchased at the \$100.00 price.

(Id.)

The parties performed under the 2000 Agreement for four years, cooperatively assisting each other in growing both NARP and Reeves. No real dispute exists that Castellani and Richardson considered each other a 25% owner of the other's company under the 2000 Agreement. (Richardson Ex. 4, Tr. p. 355; R. p. 1027; 306.)

b. **Richardson and Castellani Reduced Their Ownership Interests to 7.5% and Amended their Agreement Orally.**

On July 29, 2004, Castellani and both Richardsons met in Charleston, South Carolina ("Charleston Meeting"). During this meeting, the parties again affirmed their respective ownership interests but agreed to modify the 2000 Agreement. They agreed to reduce their percentage of ownership from 25% to 7.5%. (Tr. pp. 237-238; R. p. 233-234.) The agreement was modified because Richardson was about to sell Reeves to DHS (now called EMS). (Tr. pp. 378-380; R. p. 329-331.) Thus, the parties agreed that Richardson could acquire his 7.5% ownership interest in NARP in exchange for the monetary value of 7.5% of the proceeds from the pending sale of

Reeves. (Tr. pp. 601; 664-666; R. p. 552; 615-617.) These facts are undisputed and both Castellani and Richardson testified an agreement was reached. (Tr. pp. 237-238; 342-343; 355; R. p. 232-233; 293-294; 306.)

The terms of the agreement as modified in Charleston are simple and clear. The parties orally amended their agreement in Charleston to reduce the percentage that each could acquire of the other company from 25% to 7.5%. They further agreed that Richardson could exchange the cash equivalent of the 7.5% interest from the proceeds from the sale of Reeves. As was testified to at trial, Richardson stated that the 2004 amendment of the agreement modified the percentage share from 25% to 7.5%. (Tr. pp. 355-356; R. p. 306-307.) The parties' amendment was aimed at making the exchange of ownership shares easier in light of the sale of Reeves. (Tr. p. 420; 540-544; R. p. 371; 491-495.) At trial, Castellani testified that the meeting in Charleston resulted in a reduction of the percentage of shares from 25% to 7.5%—a “like for like” exchange. (Tr. p. 238; R. p. 234.) Castellani stated that “[w]e agreed to this in Charleston.” (Tr. p. 331; R. p. 284.) Richardson also agreed that there was a “meeting of the minds in Charleston.” (Tr. p. 585; R. p. 536.) This was the full extent of the terms of the contract, as orally amended.

c. **Richardson and NARP Attempted to Enter into a Subsequent Agreement that Never Materialized.**

Subsequently, Richardson and NARP attempted to craft an agreement during late 2004 and on into early 2005. (Tr. p. 342; R. p. 293.) This agreement, as contemplated, would have three components. (Tr. p. 342, R. p. 293.) More specifically, under the agreement as envisioned: (1) Richardson would receive an

Option Agreement reflecting his 7.5% equity interest in NARP; (2) Richardson would make a charitable contribution to a charity identified by Castellani in an amount equal to 7.5% of the sale proceeds of Reeves, which was then negotiating the sale of its assets; and (3) the parties would execute a Termination, Release and Settlement Agreement. (See Rod Manning Testimony, Court's Exhibit 7 at p. 108:11-25, p. 109:1-4, p. 112:21-25, p. 113:1-6, p. 114:20-25, p. 115:1-20, p. 118:2-25, p. 119:1, p. 130:11-18; R. pp. 904; 905; 908-911; 913-914, 919.) One component of the three-pronged agreement was memorialized in a document identified as the "Agreement of Termination, Settlement and Release." (NARP Ex. 6; R. p. 924a.) This phase of the three-step agreement was designed to reiterate Richardson's entitlement to 7.5% of the stock of NARP while ending all other rights under the parties' 2000 Agreement as had previously been modified in their Charleston meeting. (NARP Ex. 6; R. p. 924a.) In fact, the document containing the termination provision also contained two provisions protecting Richardson's right to purchase 7.5% of NARP stock and demonstrated that the document was merely the first step in the ongoing attempt to reach an agreement that satisfied both Richardson and NARP. (NARP Ex. 6; R. p. 924a.) It specifically referenced a future date of December 15, 2004 and the option agreement to then be executed as yet another step in this three-tiered agreement. (NARP Ex. 6; R. p. 924a.) Further, as stated above, the termination prong and the reiteration of Richardson's right of an option to purchase 7.5% of NARP's stock was intended to be joined with the last phase of the agreement—payment by Richardson to a charitable organization of Castellani's choosing in consideration for the NARP stock. (Tr. p. 325, 342; R. pp. 278, 293.) These three steps, when combined, would have created the overarching

three-part agreement between NARP and Richardson. (Tr. p. 342; R. p. 293.) However, Richardson and his attorneys called the contribution to the charity into question, and this portion of the three-pronged agreement never materialized. (Tr. pp. 436-37; R. pp. 387-388.) Accordingly, while the document containing the termination provision was signed by both parties, an overall agreement was never finally consummated by the parties because the document represented only a part of the three-pronged agreement, or, as described at trial, the "three-legged stool." (Tr. pp. 425-26; R. pp. 376-377.) Hence, the parties were continuing to operate under and were bound by the 2000 Agreement as modified in Charleston. That 2000 Agreement, as modified, is capable of enforcement or performance since portions of the three-pronged agreement never came to fruition.

However, rather than honor the parties' 2000 Agreement as modified in Charleston, Castellani, on behalf of NARP, sued Richardson, alleging various causes of action related to the parties' ongoing relationship, and seeking to extinguish Richardson's rights thereunder. Damages were also sought based on the alleged malfeasance of Richardson. (Compl.; R. p. 6.) As a result, Castellani and NARP never performed under the agreement and failed to tender Richardson the shares in exchange for the proceeds from the sale of Reeves (which proceeds amounted to \$415,988). (Tr. pp. 136-139; 344-349; 425-426; 587; Reeves Manufacturing Inc. Castellani Computation; R. p. 145-148; 295-300; 376-377; 538; R. p. 1026.)

At trial, Richardson stated that he remained ready, willing, and able to perform the contract as modified. Richardson stated that "[m]y intention was to carry out and honor this agreement with Bob [Castellani] by paying out with the proceeds of the sale



of Reeves.” (Tr. pp. 372-373; R. p. 323-324.) Richardson further stated that “I am bound now to honor that agreement.” (Tr. p. 586; R. p. 536.) Richardson knew he only had to deliver a check to NARP for the proceeds from the sale of Reeves to comply with the amended agreement. (Tr. p. 588; R. p. 539.) Richardson stated “that’s what it was, write him a check.” (Tr. p. 608; R. p. 559.) Richardson admitted that “we’ve never hesitated or changed our position of what Bob [Castellani] is entitled to. He was entitled to 7½ percent of what we sold Reeves for . . . .” (Tr. p. 592; R. p. 543.) Moreover, Richardson testified that the money from the sale of Reeves was in his account and could he “cut a check for that money to Bob [Castellani] today if he would take it”—that is, if Castellani would give Richardson his 7.5% interest in NARP. (Tr. p. 590, 609; R. p. 541; 560.)

After hearing the testimony related to the parties’ relationships and at the close of the evidence, both parties moved for directed verdicts. The trial court denied both stating:

[T]he facts of this case support any number of conclusions, any number of theories of law. And it is the Court’s determination that based upon matters as presented, that I cannot under the directed verdict standard, grant the motion for a directed verdict. Here by the defendant nor the motions as presented by the plaintiff as based upon the facts and evidence presented in this particular case. Therefore, I would respectfully decline to do so.

(Tr. p. 746; R. p. 697.)

Based on the evidence presented at trial, the jury found that the parties could perform under the 2000 Agreement as modified in Charleston and that no other document terminated Richardson’s right to purchase 7.5% of NARP’s stock. (Special Verdict Form; R. p. 3.) Due to this finding by the jury, the Court ordered the remedy

of specific performance in favor of Richardson. (Judgment; R. p. 1.) NARP brought this appeal alleging the trial court erred by denying its directed verdict motions. Because of the position that NARP took as to the meaning of judgment as entered by the Court, Richardson filed a cross-appeal out of an abundance of caution.

#### Standard of Review

When reviewing a ruling on a motion for directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. F & D Elec. Contractors, Inc. v. Powder Coaters, Inc., 350 S.C. 454, 567 S.E.2d 842 (2002). If the evidence as a whole is susceptible of more than one reasonable inference, the trial judge must submit the case to the jury. Quesinberry v. Rouppasong, 331 S.C. 589, 503 S.E.2d 717 (1998). This Court can reverse the trial court only when there is no evidence to support the trial court's decision to submit the case to the jury. Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999). In "considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000).

#### Summary of Argument

In order to adopt the position espoused by NARP in its initial appellant's brief this Court would have to do the following:

1. Ignore the Judgment of the Court granting specific performance in favor of Richardson;
2. Ignore the jury's finding that the termination provision did not terminate Richardson's right to purchase 7.5% of the stock in NARP;

3. Enforce a single portion of a three-pronged agreement despite the fact that one portion of the agreement is not capable of being performed;
4. Selectively enforce certain provisions of the document containing the termination provision;
5. Ignore the evidence presented at trial demonstrating that Richardson had the right to purchase 7.5% of the stock in NARP in consideration for 7.5% of the proceeds from the sale of Reeves Manufacturing, Inc. ("Reeves");
6. Ignore the evidence presented at trial demonstrating that the "Termination" document was part of a three-pronged agreement; and
7. View the evidence presented at trial in a vacuum.

Only after the Court does *all* of the above could it possibly find in favor of NARP. However, as shown herein and as argued in Richardson's initial appellant's brief, the trial court correctly entered judgment in favor of Richardson under the doctrine of specific performance based on the evidence presented and the jury's answers to the special interrogatories. Hence, the trial court properly denied NARP's directed verdict motions.

#### Law/Analysis

- I. **The trial court properly denied NARP's motion for directed verdict because evidence demonstrated that Richardson possessed a contractual right to purchase 7.5% of NARP's stock and that right had not been terminated.**

Seemingly ignoring all other evidence present in the record, NARP argues it should have obtained a directed verdict based on the written document containing a "termination" provision which was but one step of the three-pronged agreement. NARP acts as if no other evidence was presented at trial beyond this "termination" provision document. This is not accurate. Thus, the trial court properly denied

NARP's directed verdict motion because evidence existed that the document containing the purported termination provision was only a single portion of an overarching three-step agreement. Further, ample evidence existed demonstrating that the full three-step agreement was never fully executed and that the parties continued to be bound by the 2000 Agreement as orally modified in Charleston.

**A. Regardless of whether a document existed containing a termination provision, additional evidence was required to interpret the agreement and the trial court correctly denied NARP's motion.**

The trial court denied NARP's directed verdict motions with respect to its arguments that the document containing the termination provision ended Richardson's right to purchase 7.5% of NARPs' stock. In denying the motions, the trial court stated "the testimony is conflicting" and NARP's argument was "a possible conclusion that the jury can come to. But there is more than one." (Tr. pp. 735-736; R. p. 686-687.) When raising the termination document and its merger clause, the trial court again denied NARP's motion stating that "the facts in this case, though they might support the argument you are making, again there is any number of variety of conclusions and arguments that could be supported by the evidence." (Tr. p. 739; R. p. 690.) The trial court went on to state that NARP's position as to the termination agreement "is not the sole and exclusive argument that can be made based upon the facts in this case." (*Id.*) Based on the evidence, the trial court correctly denied NARP's motions for a directed verdict based on the termination agreement.

In light of the evidence as to the additional steps in the three-pronged agreement and the possible inferences arising therefrom, the trial court properly sent the interpretation of the parties' intentions to the jury. "Although as a general rule

contracts are to be construed by the court, where a contract is capable of more than one construction, the question of what the parties intended becomes one of fact to be submitted to jury.” Soil Remediation Co. v. Nu-Way Envtl., Inc., 325 S.C. 231, 234, 482 S.E.2d 554, 555-56 (1997) (internal citations omitted).

Here, there was conflicting testimony as to the force and effect of the document containing the termination provision. Richardson offered ample evidence that the document containing termination provision was merely one phase of a three-part agreement. (Richardson Ex. 21, 23, 25, 38; Tr. p. 350, 424, 521; R. pp. 1047, 1048, 1049, 1057; R. pp. 301, 375, 472.) Consistent with this, Rod Manning offered testimony detailing the exact terms of the three-part agreement. (See Rod Manning Testimony, Court’s Exhibit 7 at p. 108:11-25, p. 109:1-4, p. 112:21-25, p. 113:1-6, p. 114:20-25, p. 115:1-20, p. 118:2-25, p. 119:1, p. 130:11-18; R. pp. 904-905; 908-911; 913-914; 919.) Additional evidence was offered as to the attempt to create this three-part agreement by way of testimony and correspondence between the parties acknowledging the overall terms. (Richardson Ex. 11, 19, 25, 28, 47; Tr. p. 431, 533-35, 547-50, R. pp. 1028, 1046, 1049, 1050, 1066; 382, 484-485, 498-501.)

In contrast, NARP offered testimony claiming that the document signed in November 2004 containing the termination provision was the end-all-be-all and that the document forever ended the parties’ rights under the 2000 Agreement as modified. (NARP Ex. 10; R. p. 925.) However, even NARP offered evidence that refutes this contention. (NARP Ex. 6, 7, 9; R. p. 924a, 1048, 1049.)

The differing views of the parties as to the force and effect of the document containing the termination provision created a jury issue as to the parties’ intent. The

trial judge properly sent this issue to the jury which concluded the termination provision did not end Richardson's right to purchase NARP stock. Soil Remediation Co. v. Nu-Way Envtl., Inc., 325 S.C. at 234, 482 S.E.2d at 555-56.

Further, at the close of the plaintiff's case, the trial court denied the plaintiff's first round of directed verdict motions and found that the termination document was ambiguous and not capable of being understood without further evidence. NARP encourages this court to read any ambiguities in the November document against Richardson, as his attorney drafted the agreement. (Tr. p. 350; R. p. 301). However, NARP's attorney, Curt Stodghill, worked on two segments of the tri-partite agreement--for the reaffirmance of the right to purchase 7.5% of stock and the charitable donation. (Tr. p. 350; R. p. 301). These two portions of the agreement and the document containing the termination provision were intended to operate together. Accordingly, these ambiguities should not be read against Richardson. Moreover, this is not an adhesion contract setting. See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 26-27, 644 S.E.2d 663, 669 (2007) ("[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable."). Thus, the contract terms should not be construed against Richardson. Wilson Group, Inc. v. Quorum Health Res., Inc., 880 F.Supp. 416, 426 n.10 (D.C. S.C. 1995) (stating that the rule of construction that construes ambiguities against a contract drafter is "not automatically applied when there is no evidence of adhesion or unequal bargaining power"). Instead, these ambiguities merely necessitated that the evidence be submitted to the jury to determine the parties' intent.

The trial court properly allowed the issue of whether Richardson had the right to buy 7.5% of NARP's stock to go to the jury and correctly left the determination of the parties' intent as to whether the document with the termination provision ended Richardson's right to buy the NARP stock to the jury. The jury found the rights were not terminated and the trial court ordered the 2000 Agreement as modified to be specifically performed.

**B. The parol evidence rule does not bar the introduction of additional evidence necessary to interpret the document containing the termination provision.**

As demonstrated by viewing the evidence as a whole (and not in isolation as NARP would have this Court do), the document containing the termination provision is clearly not reflective of the complete agreement that never materialized between the parties. Therefore, parol evidence related to Richardson's right to purchase 7.5% of NARP stock under the 2000 Agreement as modified was properly reviewed. Due to the varying positions taken regarding the document with the termination provision, the trial court also properly submitted the determination of whether the termination provision ended Richardson's right to buy NARP stock to the jury as well as the additional terms under the three-pronged agreement.

"When the written evidence of the contract does not contain all the terms of the transaction between the parties, parol evidence (not contradicting or varying the writing) is admissible for the purpose of showing a contemporaneous independent agreement entered into between the parties." Ashe v. Carolina & Nw. Ry. Co., 65 S.C. 134, 138, 43 S.E. 393, 394 (1903); see also Greenville v. Washington Am. League Baseball Club, 205 S.C. 495, 507-08, 32 S.E.2d 777, 782 (1945) (holding the

trial court properly reviewed the contract language, relationship of the parties, and surrounding circumstances when determining the parties' intent as the contract omitted necessary provisions).

In Harbour Town Yacht Club Boat Slip Owners' Ass'n v. Safe Berth Management, Inc., 421 F.Supp. 908 (D.C. S.C. 2006), the court, applying South Carolina law, also admitted parol evidence. In Harbour Town, the parties entered into a lease agreement for dredging equipment. Id. at 909. Safe Berth stopped making payments under the lease agreement, and Harbour Town brought a breach of contract action. Id. at 910. As the lease agreement contained no integration clause, referenced another agreement, and provided a purpose of completing a project involving both parties, the court determined parol evidence was admissible as the lease agreement was not the whole and complete agreement between the parties. Id. at 911-12.

Here, the November document contains two identical provisions protecting Richardson's right to purchase 7.5% of the capital stock of NARP—another prong of the three part agreement. (NARP Tr. Ex. 6; R. p. 924a.) The trial court also properly allowed consideration of testimony regarding the attempt by Castellani to have Richardson pay the proceeds of the sale of Reeves into a charity for tax purposes—the final leg of the three part agreement. During the Atlanta meeting, Castellani first mentioned his desire that Richardson pay Dobson Ministries (a charity) for the 7.5% NARP stock. (Richardson Ex. 46; Tr. p. 521-22; R. p. 1063; 472-473). This desire created the three-part agreement so discussed at trial: the option agreement to be entered into on December 2004, the document containing the termination provision, and the payment to a charity. (Tr. pp. 529-30; R. pp. 480-481). Therefore, because the



document with the termination provision is not a whole and complete agreement between the parties, parol evidence was necessary to determine exactly which contract governed the rights of the parties.

As NARP correctly notes, the document with the termination provision contains a merger clause stating, "[t]his agreement sets forth the entire agreement and understanding of the parties relating to the subject matter contained herein, and merges all prior discussions and agreements, both oral and written, between the parties." In Lingefelt v. Forest Hills Homes, Inc., 305 S.C. 197, 406 S.E.2d 394 (Ct. App. 1991), the Court of Appeals interpreted a contract containing a similar merger clause, which stated, "[t]his agreement contains the entire understanding between us and no other representation, verbal or written, has been made which is not set forth herein." Id. at 200, 406 S.E.2d at 396. The court held, "the doctrine of merger is inapplicable to a consistent parol agreement that was not intended to be merged into the written agreement." Id. at 201, 406 S.E.2d at 396.

Contracts can have multiple parts and be made of several documents or oral agreements. Thus, the inclusion of a merger clause does not eliminate the fact that the document with the merger clause and termination provision was just one part of the overall contract. Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). ("[T]he instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole. This is true even though the transaction consumed more than one day; the date of the writings constituting such transaction is immaterial."); Ellie, Inc. v. Miccichi, 358 S.C.

78, 92, 594 S.E.2d 485, 492 (Ct. App. 2004) (“[T]wo contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole.”); Housing Auth. of Columbia v. Cornerstone Hous., LLC, 356 S.C. 328, 336, 588 S.E.2d 617, 621 (Ct. App. 2003) (“Under South Carolina law, two contracts executed at different times but which relate to the same subject matter and are entered into by the same parties are to be construed as one contract and considered as a whole.”); Bishop Realty & Rentals, Inc. v. Perk, Inc., 292 S.C. 182, 184-85, 355 S.E.2d 298, 300 (Ct. App. 1987) (“Where instruments entered into by the same parties at different times relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. If the provisions of one instrument limit, explain, or otherwise affect the provisions of the other, they will be given effect to accomplish the entire agreement between the parties.”) (internal citations omitted).

Here, the contract twice referenced Richardson’s right to purchase 7.5% of NARP stock from NARP and forecast the execution of an agreement reaffirming the rights of the earlier 2000 Agreement as modified. These references indicate intent *not* to make the 7.5% agreement part of the document containing the termination provision. The future date also shows that the document with the termination provision was not the only document making up the entire agreement of the parties, and that there was ambiguity that could only be explained by other evidence. Thus, the trial judge properly submitted the issue to the jury for its consideration. If NARP believed the jury’s special verdict conclusion with respect to the termination provision document was inconsistent with other parts of its verdict, it was incumbent upon NARP to make a

motion for new trial based on such inconsistency before the jury departed. Dykema v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 554-55, 560 S.E.2d 894, 896 (2002) (holding a party waived its right to object to an inconsistent verdict by failing to raise the objection prior to the jury being discharged). It did not do so, and in fact has never raised inconsistency of verdict as an issue.

In light of the fact that the parties' three-pronged agreement never materialized, the parties were bound by and were operating under the prior agreement. As a result, a jury issue existed regarding Richardson's right to purchase 7.5% of NARP stock and the effect of the subsequent attempts to enter into a three-part contract. Accordingly, the trial court properly denied NARP's motion for directed verdict. See Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 418-19 (Ct. App. 2000) ("The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. This Court will reverse the trial court only when there is no evidence to support the ruling below.") (internal citation omitted).

**C. Delaware law does not come into question with respect to the only contract capable of being performed—the 2000 Agreement as modified in Charleston.**

NARP argues in summary fashion that the option agreement for Richardson to purchase 7.5% of NARP stock is invalid under Delaware law. This argument surrounds part of the three-pronged contract that never materialized. But as outlined above, the parties inserted December 15, 2004 into the document containing the termination provision looking forward to the future event of finally consummating the three-pronged agreement. Had this agreement materialized and been subjected to writing, there might be a question as to which State's laws apply. However, since the

parties never reached a final agreement on the three-part contract, the parties were instead operating and were bound by the 2000 Agreement as modified in Charleston.

The law is clear, contracts are governed by the State's law where the contract is formed. Doctors Hosp. of Augusta, L.L.C. v. CompTrust AGC Workers' Comp. Trust Fund, 371 S.C. 5, 9, 636 S.E.2d 862, 864 (2006) ("[A] contract is controlled by the laws of the State in which it is made and is to be performed."); Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 301, 305, 609 S.E.2d 838, 841 (Ct. App. 2005) (applying Virginia law because the oral contract was allegedly made in Virginia); Unisun Ins. Co. v. Hertz Rental Corp., 312 S.C. 549, 551-52, 436 S.E.2d 182, 184 (Ct. App. 1993) ("Unless the parties agree to a different rule, the validity and interpretation of a contract is ordinarily to be determined by the law of the state in which the contract was made."). In South Carolina "[t]he necessary elements of a contract are an offer, acceptance, and valuable consideration." Sauner v. Public Serv. Auth., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003).

The Record contains clear evidence that a valid and enforceable agreement was created in Charleston and the Court ordered it to be performed. In the year 2004, the parties modified their agreement that was previously identified as the "Outline of the Business Relationship Between North American Rescue Products, Inc. and Reeves Manufacturing." (NARP Ex. 2 (Richardson Ex. 3); Tr. p. 206; R. p. 923; R. p. 202.) The modified agreement provided that Richardson could acquire a 7.5% share of NARP in exchange for the proceeds of the sale of Reeves—\$415,988. (Tr. pp. 238, 331, 355-356, 420, 540-544, 585; R. pp. 234, 284, 306-307, 371, 491-495, 536.) Richardson presented evidence that this was the agreement of the parties and the jury

found that this agreement existed and could be performed. (Special Verdict Form; R. p. 2.)

The evidence at trial supports the fact that the parties orally amended their agreement in Charleston to reduce the percentage that each could acquire of the other company from 25% to 7.5% and that Richardson could exchange the cash equivalent of the 7.5% interest from the proceeds from the sale of Reeves. As was testified to at trial, Richardson stated that the 2004 amendment of the 2000 agreement modified the percentage share from 25% to 7.5%. (Tr. pp. 355-356; R. p. 306-307.) Richardson also testified that he was seeking to have the court enforce his right to acquire 7.5% of the stock of NARP. (*Id.*; Tr. p. 585; R. p. 536.) Richardson stated that the amendment was aimed at making the exchange of ownership shares easier in light of the sale of Reeves. (Tr. p. 420; 540-544; R. p. 371; 491-495.) Castellani, on behalf of NARP, testified that the meeting in Charleston resulted in a reduction of the percentage of shares from 25% to 7.5%—a “like for like” exchange. (Tr. p. 238; R. p. 234.) Castellani also agreed that the parties “did that deal and then [ ] hugged and kissed and sealed the deal[.]” (*Id.*) Later, at trial, Castellani testified that “[w]e agreed to this in Charleston.” (Tr. p. 331; R. p. 284.) Richardson also agreed that there was a “meeting of the minds in Charleston.” (Tr. p. 585; R. p. 536.) Thus, the parties’ agreement was clear and both understood the agreement.

The existence of a valid contract was proper and warranted a judgment for specific performance. As set forth in Campbell v. Carr, South Carolina’s courts recognize that “South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with

regard to all essential and material terms of the agreement.’” Clardy v. Bodolosky, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) (quoting Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis in original)). Thus, “[s]pecific performance will not be ordered unless the contract expresses the true intent of the parties and is fair, just and equitable.” Amick v. Hagler, 286 S.C. 481, 484, 334 S.E.2d 525, 527 (Ct. App. 1985) (citing McChesney v. Smith, 105 S.C. 171, 176, 89 S.E. 639, 641 (1916)).

As a result, the record contains ample evidence that the parties had a valid and enforceable agreement that the jury found was capable of being performed. Thus, this Court should reject NARP’s mischaracterization of the judgment and attempts to cloud the issues in the case by relying on one portion of a three-step agreement. Thus, NARP’s arguments regarding the finer points of Delaware law have no application whatsoever to the contract that the trial court entered judgment to enforce via the doctrine of specific performance. The trial court’s denial of NARP’s motion for directed verdict should be affirmed.

**II. The trial court properly denied NARP’s directed verdict motion as to promissory estoppel because evidence existed that Richardson relied on NARP’s promise to sell Richardson 7.5% of NARP stock.**

NARP argues any promises or agreements between NARP and Richardson were extinguished by the document containing the termination provision and merger clause and, thus, Richardson’s right to rely on these promises was also extinguished. As shown above, the termination provision did not terminate Richardson’s right to acquire 7.5% of stock in NARP. This argument is entirely without merit. Richardson reasonably relied on NARP’s promises regarding his ability to purchase 7.5% of

NARP's stock. Accordingly, the evidence presented an issue for the jury, and the trial court properly denied NARP's directed verdict motion.

The elements of promissory estoppel are: "(1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise." Powers Const. Co., Inc. v. Salem Carpets, Inc., 283 S.C. 302, 306, 322 S.E.2d 30, 33 (Ct. App. 1984).

Richardson provided ample evidence to establish a promissory estoppel claim and to survive NARP's directed verdict motion. In fact, Richardson has performed his part of the contract. Richardson sold Reeves Company and has set aside the proceeds from the sale of Reeves which the contract provided he could exchange for a 7.5% share in NARP. (Tr. pp. 355-356; R. p. 306-307.) However, NARP has failed to perform by not tendering the shares for the proceeds from Reeves. Thus, NARP stands in the way of executing the contract and Richardson relied on the promise that NARP would sell him the shares as outlined under their 2000 modified agreement.

After the sale of Reeves, Richardson kept the proceeds from the sale in order to pay NARP and Castellani for the 7.5% share in the company. (Tr. p. 590; R. p. 541.) At trial and now, Richardson has the funds ready to pay to NARP and Castellani if the shares are tendered. (Tr. pp. 590, 609; R. p. 541; 560.) Richardson kept those funds in order to perform his obligations under the agreement. (Tr. pp. 435-436; 540-544; R. pp. 386-387; 491-495.) Richardson's actions were undertaken as a result of the understanding and agreement reached with Castellani on behalf of NARP. (Tr. pp.

341-344; 608-609; R. p. 292-295; 559-560). Thus, Richards acted on the approval of the agreement by Castellani and had every expectation that NARP and Castellani would perform their part of the agreement. (Tr. pp. 514; 518; 530; R. p. 465; 469; 481.)

As a result, Richardson properly demonstrated that he has performed as envisioned under the parties' agreement with the approval of NARP after the contract was modified. Further, Richardson's actions in saving those proceeds and his stated tender of them in open court to exchange for the stock shares demonstrate that he partly performed his part as envisioned under the agreement.

Richardson demonstrated that he performed under the contract and that he remains ready, willing, and able to perform his part of the contract. Nonetheless, NARP did not tender the 7.5% of stock as required under the agreement. Based on Richardson's demonstration to perform, this Court should affirm the trial court's judgment. See Elliott v. Dew, 264 S.C. 40, 47-48, 212 S.E.2d 421, 424 (1975) (affirming the recommendation of specific performance and noting that "[i]t was sufficient for the respondent to plead a tender of the purchase money and to offer by his complaint to pay whatever amount of money was necessary to consummate the transaction and to pay that sum when determined by the court.").

As was shown at trial, Richardson was ready willing and able to perform the contract as modified, and the pleadings were amended to conform with the evidence at trial. Richardson averred that "[m]y intention was to carry out and honor this agreement with Bob [Castellani] by paying out with the proceeds of the sale of Reeves." (Tr. pp. 372-373; R. p. 323-324.) Richardson further stated that "the only memorialization we had of it was the oral agreement, meaning the 2000 agreement . . .



I am bound now to honor that agreement.” (Tr. p. 586; R. p. 537.) Richardson knew he only had to deliver a check to NARP for the proceeds from the sale of Reeves to comply with the amended agreement. (Tr. p. 588; R. p. 539.) Specifically, Richardson testified that “we would write a check for whatever that number was, yet to be determined, and we would pay it.” (Tr. p. 589; R. p. 540.) That was all Richardson had to do to perform—“that’s what it was, write him a check.” (Tr. p. 608; R. p. 559.) Richardson admitted that “we’ve never hesitated or changed our position of what Bob [Castellani] is entitled to. He was entitled to 7½ percent of what we sold Reeves for . . . .” (Tr. p. 592; R. p. 543). Moreover, Richardson testified that the money from the sale of Reeves was in his account and he could “cut a check for that money to Bob [Castellani] today if he would take it” if Castellani would give Richardson his 7.5% interest in NARP. (Tr. p. 590, 609; R. p. 541, 560.)

In light of the voluminous evidence, Richardson reasonably relied on this promise, and Richardson’s reliance was foreseeable and expected by NARP. Moreover, NARP’s contention that Richardson lacks injury from his reliance is nonsensical. Through this lawsuit, NARP is attempting to prevent Richardson from realizing his right to purchase 7.5% of NARP stock. This attempt to deprive Richardson of his rights is no doubt injurious.

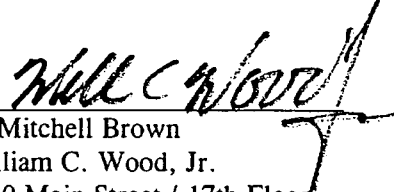
Accordingly, evidence was presented to establish every element for a promissory estoppel claim making NARP’s directed verdict motion against the promissory estoppel claim completely untenable. Thus, the trial court properly denied NARP’s directed verdict motion.

Conclusion

Accordingly, this Court should affirm the trial court's denial of NARP's directed verdict motions and uphold the trial court's judgment ordering NARP to specifically perform under the 2000 Agreement as modified.

Respectfully submitted,

By:

  
C. Mitchell Brown  
William C. Wood, Jr.  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

Attorneys for P.J. Richardson

September 14, 2010  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2007-CP-23-3206

RECEIVED

SEP 14 2010

SC Court of Appeals

North American Rescue Products, Inc., ..... Appellant/Respondent

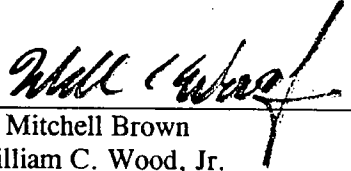
v.

P.J. Richardson, ..... Respondent/Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Responsive Brief complies with  
Rule 211(b), SCACR.

By:

  
C. Mitchell Brown  
William C. Wood, Jr.  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

Attorneys for P.J. Richardson

9/14

, 2010

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SEP 14 2010

SC Court of Appeals

Case No. 2007-CP-23-3206

North American Rescue Products, Inc., ..... Appellant/Respondent,

v.

P.J. Richardson, ..... Respondent/Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent/Appellant P.J. Richardson, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

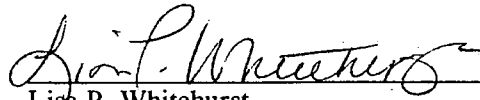
Pleadings:

Final Responsive Brief of Respondent/Appellant P.J.  
Richardson

Counsel Served:

Robert L. Widener, Esquire  
McNair Law Firm, PA  
Post Office Box 11390  
Columbia, SC 29211

Bernie W. Ellis, Esquire  
McNair Law Firm, PA  
Post Office Box 447  
Greenville, SC 29602



Lisa P. Whitehurst  
Administrative Assistant

September 14, 2010

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**FINAL REPLY BRIEF OF RESPONDENT/APPELLANT P.J. RICHARDSON**

C. Mitchell Brown  
William C. Wood, Jr.  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

Attorneys for P.J. Richardson

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### Introduction

This case involves a dispute over P.J. Richardson's ("Richardson") entitlement to a 7.5% stock ownership stake in North American Rescue Products, Inc. ("NARP"). The trial court entered judgment in favor of Richardson for specific performance. NARP has appealed claiming it is entitled to judgment in its favor. Richardson has cross-appealed to protect his rights and to contest NARP's attempt to misconstrue, limit, and impose conditions upon the judgment granting specific performance.

As is detailed throughout its briefing before this Honorable Court, the matter was tried before a jury August 25-29, 2008. At the close of the evidence, Richardson amended his pleadings to conform to the evidence presented at trial. In his motion, counsel went on to state:

And in that context, therefore, Mr. Castellani promised to give seven and a half percent of shares in his—of the shares of his company, however that would be styled, in return for 7.5 percent of the proceeds of the sale of Reeves.

(Tr. p. 720; R. p. 671.) The Trial Court granted Richardson's motion to amend stating "[i]n looking at the revised amended answer and counterclaim, I'm not sure it's even necessary to grant the motion, it might very well be encompassed in that but I am granting the motion to amend the pleadings to conform to the proof." (Tr. p. 727; R. p. 678.) NARP has not challenged the trial court's decision to allow this amendment in its appeal.

The matter was then submitted to the jury on a special verdict form posing specific fact questions and requiring the jury to give categorical answers. (Special Verdict Form; R. p. 2.) Neither party objected to the form of the special verdict. The

jury answered each of the questions posed to it on the verdict form at the direct instruction of the Court. In doing so, the jury concluded, among other things, that NARP had given Richardson the right to 7.5% of its stock and that Richardson had, in turn, given NARP the right to 7.5% of the stock of Reeves Manufacturing, Richardson's former company. The jury concluded that Richardson could fulfill his part of this agreement by giving a cash equivalent, rather than actual Reeves Manufacturing stock, due to the sale of Reeves. The jury found that the parties could perform under the 2000 agreement, as later modified, and that none of the parties' later agreements terminated that agreement. (Special Verdict Form; R. p. 3.) As stated, the Trial Court entered judgment in favor of Richardson under the doctrine of specific performance. (Judgment; R. p. 1.)

Despite these simple and express findings by the jury, NARP contends "the judge could not have intended to put the parties back under the 2000 Agreement." (NARP Brief at p. 16.) NARP's position utterly fails to address the jury's finding, upon which the Judgment was based, that "both parties [can] perform under the 2000 Agreement as amended in Charleston." (Special Verdict Form at ¶3; R. p. 2.)

Richardson's position is straightforward – if the Trial Court properly declined to grant NARP a directed verdict, and if the Trial Court's specific performance judgment is specific performance of the 2000 agreement, as amended, then this Court would state as such in its opinion and Richardson's appeal would be rendered unnecessary. Further, NARP has not argued in its *appeal* against Richardson's reading of the Trial Court's specific performance judgment. Hence, if this Court agrees with Richardson's position on the Trial Court's specific performance judgment, this matter will be resolved entirely.

On the other hand, NARP argues it should have obtained a directed verdict but failing that, NARP offers a complicated position as to why the jury's finding on the 2000 agreement (as amended) should be ignored and why Richardson should be required to pay more for the NARP stock than the amount the parties contracted for in that agreement. If this Court were to agree with NARP's position on the Trial Court's judgment, then this would mean the Trial Court erred in rendering such a judgment, and Richardson has preserved his rights—by appealing—to contest such a construction of the judgment and to preserve his ability to argue that such a construction would be error.

Accordingly, this Court should agree that the judgment in favor of Richardson is for specific performance and that Richardson pays the price the parties contracted for when they amended the 2000 agreement—\$415,988. If this Court believes that the Trial Court's judgment means what NARP states it means, then the Trial Court was in error and should be reversed.

#### Law/Analysis

##### **I. Richardson's appeal is properly before this Court.**

As is demonstrated by the arguments made by NARP in its respondent's brief, Richardson is clearly aggrieved. Richardson had a contract requiring him to pay only \$415,988 for his interest in NARP. The jury made findings indicating such. The Trial Court ordered judgment in favor of Richardson under the specific performance doctrine. Yet NARP is demanding that the judgment means Richardson must pay \$2,936,000. Richardson has thus preserved his rights and protected himself by appealing if this Court agrees with NARP on the meaning of the Trial Court's judgment.

The law recognizes that despite having been a “winning” party below, a party can be aggrieved by a judgment or order in light of the effect or position or interpretation given to the judgment or order by the court or opposing party. State v. Gregorie, 339 S.C. 2, 4, 528 S.E.2d 77, 78 (2000) (holding appeal was proper when defendant won below but was aggrieved by the circuit court’s order remanding the case to the magistrate for a new trial, as the remand implicated double jeopardy); Cobb v. Benjamin, 325 S.C. 573, 580, 482 S.E.2d 589, 592 (Ct. App. 1997) (holding party was aggrieved and appeal was proper even though judgment essentially provided the party’s requested relief). Moreover, Richardson’s appeal is proper as it arises in a context that requires this Court to interpret the Trial Court’s judgment ordering specific performance and it is proper for this Court to interpret the Trial Court’s order. See Wayburn v. Smith, 263 S.C. 518, 522, 211 S.E.2d 560, 561 (1975) (demonstrating appellate courts may interpret an order of the lower court); Management Recruiters of Greenville v. R.J.R. Mech., Inc., 304 S.C. 399, 401, 404 S.E.2d 908, 909 (Ct. App. 1991) (construing a judgment of the trial court by determining the trial court’s intent and carefully reviewing the order); Petition of White, 299 S.C. 406, 412, 385 S.E.2d 211, 215 (Ct. App. 1989) (illustrating that an appellate court may interpret a judgment by a trial court by stating “[a]s a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the parties or the court, as gathered, not from an isolated part of the contract or judgment but from all its parts”).

Here, the Trial Court ordered, “[j]udgment for the defendant [Richardson] under specific performance doctrine.” (R. p. 1; Judgment.) This judgment for specific performance clearly requires the parties to perform under a contract. The parties and the

Court need only to look to the record to find the terms of the contract. Despite the ease in finding the terms the parties agreed to, NARP now argues the Trial Court's award of specific performance incorporated a brand new term fundamentally rewriting the contract by changing an essential term—the price—to an amount regarding which there was no meeting of the minds between the parties. NARP argues Richardson is not an aggrieved party and should not be permitted to “thrust this issue [of interpreting the judgment] upon this Court.” However, it is NARP's novel spin with regard to the judgment that thrusts this issue upon this Court and necessitates this appeal by Richardson.

Richardson clearly falls within the definition of an aggrieved party, which is “[a] party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment.” BLACK'S LAW DICTIONARY 1144 (7th ed. 1999). Richardson is adversely affected by the judgment, if it is construed according to NARP's interpretation, and thus, must appeal. Were a court to follow NARP's flawed logic and ignore the contract's price achieved by a meeting of the minds, Richardson's right to purchase NARP stock would be compromised, and the Trial Court judgment would be in error. Therefore, Richardson is an aggrieved party, and Richardson's appeal should not be dismissed.

Further, prevailing parties are permitted to appeal “where the order of judgment in question is apparently favorable but is actually adverse.” 5 Am. Jur. 2d *Appellate Review* § 243 (2007); State v. Gregorie, 339 S.C. 2, 4, 528 S.E.2d 77, 78 (2000); Cobb v. Benjamin, 325 S.C. 573, 580, 482 S.E.2d 589, 592 (Ct. App. 1997). Again, if a court were to adopt NARP's interpretation of the judgment, then the judgment would not be

favorable to Richardson, would be in error, and would need to be reversed. Therefore, Richardson must appeal and this is Richardson's opportunity to do so.

**II. Richardson's interpretation of the judgment is the only reasonable reading of the judgment.**

For a court to compel specific performance there must be a valid agreement. - Ingram v. Kasey's Assocs., 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000). Therefore, it is nonsensical for NARP to argue that the Trial Court intended to remove an essential term from this valid agreement and introduce a new price set by a jury, to which there was no meeting of the minds between the parties.

NARP argues that the Trial Court must have intended to introduce this new price to the agreement because "[i]t is inconceivable that the trial court intended to order specific performance of a sales contract without setting a price in the judgment." (NARP Brief at p. 3.) However, a court need not include the price in the judgment itself when ordering specific performance because the contract provides the price and the record includes the terms of the contract. Trial courts frequently order specific performance without reciting the terms of the contract in their orders—because those terms are already of record. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 806 (Ct. App. 2009) (stating the master-in-equity ordered the specific performance of an oral contract and looking to the evidence to determine the oral contract and the admissibility of the evidence); Campbell v. Carr, 361 S.C. 258, 263-66, 603 S.E.2d 625, 627-29 (Ct. App. 2004) (stating the master-in-equity ordered specific performance of the contract and looking to the contract for the price to determine if the price was adequate). A review of the records on appeal in Fesmire and Campbell indicates the masters ordered specific performance of the contracts there without setting forth the exact terms of those contracts

in their orders, as the contracts were in evidence and already in the record. This is all that occurred here.

In this case, the parties agreed in Charleston that Richardson could purchase 7.5% of NARP stock for 7.5% of the proceeds of the sale price of Richardson's company (Reeves). Therefore, the parties had a meeting of the minds regarding price. The jury so found. NARP may not now destroy this contract by changing an essential term after the fact by trying to create ambiguity where none exists.

Further, as stated, this Court need merely look to the record to determine the terms of the contract. McMaster v. Strickland, 322 S.C. 451, 455, 472 S.E.2d 623, 626 (1996) (looking to the record for support for the award of attorneys' fees); Reese v. Holmes, 26 S.C. Eq. (5 Rich. Eq.) 531, 549, 1852 WL 2575 \*12 (1852) (looking to the record to interpret a judgment in order to give the judgment its intended effect). The record includes the initial 2000 Agreement entered into by Richardson and Robert Castellani, NARP's founder, who formed a close relationship during the development of their companies. (2000 Agreement; R. p. 923.) In the 2000 Agreement the parties contracted to exchange a 25% interest in each other's companies. (Id.) The record also includes evidence of a meeting in Charleston in July 2004, where Richardson and Castellani agreed to reduce their percentage of ownership from 25% to 7.5%. (Tr. pp. 237-38; R. p. 233-234.) This modification occurred because Richardson was about to sell his company, and the parties agreed Richardson could acquire his 7.5% interest in NARP in exchange for the monetary value of 7.5% of the proceeds from the pending sale of Richardson's company. (Tr. p. 417, 420; R. p. 368, 371.) This percentage of the proceeds from the sale of Richardson's company equaled \$415,988, a definite and



essential term of the contract. (Tr. p. 425; R. p. 376.) Richardson moved for an amendment of the Complaint on this point to conform to the proof adduced at trial, the trial judge granted the motion, and NARP has not challenged the Trial Court's ruling on this point on appeal.

Then, following the trial, the jury specifically found the 2000 Agreement entered into by Richardson and NARP could still be performed as modified by the parties during their meeting in Charleston. (Special Verdict Form at ¶3; R. p. 2.) This contract was still in place and was not ended by the parties' 2004 termination, settlement and release agreement, as also found by the jury. (Special Verdict Form at ¶4; R. p. 2.) Therefore, the 2000 Agreement as amended in Charleston is the contract to be performed under the Trial Court's judgment for specific performance and Richardson must pay \$415,988 for the 7.5% interest as provided by that agreement. If this Court were to adopt NARP's articulation of the meaning of the judgment of the Trial Court, the judgment would make no sense and need to be reversed. The judgment would be ignoring the above clear findings by the jury and substituting a different price term into the parties' agreement. This would be error, and require reversal.

**III. NARP's construction of the verdict form and judgment is incorrect and should be rejected.**

While Richardson believes the judgment to be clear and specific performance is ordered for the only contract capable of being performed (7.5% for 7.5% i.e. \$415,988 from the sale of Reeves ), NARP wishes for this Court to find that Richardson must pay \$2,936,000 "for the outstanding [common] capital stock of North American Rescue Products, Inc." (Special Verdict Form at ¶8; R. p. 5.) NARP contends that, based on a jury question from the jury at trial, that Richardson is "required to purchase stock at

current market value.” (NARP Brief at p. 17.) The only mention in any agreement that stock would be purchased at market value is in the 2004 Stockholder Agreement that was a part of the *failed* tripartite agreement. (Richardson Exhibit 15—2004 Stockholder Agreement; R. p. 1035.) Under that proposed agreement, Richardson would have had the option to purchase an additional 7.5% of the stock of NARP at market value. (Richardson Exhibits 13 and NARP 17—Proposed option agreement R. p. 1030; 953.) That proposed agreement had two other parts, however—1) entry into a Termination Agreement; and 2) use of an agreed upon charitable donation pass through for the sale monies. (Richardson Exhibits 37 and 46; R. p. 1056; 1063.) Item 2) was never agreed upon by the parties. The jury’s finding that the 2000 agreement was still capable of being enforced, as amended, demonstrates that the proposed tripartite agreement (referred to in the trial as the “three-legged stool”) failed in at least one of its parts, as the jury found it did not eradicate the 2000 agreement.

If, despite this, NARP argues Richardson can *also* pay \$2,936,000 for stock in NARP, such would give him a total right to 15% of the shares—7.5% at \$415,988 under the 2000 Agreement as amended and another 7.5% at \$2,936,000 under a 2004 option. In other words, in order to respect the parties’ 2000 agreement rights, if this Court wishes to adopt NARP’s logic with respect to Richardson’s option to pay for NARP stock at a fair market value, it must do so in the context of finding that Richardson has an option to buy an additional 7.5% in stock beyond the 7.5% he is clearly entitled to under the 2000 Agreement as modified.

Richardson’s position is the jury’s finding as to fair market value of the stock ultimately became irrelevant in light of their finding that the 2000 Agreement as modified

could still be enforced by the parties. If NARP wishes to continue its position that Richardson also has the option to pay for another 7.5% of NARP stock for \$2,936,000 over and above Richardson's rights under the 2000 Agreement as modified, then Richardson may opt to do so. Richardson's position on the meaning of the judgment should be adopted and this case resolved as such.

**IV. The Trial Court's judgment should be enforced as a proper order of the remedy of specific performance following the jury's determination that a binding and enforceable contract existed between the parties.**

Following the entry of the judgment in this action and *after* NARP filed its notice of appeal<sup>1</sup>, NARP took the position that in order for Richardson to obtain his 7.5% interest in NARP, he had to pay \$2,936,300.00 (two million, nine hundred and thirty-six thousand and three hundred and 00/100 dollars) for his shares of stock. (October 6, 2008 letter from Curtis Stodghill; R. p. 1067.) NARP's position ignores the claim for specific performance of the contract between the parties as orally amended in Charleston. NARP states "the judge could not have intended to put the parties back under the 2000 Agreement." (NARP Brief at p. 16.) But this position blatantly ignores the jury's finding, upon which the Judgment was based, that "both parties [can] perform under the 2000 Agreement as amended in Charleston." (Verdict Form at ¶3; R. p. 2.) As a direct

---

<sup>1</sup> NARP took its novel position on how much it believed Richardson had to pay for his 7.5% interest share only after filing its notice of appeal and failing to challenge the plain language of the Trial Court's judgment via post-trial motion. Therefore, NARP's continual references to alleged preservation errors are misplaced. It was not until after NARP appealed that it took such a position as to the amount of payment and Richardson had no reason to doubt that the judgment meant exactly what it said—specific performance. Thus, Richardson has not and was not required to challenge anything before the Trial Court. It is NARP's curious position that has made the posture of this case odd, not the actions of Richardson. As noted herein, Richardson has raised its position in both the cross-appeal and in NARP's appeal so even under NARP's strained preservation analysis, the issue is properly before this Court.

result of NARP's misapprehension of the judgment in this case, Richardson filed this cross-appeal.

As is shown on the verdict form, the jury found that a contract existed. The terms of the contract are clear. The Trial Court ordered the parties to specifically perform that contract. Therefore, the Trial Court rightly entered judgment for specific performance in Richardson's favor.

In order to award the remedy of specific performance, a party must show: "(1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract." Campbell v. Carr, 361 S.C. 258, 264-65, 603 S.E.2d 625, 628 (Ct. App. 2004) (citing Guignard v. Atkins, 282 S.C. 61, 64, 317 S.E.2d 137, 140 (Ct. App. 1984)). "Whether to grant specific performance is a matter committed to 'sound judicial discretion.'" Ex parte Bland, 380 S.C. 1, 16, 667 S.E.2d 540, 547 (2008) (quoting Summer v. Bankhead, 119 S.C. 78, 111 S.E. 891 (1922)). Absent an abuse of discretion, the trial court's judgment must be upheld. Id. "An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support." Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). The jury found that a contract existed as orally modified and both parties were capable of performing. This Court should order NARP to tender the shares for the price of \$415,988.

a. The jury found a valid agreement existed.

The modified agreement provided that Richardson could acquire a 7.5% share of NARP in exchange for the proceeds of the sale of Reeves—\$415,988. (Tr. pp. 355-356; 585; 420; 540-544; 238; 331; R. pp. 306-307; 536; 371; 491-495; 234; 284.) Richardson presented evidence that this was the agreement of the parties and the jury found that this agreement existed and could be performed. (Special Verdict Form; R. p. 2.) Thus, the position taken by NARP as to their interpretation of the judgment must be rejected and the judgment ordering specific performance affirmed as set forth herein. More importantly, the jury found that “both parties [can] perform under the 2000 Agreement as amended in Charleston[.]” (Special Verdict Form at ¶3; R. p. 2.)

In finding a valid contract sufficient to fulfill the first requirement for an award of specific performance as set forth in Campbell v. Carr, South Carolina’s courts recognize that “‘South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.’” Clardy v. Bodolosky, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) (quoting Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis in original)). Thus, “[s]pecific performance will not be ordered unless the contract expresses the true intent of the parties and is fair, just and equitable.” Amick v. Hagler, 286 S.C. 481, 484, 334 S.E.2d 525, 527 (Ct. App. 1985) (citing McChesney v. Smith, 105 S.C. 171, 176, 89 S.E. 639, 641 (1916)).

The evidence at trial supports the jury’s finding that the parties orally amended their agreement in Charleston and can perform thereunder. As was testified to at trial, Richardson stated that the 2004 amendment of the agreement modified the percentage

share from 25% to 7.5%. (Tr. pp. 355-356; R. p. 306-307.) Richardson also testified that he was seeking to have the court enforce his right to acquire 7.5% of the stock of NARP. (Id; Tr. p. 585; R. p. 536.) Richardson stated that the amendment was aimed at making the exchange of ownership shares easier in light of the sale of Reeves. (Tr. p. 420; 540-544; R. p. 371; 491-495.) Castellani, on behalf of NARP, testified that the meeting in Charleston resulted in a reduction of the percentage of shares from 25% to 7.5%—a “like for like” exchange. (Tr. p. 238; R. p. 234.) Castellani also agreed that the parties “did that deal and then [ ] hugged and kissed and sealed the deal[.]” (Id.) Later, at trial, Castellani testified that “[w]e agreed to this in Charleston.” (Tr. p. 331; R. p. 284.) Richardson also agreed that there was a “meeting of the minds in Charleston.” (Tr. p. 585; R. p. 536.) Thus, the parties’ agreement was clear and both understood the agreement.

As a result, the record contains ample evidence that the parties had a valid and enforceable agreement that the jury found was capable of being performed. Thus, this Court should reject NARP’s mischaracterization of the judgment and uphold the judgment as entered by the Trial Court—ordering specific performance of the contract as modified in Charleston under which Richardson has a right to a 7.5% interest share in NARP in exchange for \$415,988.

**b. The agreement had been partly carried into execution on one side with the approbation of the other.**

Richardson has performed his part of the contract. Richardson sold Reeves Company and has set aside the proceeds from the sale of Reeves which the contract provided he could exchange for a 7.5% share in NARP. (Tr. pp. 355-356; R. p. 306-307.)

However, NARP has failed to perform by not tendering the shares for the proceeds from Reeves.<sup>2</sup> Thus, NARP stands in the way of executing the contract.

The second requirement that must be fulfilled before a court can order specific performance is that the agreement has been partly carried into execution by one party based on the agreement with the other party. Campbell v. Carr, 361 S.C. at 264-65, 603 S.E.2d at 628. In Gibson v. Hrysiak, 293 S.C. 8, 358 S.E.2d 173 (Ct. App. 1987), the court granted the request for specific performance finding that certain actions constituted part performance, which took the contract out of the statute of frauds and satisfied the second element of the specific performance test. Id. at 13-16, 358 S.E.2d at 175-77. Recently, this Court noted in Clardy that “[t]he doctrine of substantial performance was conceived for the case where a plaintiff’s partial performance has already given to a defendant substantially all that he bargained for and is of such a nature that it cannot be returned.” Clardy v. Bodolosky, 383 S.C. 418, 427, 679 S.E.2d 527, 531 (Ct. App. 2009) (quoting Coastal Seafood Co., Inc. v. Alcoa S.C., Inc., 298 S.C. 466, 467-68, 381 S.E.2d 502, 503 (Ct. App. 1989)) (holding that the Clardys had satisfied the second element by their substantial performance with the consent of the other party).

After the sale of Reeves, Richardson kept the proceeds from the sale in order to pay NARP and Castellani for the 7.5% share in the company. (Tr. p. 590; R. p. 541.) At trial and now, Richardson has the funds ready to pay to NARP and Castellani if the shares are tendered. (Tr. pp. 609; 590; R. p. 560; 541.) Richardson kept those funds in order to perform his obligations under the agreement. (Tr. pp. 435-436; 540-544; R. p.

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<sup>2</sup> NARP, after appealing, purportedly attempted to “tender” the shares via its October 6, 2008 letter but not at the price that the parties agreed to in their amendment of the 2000 Agreement which is the contract the jury found capable of performance and which the Trial Court ordered to be specifically performed.

386-387; 491-495.) Richardson's actions were undertaken as a result of the understanding and agreement reached with Castellani on behalf of NARP. (Tr. pp. 341-344; 608-609; R. p. 292-295; 559-560). Thus, Richardson acted on the approval of the agreement by Castellani and had every expectation that NARP and Castellani would perform their part of the agreement. (Tr. pp. 514; 518; 530; R. p. 465; 469; 481.)

As a result, Richardson properly demonstrated that he has performed as envisioned under the parties' agreement with the approval of NARP after the contract was modified. Further, Richardson's actions in saving those proceeds and his stated tender of them in open court to exchange for the stock shares demonstrate that he partly performed his part as envisioned under the agreement. This Court should reject NARPs' attempt to misconstrue the judgment accordingly.

**c. Richardson has performed his part of the contract and remains able and willing to perform.**

Richardson demonstrated that he performed under the contract and that he remains ready, willing, and able to perform his part of the contract. Nonetheless, NARP did not tender the 7.5% of stock as required under the agreement. Based on Richardson's demonstration to perform, this Court should agree with the Trial Court's judgment.

The party seeking specific performance must be able to demonstrate that he was ready and willing to perform his part of the contract. Gibson v. Hrysiokos, 293 S.C. at 13-14, 358 S.E.2d at 176. In a case finding that a party failed to meet its burden in requesting the remedy of specific performance, the South Carolina Supreme Court noted that a party requesting specific performance:

[M]ust aver that he has performed his part of the contract or that he is willing and ready to perform it, and that he has performed all conditions precedent to the taking effect of the obligation of the defendant, including



the payment to be made thereon, or some valid excuse for his failure to perform or offer to perform.

Ingram v. Kasey's Assocs., 340 S.C. 98, 106-07, 531 S.E.2d 287, 291 (2000) (quoting 71 Am. Jur. 2d Specific Performance § 201 (1973)). Thus, South Carolina courts have found that pleading an ability to immediately tender money to fulfill the terms of a contract is sufficient to demonstrate that a party is "ready, able and willing to perform his part of the contract." See Elliott v. Dew, 264 S.C. 40, 47-48, 212 S.E.2d 421, 424 (1975) (affirming the recommendation of specific performance and noting that "[i]t was sufficient for the respondent to plead a tender of the purchase money and to offer by his complaint to pay whatever amount of money was necessary to consummate the transaction and to pay that sum when determined by the court.").

As was shown at trial, Richardson was ready willing and able to perform the contract as modified, and the pleadings were amended to conform with the evidence at trial. Richardson averred that "[m]y intention was to carry out and honor this agreement with Bob [Castellani] by paying out with the proceeds of the sale of Reeves." (Tr. pp. 372-373; R. p. 323-324.) Richardson further stated that "the only memorialization we had of it was the oral agreement, meaning the 2000 agreement . . . I am bound now to honor that agreement." (Tr. p. 586; R. p. 537.) Richardson knew he only had to deliver a check to NARP for the proceeds from the sale of Reeves to comply with the amended agreement. (Tr. p. 588; R. p. 539.) Specifically, Richardson testified that "we would write a check for whatever that number was, yet to be determined, and we would pay it." (Tr. p. 589; R. p. 540.) That was all Richardson had to do to perform—"that's what it was, write him a check." (Tr. p. 608; R. p. 559.) Richardson admitted that "we've never hesitated or changed our position of what Bob [Castellani] is entitled to. He was entitled

to 7½ percent of what we sold Reeves for . . . .” (Tr. p. 592; R. p. 543). Moreover, Richardson testified that the money from the sale of Reeves was in his account and he could “cut a check for that money to Bob [Castellani] today if he would take it” if Castellani would give Richardson his 7.5% interest in NARP. (Tr. p. 609; 590; R. p. 560; 541.)

Accordingly, NARP’s position as to the remedy the Trial Court ordered is not consistent with the judgment in this case. When asked “[c]an [b]oth parties perform under the 2000 Agreement as amended in Charleston?” the jury answered “Yes.” (Special Verdict Form at ¶ 3; R. p. 2.) Thus, Richardson was willing and remains willing to perform. As a result, he met his burden in demonstrating his entitlement to the remedy of specific performance as to each element under the law. Hence, this Court should affirm the Trial Court’s judgment ordering NARP to specifically perform under the contract as orally modified in Charleston, South Carolina. On the other hand, if this Court agrees with NARP on what the Trial Court meant to order in its judgment, this Court must reverse the Trial Court for ignoring the jury’s findings based on the above clear evidence and substituting new terms not agreed upon by the parties into their contract.

**V. The Trial Court’s entry of the form of the judgment should be enforced in accordance with the position advanced by Richardson.**

The Trial Court submitted a special verdict form to the jury. (Special Verdict Form; R. p. 2.) That verdict form contained written questions for findings which might properly be made under the pleadings and evidence. (*Id.*) Neither party challenged the verdict form used or the form of the judgment. The Trial Court then entered the form of the judgment based on the jury’s answers to the interrogatories contained on the special

verdict form. (Judgment; R. p. 1.) Based on the pleadings and the answers to the interrogatories, the Trial Court entered judgment in favor of Richardson “under the doctrine of specific performance.” (*Id.*)

Rule 49 of the South Carolina Rules of Civil Procedure provides in pertinent part:

**(a) Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court *may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence*; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. . . .

Rule 49(a), SCRCP (emphasis added).

Following the jury’s return of the special verdict, the trial court is charged with preparing the form of the judgment. Rule 58, SCRCP. It is well settled that “[a] judgment is effective only when reduced to writing and entered into the record.” *Johnson v. S.C. Dep’t of Prob.*, 372 S.C. 279, 284, 641 S.E.2d 895, 898 (2007) (citing Rule 58(a)(2), SCRCP). Rule 58 provides:

**(a) Entry Upon Verdict or Decision.** Subject to the provisions of Rule 54(b): . . .

**(2)** upon a decision by the court granting other relief, or *upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly prepare the form of the judgment*, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court, *and after review and approval by the court, the clerk shall promptly enter it.*

*Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record.* Entry of the judgment should not be delayed for the taxing of costs.

Rule 58, SCRCP (emphasis added).

Here, the Trial Court submitted a special verdict form containing written questions as to factual findings that might be made under the evidence presented at trial. On the special verdict form, the Trial Court inquired of the jury “[c]an [b]oth parties perform under the 2000 Agreement as amended in Charleston?” (Special Verdict Form at ¶ 3; R. p. 2.) The jury responded, “Yes.” On the same day the jury answered the special interrogatories, the Trial Court entered judgment for Richardson under the specific performance doctrine. (Judgment; R. p. 1.)

This Court should agree with Richardson’s position as to the Trial Court’s judgment and rule that the Trial Court correctly and lawfully entered a judgment in favor of Richardson under the doctrine of specific performance. Ex parte Bland, 380 S.C. 1, 16, 667 S.E.2d 540, 547 (2008) (quoting Summer v. Bankhead, 119 S.C. 78, 111 S.E. 891 (1922)) (stating “[w]hether to grant specific performance is a matter committed to ‘sound judicial discretion.’” If, however, this Court agrees with NARP’s arguments regarding the meaning of the judgment from the Trial Court, this Court should reverse the Trial Court for the reasons set forth herein.

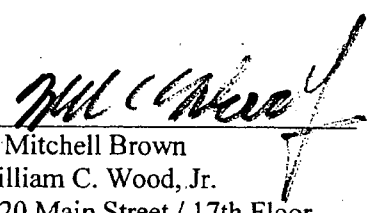
#### **Conclusion**

Accordingly, this Court should agree with the Trial Court’s judgment ordering the parties to specifically perform under the 2000 Agreement as modified at the Charleston meeting. Thus, Richardson has a right to a 7.5% interest share in NARP in exchange for \$415,988—the proceeds from his sale of Reeves Company, and this Court should so rule.

***Signatures Attached***

Respectfully submitted,

By:

  
C. Mitchell Brown  
William C. Wood, Jr.  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

Attorneys for P.J. Richardson

September 14, 2010  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2007-CP-23-3206

North American Rescue Products, Inc., ..... Appellant/Respondent

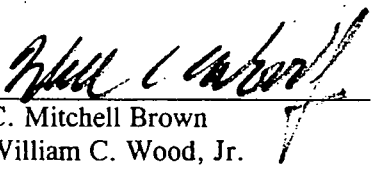
v.

P.J. Richardson, ..... Respondent/Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule  
211(b), SCACR.

By:

  
C. Mitchell Brown  
William C. Wood, Jr.  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

Attorneys for P.J. Richardson

9/14

, 2010

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2007-CP-23-3206

North American Rescue Products, Inc., ..... Appellant/Respondent,

v.

P.J. Richardson, ..... Respondent/Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent/Appellant P.J. Richardson, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

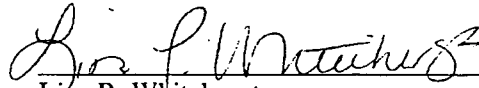
Pleadings:

Final Reply Brief of Respondent/Appellant P.J.  
Richardson

Counsel Served:

Robert L. Widener, Esquire  
McNair Law Firm, PA  
Post Office Box 11390  
Columbia, SC 29211

Bernie W. Ellis, Esquire  
McNair Law Firm, PA  
Post Office Box 447  
Greenville, SC 29602



Lisa P. Whitehurst  
Administrative Assistant

September 14, 2010





rec'd 1/30/12  
30528/01500

## The South Carolina Court of Appeals

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COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
[www.sccourts.org](http://www.sccourts.org)

January 27, 2012

Robert L. Widener, Esquire  
McNair Law Firm, PA  
P.O. Box 11390  
Columbia, SC 29211

C. Mitchell Brown, Esquire  
William C. Wood, Jr., Esquire  
A. Mattison Bogan, Esquire  
Nelson Mullins Riley  
& Scarborough  
P O Box 11070  
Columbia, SC 29211

Re: North American Rescue v. Richardson

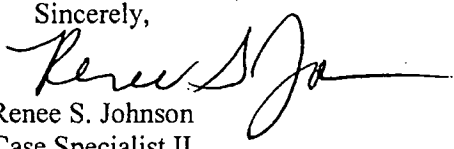
Dear Counsel:

Enclosed is a copy of an Order of the Court denying your Petition for Rehearing in the above case.

The Remittitur in this case will be held in this Court only so long as required by Appellate Court Rule 221 (b).

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining Records on Appeal and briefs we may have in this case. Also enclose a check payable to the S. C. Court of Appeals, in the amount of \$7.50, to cover mailing costs. If we have not heard from you within ten (10) days, the Record on Appeal and briefs will be disposed of.

Sincerely,

  
Renee S. Johnson  
Case Specialist II

 TAG/rj

cc: Bernie Wellington Ellis, Esquire  
Lane W. Davis, Esquire  
Rivers S. Stilwell, Esquire  
A. Marvin Quattlebaum, Jr., Esquire

# The South Carolina Court of Appeals

North American Rescue Products, Inc., Appellant/Respondent,

v.

P. J. Richardson,

Respondent/Appellant.

The Honorable Steven H. John  
Greenville County  
Trial Court Case No. 2007-CP-23-03206

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## ORDER DENYING PETITIONS FOR REHEARING

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PER CURIAM: After a careful consideration of both the Petitions for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that both the Petitions for Rehearing be denied.

Paul E. Short, Jr. J. Short

H. Bruce Williams J. Williams

John O. Beattie J. Geathers

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Columbia, South Carolina

cc: Bernie Wellington Ellis, Esquire  
Robert L. Widener, Esquire  
C. Mitchell Brown, Esquire  
William C. Wood, Jr., Esquire  
A. Mattison Bogan, Esquire  
Lane W. Davis, Esquire  
Rivers S. Stilwell, Esquire  
A. Marvin Quattlebaum, Jr., Esquire

FILED

27 Jan 12

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

North American Rescue Products, Inc.,  
Appellant/Respondent,

v.

P. J. Richardson, Respondent/Appellant.

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Appeal From Greenville County  
Steven H. John, Circuit Court Judge

---

Opinion No. 4909  
Heard September 12, 2011 – Filed November 9, 2011

---

**AFFIRMED**

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Bernie Wellington Ellis, of Greenville and  
Robert L. Widener, of Columbia, for  
Appellant-Respondent.

C. Mitchell Brown, William C. Wood, Jr., and  
A. Mattison Bogan, all of Columbia and  
Rivers S. Stilwell, of Greenville, for  
Respondent-Appellant.

**WILLIAMS, J.:** In this cross-appeal, North American Rescue Products, Inc. (NARP) argues the circuit court erred in denying its motion for a directed verdict because no evidence existed that P.J. Richardson (Richardson) had an ownership interest in NARP or had a contractual right to purchase an ownership interest in NARP. Richardson cross-appeals, contending the circuit court erred in upholding the jury verdict ordering specific performance of the contract with a fair market valuation of the stock. We affirm.

**FACTS/PROCEDURAL HISTORY**

On January 1, 2000, Bob Castellani (Castellani), on behalf of NARP, and Richardson, on behalf of Reeves Manufacturing, Inc. (Reeves), entered into an agreement (the 2000 Agreement), in which the parties agreed to pay each other commissions equal to twenty-

five percent of the taxable income of their companies for cross-selling each other's respective products. Moreover, the parties agreed to issue twenty-five percent of their companies' respective capital stock to each other. After several years of each company operating under this agreement, it is undisputed the parties orally modified the 2000 Agreement by reducing the percentages of stock from twenty-five percent to seven and one-half percent at a meeting in Charleston, South Carolina (the Charleston Agreement). At trial, the parties testified the percentages were reduced, in part, because Richardson began negotiating with a third party for the sale of Reeves. Although the parties agree that the Charleston Agreement modified the percentages of stock from twenty-five percent to seven and one-half percent, the parties dispute the method of payment. Richardson contends the parties agreed that Richardson could acquire seven and one-half percent ownership interest in NARP in exchange for the monetary value of seven and one-half percent of the proceeds from the pending sale of Reeves. NARP argues there was never an agreement where it would accept a cash payment from Richardson in exchange for seven and one-half percent of NARP's stock, but insisted instead that the Charleston Agreement was a "like for like" exchange in each other's companies. In short, there is conflicting testimony as to the method of payment, and the Charleston Agreement is silent on this term.

Several months after the Charleston Agreement, Richardson's attorney drafted an "Agreement of Termination, Settlement, and Release" (the Termination Agreement). Richardson signed the Termination Agreement on behalf of Reeves on November 4, 2004, and Castellani signed the same agreement on behalf of NARP several days later. The Termination Agreement provided, in pertinent part:

1. Termination of the 2000 Outline. The parties agree that the 2000 Outline and any and all agreements, understandings, undertakings, or arrangements that in any way arose or may have arisen out of or relate in any manner to the 2000 Outline, are terminated.
2. Settlement. All claims and potential claims of any nature whatsoever that have been, could have been, or in the future could be asserted by the parties arising out of or relating in any manner to the 2000 Outline are hereby settled, compromised and released for and in consideration of the payment by [Reeves/Richardson] of the sum of \$100.00 in lawful money of the United States of America to NARP and [Castellani].
3. [Reeves and Richardson] Release. NARP and [Castellani] hereby remise, release and forever discharge each [other], along with their respective directors, officers, stockholders, controlling persons, employees, agents, predecessors, successors and assigns, and agents, of and from all, and all manner of, actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands whatsoever, whether in law or equity, which NARP and/or [Castellani] had, now have or which any personal representative, heir, predecessor, successor or assign of NARP and/or [Castellani] can, shall or may have against [Reeves or Richardson] or their respective directors, officers, stockholders, controlling persons, employees, agents, predecessors, successors and assigns, arising out of or relating to the 2000 Outline from and

beginning of time to the date of this Settlement Agreement. It is specifically agreed and understood by the parties that the foregoing release is not intended to, and shall not, release any of the parties from that certain, separate Option Agreement dated [15 Dec], 2004 pursuant to which NARP and [Castellani] have granted [Richardson] an option to purchase 7.5% of the capital stock of NARP.

4. NARP and [Castellani] Release. [Reeves] and [Richardson] hereby remise, release and forever discharge each [other], along with their respective directors, officers, stockholders, controlling persons, employees, agents, predecessors, successors and assigns, and agents, of and from all, and all manner of, actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands whatsoever, whether in law or equity, which [Reeves] and/or [Richardson] had, now have or which any personal representative, heir, predecessor, successor or assign of [Reeves] and/or [Richardson] can, shall or may have against [NARP or Castellani] or their respective directors, officers, stockholders, controlling persons, employees, agents, predecessors, successors and assigns, arising out of or relating to the 2000 Outline from and beginning of time to the date of this Settlement Agreement. It is specifically agreed and understood by the parties that the foregoing release is not intended to, and shall not, release any of the parties from that certain, separate Option Agreement dated [15 Dec], 2004 pursuant to which NARP and [Castellani] have granted [Richardson] an option to purchase 7.5% of the capital stock of NARP.

5. Entire Agreement. This Agreement sets forth the entire agreement and understanding of the parties relating to the subject matter contained herein, and merges all prior discussions and agreements, both oral and written, between the parties.

(emphasis added). To complicate matters further, the parties concede that no written option agreement dated December 15, 2004 existed at the time of the Termination Agreement. Moreover, the parties never entered into an option agreement dated December 15, 2004.

In January 2005, Richardson sold one-hundred percent of Reeves to a third party. The parties continued to discuss the terms of a potential agreement, including the exchange of several proposals, but NARP and Richardson never reached an agreement. On April 17, 2007, Richardson sent NARP a demand letter, advising NARP that Richardson "now desires to exercise his option to purchase" seven and one-half percent of NARP's stock "under the terms of the October 4, 2004 Option Agreement."<sup>[1]</sup> NARP responded to the demand letter by instituting this suit seeking a declaratory judgment on the matter. Richardson filed an answer and counterclaim, alleging breach of contract and demanded specific performance. Richardson also asserted relief under the doctrine of promissory estoppel. During the course of the litigation, Richardson filed multiple amended answers and counterclaims. In addition, the circuit court granted Richardson's motion to amend the pleadings to conform to the evidence presented at trial under Rule 15(b), SCRCP.

As a result of the conflicting testimony throughout the trial, the circuit court refused NARP's multiple requests for a directed verdict. Without objection, the circuit court submitted the case to the jury under a special verdict form to answer the fundamental question of whether Richardson had the right to acquire seven and one-half percent of NARP's stock and, if so, at what price. The jury returned a verdict finding Richardson was entitled to receive seven and one-half percent of NARP's stock, but Richardson should pay \$2,936,300 for the stock. Following the verdict, the circuit court denied NARP's post-trial motions for directed verdict, new trial absolute, judgment notwithstanding the verdict, and for a new trial under the thirteenth juror doctrine. In addition, Richardson unsuccessfully moved for the circuit court to "reform the verdict" on the basis that the "number is something that [Richardson] can't see already in evidence." The circuit court confirmed the jury verdict in favor of Richardson and granted specific performance as found by the jury.

NARP appeals, contending the circuit court erred in denying its directed verdict motion on all contract claims and on promissory estoppel. Richardson cross-appeals, arguing the judgment amount for specific performance should be \$415,988, not \$2,936,300 as provided in the jury verdict.

### STANDARD OF REVIEW

When considering a directed verdict motion, the circuit court should view the evidence and all reasonable inferences in the light most favorable to the non-moving party. Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002) (citing Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999)). "If more than one reasonable inference can be drawn . . . the case should be submitted to the jury." Chaney v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965) (citing Mahon v. Spartanburg Cnty., 205 S.C. 441, 449, 32 S.E.2d 368, 371 (1944)). The circuit court should be "concerned only with the existence or nonexistence of evidence," not its credibility or weight. Jones v. Gen. Elec. Co., 331 S.C. 351, 356, 503 S.E.2d 173, 176 (1998) (citing Garrett v. Locke, 309 S.C. 94, 99, 419 S.E.2d 842, 845 (Ct. App. 1992)). An appellate court will only reverse the circuit court's ruling when no evidence supports the ruling or when the ruling is controlled by an error of law. Steinke, 336 S.C. at 386, 520 S.E.2d at 148.

An action for specific performance is one in equity. Campbell v. Carr, 361 S.C. 258, 262, 603 S.E.2d 625, 627 (Ct. App. 2004). "In reviewing a proceeding in equity, this court may find facts based on its own view of the preponderance of the evidence." Greer v. Spartanburg Technical Coll., 338 S.C. 76, 79, 524 S.E.2d 856, 858 (Ct. App. 1999). "This broad scope of review does not require this court to ignore the findings below when the circuit court was in a better position to evaluate the credibility of the witnesses." Id. "Moreover, the appellant is not relieved of his burden of convincing the appellate court the [circuit court] committed error in its findings." Pinckney v. Warren, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001).

Additionally, "[a] legal question in an equity case receives review as in law." Sloan v. Greenville Cnty., 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). Because questions of law may be decided with no particular deference to the circuit court, this court may correct errors of law in both legal and equitable actions. See I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Code Ann. § 14-8-



200 (Supp. 1998)).

## LAW/ANALYSIS

### I. NARP's Appeal

NARP argues the circuit court erred in denying its directed verdict motion on Richardson's contract and promissory estoppel claims on the grounds that the Termination Agreement unambiguously and unequivocally terminated all rights and promises under the 2000 agreement. We disagree.

In ruling on motions for directed verdict, "the [circuit] court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions whe[n] either the evidence yields more than one inference or its inference is in doubt." Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). This court will reverse the circuit court's rulings on directed verdict motions only when there is no evidence to support the rulings or when the rulings are controlled by an error of law. See Hinkle v. Nat'l Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003) (internal citation omitted). After viewing the evidence in a light most favorable to Richardson, as our standard of review requires, we find the circuit court properly denied NARP's directed verdict motion.

NARP maintains the merger clause of the Termination Agreement between the parties ended any and all rights that Richardson had or may have to own or purchase any NARP stock. However, considered in the light most favorable to Richardson, there is evidence from which the jury could find the document containing the termination provision was only a single portion of an overarching, three-step agreement between the parties. At trial, Richardson presented evidence that a tripartite agreement was never fully executed and, as a result, the parties continued to be bound by the Charleston Agreement. Richardson and his wife both testified the Termination Agreement was only one part of a tripartite agreement, which also included Richardson's right to purchase seven and one-half percent of NARP's stock in exchange for a charitable donation to Dobson Ministries in the amount equivalent to seven and one-half percent of the sale of Reeves. In addition, Richardson's former attorney, Rod Manning (Manning), offered similar testimony consistent with the position that the Termination Agreement was part of a larger, tripartite agreement.

In denying NARP's multiple motions for directed verdict, the circuit court properly considered the existence of this conflicting evidence. See Garrett, 309 S.C. at 99, 419 S.E.2d at 845 (stating that the circuit court should not be concerned with the credibility or weight of evidence, only its existence). The circuit court stated,

Y'all might be certain that you entered into that November 8, 2004 termination agreement but I don't think the evidence shows that. I don't know if you did or not. Number one. And the terms of the contract are absolutely ambiguous [sic]. Read as a whole, it borders on being completely un-understandable. So all these matters barring some change from the evidence presented by the defense and all these issues are going to go to the jury.

In denying NARP's motion for a directed verdict again at the close of the evidence, the circuit court stated "the testimony is conflicting" and NARP's position "certainly is a possible conclusion that the jury can come to[, b]ut there is more than one."

There may be a basis for the fact-finder to reject the testimony of Richardson, his wife, and Manning, but that credibility determination lies with the jury, not the court, at the directed verdict stage. See Sabb, 350 S.C. at 427, 567 S.E.2d at 236 (noting a circuit court must deny a directed verdict motion when the evidence yields more than one inference or its inference is in doubt). We hold the evidence under the proper standard of review presented a question of fact as to whether a contract existed between the parties. Accordingly, we affirm the circuit court's denial of NARP's directed verdict motions. Id. (stating an appellate court will reverse the circuit court's decision to deny a directed verdict motion only when no evidence supports the ruling below).

## II. Richardson's Cross-Appeal

### A. Standing

As an initial matter, NARP contends Richardson does not have standing to appeal because Richardson is not an aggrieved party and, therefore, does not have the right to appeal. See Rule 201, SCACR; S.C. Code Ann. § 18-1-30 (1976). We find this position without merit.

Rule 201(b) limits the ability to appeal to "[o]nly a party aggrieved by an order, judgment . . . or decision . . . ." Rule 201(b), SCACR. This court has previously explained that under Rule 201(b), "[t]he word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation." Beaufort Realty Co. v. Beaufort Cnty., 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). "A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest." Id.

In the instant case, Richardson contends he entered into a contract requiring him to pay seven and one-half percent of the sale of Reeves in exchange for seven and one-half percent of stock in NARP. The jury's verdict granted specific performance in favor of Richardson, but the judgment required Richardson pay \$2,936,000, instead of \$415,988, which is the equivalent to seven and one-half percent of the proceeds from the sale of Reeves. The law recognizes that despite having been a "winning" party below, a party can still be aggrieved by a judgment of the court. See Cobb v. Benjamin, 325 S.C. 573, 580, 482 S.E.2d 589, 592-93 (Ct. App. 1997) (holding party was aggrieved and appeal was proper despite judgment essentially granting relief the party requested); Cisson v. McWhorter, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970) (stating an aggrieved party is defined as a person who is aggrieved by a judgment or decree "when it operates on his rights of property or bears directly upon his interest, the word aggrieved referring to a substantial grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation"). Accordingly, we find Richardson is an aggrieved party in a legal sense and, therefore, has standing to appeal.

### B. Preservation

NARP also asserts Richardson's argument on cross-appeal is not preserved for our review

because Richardson failed to challenge the circuit court's ruling at trial and does not specifically raise the issue on appeal. We disagree.

It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the circuit court to be preserved. See generally Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000); Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Moreover, our courts have adhered to the rule that when an issue has not been ruled upon by the circuit court or raised in a post-trial motion, such issue may not be considered on appeal. See SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 499, 392 S.E.2d 789, 793 (1990) (finding an issue never ruled on by the circuit court or raised in an appropriate post-trial motion is not preserved for review).

After the jury granted specific performance in favor of Richardson and found that he was entitled to receive seven and one-half percent of NARP's stock upon paying \$2,936,300, Richardson made the following motion:

[W]e'd ask for JNOV based on the 13th jury doctrine for the Court to reform the verdict in that the basis for the number [i.e. \$2,936,300] is something that I can't see already in evidence.<sup>[2]</sup>

It is evident that Richardson made a post-trial motion objecting to the amount the jury determined NARP was entitled to receive in exchange for seven and one-half percent of its stock. In response, the circuit court denied Richardson's post-trial motion stating, "there is sufficient evidence in the record which would support the jury's verdicts in the amount set forth based upon the evidence presented." As a result, this issue was raised and ruled upon by the circuit court. Richardson properly appeals this issue, arguing the circuit court's grant of specific performance should be for \$415,988, the contract amount Richardson alleges was agreed to by the parties in the Charleston Agreement. Accordingly, we find Richardson properly preserved and raised this issue on appeal.

### C. Specific Performance

In his cross-appeal, Richardson contends the circuit court properly entered a judgment of specific performance based upon the jury's answers to the interrogatories on the special verdict form, but erred in determining the amount Richardson must pay for seven and one-half percent of NARP's stock. We disagree.

Although an action for specific performance is one in equity, the record indicates the parties and the court treated this case as one in law, submitting issues of fact to a jury. See Horn v. Davis Elec. Constructors, Inc., 302 S.C. 484, 487, 395 S.E.2d 724, 725-26 (Ct. App. 1990) (holding parties implicitly agreed to trial by consent in equity action for retaliatory discharge when parties and court treated case as law case with submission of issues of fact to jury and court did not consider jury as advisory only). Moreover, the record conclusively demonstrates the circuit court intended that the jury would decide all questions of fact in this case, including the price for the stock, as evidenced by the special verdict form submitted to the jury without objection.<sup>[3]</sup> Accordingly, the circuit court had the responsibility to enter an order consistent with the jury's findings if there was any evidence to support such findings. See Johnstone v. Matthews, 183 S.C. 360, 366, 191 S.E. 223, 225 (1937) (holding when issues of fact in equity cases are tried to a jury and

findings of fact are made, if there is any evidence to support them, the findings are conclusive of the issues submitted).

Here, the circuit court did not err in granting specific performance in the amount the jury determined because it is an appropriate remedy under the evidence presented in this case. At trial, Richardson presented the testimony of Mike Melinger (Melinger), an expert witness qualified in the field of business evaluations, to detail the fair market value of NARP's stock. Over NARP's objections, the circuit court ruled the expert witness could testify and informed the parties that the jury would have to decide the amount Richardson would have to pay for the stock if Richardson was entitled to it. Melinger testified he applied the industry standard lack of control discount and a lack of marketability discount to the two estimated values of \$150,000,000 and \$80,000,000 placed on NARP's company. Melinger further testified that "[a]t 150 million dollars, the [seven and one-half percent] interest would be worth \$5,750,000. At 80 million dollars, [seven and one-half percent] interest would be worth \$3,000,120."

Once in deliberations, the jury submitted a question to the court concerning number eight on the verdict form. The jury inquired: "If we [find Richardson is entitled to NARP's stock], will P.J. Richardson be required to purchase 7.5% of NARP common stock at current market value[?]" (emphasis in original). The circuit court advised the jury that it "must assign some value for the stock if" the jury answered question number eight in the affirmative. Utilizing the fair market value of \$80,000,000, the jury's determination that Richardson must pay \$2,936,300 for seven and one-half percent of NARP's stock is within the range of the expert witness' testimony. See Buzhardt v. Cromer, 272 S.C. 159, 163, 249 S.E.2d 898, 900 (1978) (holding when the amount of the verdict falls within the range of amounts testified to, the verdict cannot be disturbed on the ground of excessiveness). Furthermore, in denying Richardson's post-trial motion, the circuit court stated:

I do find that there is sufficient evidence in the record which would support the jury's verdict in the amount set forth based upon the evidence presented [including] the different dates as far as the evaluation over a period of years that the jury could have used in this particular matter to arrive at that verdict. And I find it's well within their discretion and the facts and evidence in this case.

As a result, we find ample evidence in the record to support the jury's verdict. Moreover, Richardson has not presented, and we do not find, any compelling reasons to invade the jury's province and alter the amount in the verdict. See Bailey v. Peacock, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) (stating compelling reasons must be given to justify invading the jury's province).

In granting Richardson seven and one-half percent of NARP's stock in exchange for \$2,936,300, the jury's verdict is supported by the evidence in the record. See Johnstone, 183 S.C. at 366, 191 S.E. at 225 (holding when issues of fact in equity cases are tried to a jury and findings of fact are made, if there is any evidence to support them, the findings are conclusive of the issues submitted). Accordingly, we affirm the circuit court's entry of specific performance and hold Richardson must pay \$2,936,300 for seven and one-half percent of NARP's stock.

## CONCLUSION

Accordingly, the circuit court's order is

**AFFIRMED.**

**SHORT and GEATHERS, JJ., concur.**

[1] Richardson conceded at trial that the option agreement dated October 4, 2004 was never finally agreed to by both parties.

[2] Although Richardson's counsel has confused the language of the post-trial motion he wished to employ, as we interpret the record, it is entirely clear to this court that Richardson's counsel moved for a new trial nisi remittitur based upon counsel's desire to "reform the verdict" and his statement that the jury's "number is something that [he] can't see already in evidence." Counsel's statements, coupled with the circuit court's ruling, support this interpretation. See James v. Horace Mann Ins. Co., 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006) ("A motion for a new trial nisi remittitur asks the [circuit] court to reduce the verdict because the [jury's] verdict is merely excessive."). Accordingly, we treat Richardson's post-trial motion as a new trial nisi remittitur.

[3] The circuit court submitted the case to the jury under a special verdict form that asked numerous contract questions, which the jury answered as follows:

1. Did [NARP] and [Richardson] give each other the right to acquire 7.5% of each other's stock?

a. YES.

2. Do you find that [NARP] agreed to let [Richardson] acquire 7.5% of [NARP's] stock in exchange for money rather than the issuance of 7.5% of capital stock?

a. YES.

3. Can both parties perform under the 2000 Agreement as amended in Charleston?

a. YES:

4. Did the parties [NARP and Richardson] enter into a contract, that is the November 2004 [Termination Agreement]?

a. YES.

5. If the [Termination Agreement] is a contract, does it end both parties' rights to acquire 7.5% of the capital stock of each other?

a. NO.

8. Is [Richardson] entitled to receive 7.5% of the outstanding capital stock of [NARP]?

a. YES.

b. [If so], what should [Richardson] pay to [NARP] for 7.5% of the common capital stock?

i. \$2,936,300.

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

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Case No. 07-CP-23-3206

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North American Rescue Products, Inc.,.....Appellant-Respondent,

v.

P. J. Richardson,.....Respondent-Appellant.

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**PETITION FOR REHEARING**

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Pursuant to Rule 221(a), SCACR, Appellant-Respondent (NARP) respectfully submits  
this Petition for Rehearing.

**GROUND FOR REHEARING**

**I. This Court overlooked or misapprehended the substantive law and standard of review applicable to the question of whether a contract is ambiguous.**

The threshold question is whether the Termination Agreement was ambiguous. This Court's opinion never addresses this threshold question. Rather, the opinion goes directly to the conflicting testimony on the meaning of the Termination Agreement and views that evidence in the light most favorable to Respondent-Appellant (PJ). See Op. at 63-65.<sup>1</sup> NARP respectfully submits this was error: (1) the question of whether a contract is ambiguous is a question of law

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<sup>1</sup> All citations to this Court's opinion are to the page numbers appearing in Shearhouse Advance Sheet Number 14, published November 14, 2011.

for the court; (2) this Court has a *de novo* standard of review on this question; and (3) the question is to be decided based solely upon the language used in the four corners of the contract. *Laser Supply and Services, Inc. v. Orchard Park Assocs.*, 676 S.E.2d 139 (S.C. App. 2009). NARP respectfully requests this Court to grant rehearing, apply the correct analysis to the threshold question of whether the Termination Agreement is ambiguous, and issue an amended opinion finding that the Termination Agreement is not ambiguous. The conflicting evidence relied upon by this Court does not and cannot create any ambiguity – that evidence becomes relevant if, and only if, the Termination Agreement is first found to be ambiguous based upon the language used in the four corners of the Agreement.

**II. The Termination Agreement is not ambiguous – it plainly terminates all prior agreements and discussions that were in any manner related to the 2000 Agreement.**

PJ drafted the Termination Agreement. He signed it on November 4, 2004, gave it an effective date of November 4, 2004, and forwarded it to NARP's president (Bob), requesting that he sign it on behalf of NARP. Bob signed the Termination Agreement as requested by PJ on November 8, 2004, without suggesting or making any changes. PJ then used the Termination Agreement to close the sale of the assets of his company, RMI, free of any ownership interest claim by NARP or Bob. Once finished with his need for the Termination Agreement, PJ disavowed it in this lawsuit. The law does not permit this.

It would be impossible to draft an agreement that more clearly and more unambiguously terminated and ended forever a prior agreement than did the Termination Agreement. In Paragraph 1, the Termination Agreement expressly and plainly "terminated" the 2000 Agreement and "*any and all* agreements, understandings, undertakings or arrangements that *in any way* arose or may have arisen out of or relate *in any manner* to the" 2000 Agreement. (R. 924a at ¶ 1) (emphasis added). In Paragraph 2, the Termination Agreement expressly and plainly settled,



compromised and released “[a]ll claims and potential claims of *any nature whatsoever* that have been, could have been, or in the future could be asserted by the parties arising out of or relating in *any manner* to the” 2000 Agreement. (R. 924a at ¶ 2) (emphasis added). In paragraph 4 of the Termination Agreement, PJ and his company, RMI, expressly and plainly “remit[d], release[d] and forever discharge[d]” NARP and Bob “from *all, and all manner of*” claims and demands “arising out of or relating to the 2000 [Agreement] from the beginning of time to the date of this [Termination] Agreement.” (R. 924b, ¶ 4) (emphasis added).<sup>2</sup> Finally, paragraph 6 of the Termination Agreement set forth a classic merger or integration clause:

This [Termination] Agreement sets forth the *entire* agreement and understanding of the parties relating to the subject matter contained herein, and *merges all* prior discussions and agreements, *both* oral and written, between the parties.

(R. 924b, ¶ 6) (emphasis added). Notably, nothing in the Termination Agreement made it or any part thereof contingent upon any past, present, or future event.

In short, the Termination Agreement plainly and unambiguously terminated and forever ended any and all rights that PJ had or may have had to own or purchase any NARP stock under the 2000 Agreement or under any agreement or discussion, oral or written, that pre-dated the Termination Agreement. Thus, as a matter of law, any purported right held by PJ could only exist under some other agreement that was excepted from the Termination Agreement or entered after the Termination Agreement.

The Termination Agreement plainly sets forth the parties’ rights and obligations and, therefore, this Court must enforce the contract as written, regardless of its wisdom or folly, apparent unreasonableness, or PJ’s failure to guard his rights carefully. *Laser Supply and Services, Inc. v. Orchard Park Assocs.*, 676 S.E.2d 139 (S.C. App. 2009). Courts do not exist to and cannot relieve parties from the results of their unambiguous contract. *Id.* Here, the

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<sup>2</sup> In the preceding paragraph 3, NARP and Bob gave the same release to PJ and RMI. (R. 924a-924b, ¶ 3).

Termination Agreement plainly ends any claims related to the 2000 Agreement, and the merger clause plainly captures and extinguishes all prior written and oral undertakings. *Wilson v. Landstrom*, 315 S.E.2d 130, 134 (S.C. App. 1984) (merger clause renders the agreement fully integrated and extinguishes contemporaneous and prior agreements). Thus, nothing that happened before the Termination Agreement is relevant here, and PJ cannot rely on such to establish any claim against NARP.

**III. The Termination Agreement's reference to a "Dec 15" option agreement does not create any ambiguity, and any assumed ambiguity must be construed against PJ as the drafter of the Termination Agreement.**

The Termination Agreement specifically stated that it did not "release any of the parties from that *certain, separate* Option Agreement dated [Dec 15] pursuant to which NARP and [Bob] have granted [PJ] an *option* to purchase 7.5% of the capital stock of NARP." (R. 924b, ¶ 4) (emphasis added). This language does not create any ambiguity on the termination of the 2000 Agreement and any related agreements or discussions – it simply provides that the Termination Agreement does not apply to the "separate" option agreement. It is undisputed that the parties had not entered any option dated December 15 or otherwise at the time of the Termination Agreement, and it is also undisputed they never did so after the Termination Agreement. Nothing in the Termination Agreement makes its provisions contingent upon the existence of this December 15 agreement or any other agreement.

PJ drafted the Termination Agreement. If there is any ambiguity in the Termination Agreement, including the scope and effect of the merger clause (and there is not), it must be "construed liberally and interpreted strongly in favor of the non-drafting party [NARP]." *Southern Atl. Fin. Servs., Inc. v. Middleton*, 590 S.E.2d 27, 29 (S.C. 2003); *accord Springs and Davenport, Inc. v. AAG, Inc.*, 683 S.E.2d 814 (S.C. App. 2009). As the drafting party, PJ had

“the greater opportunity to prevent mistakes in meaning [and is therefore] responsible for any ambiguity and should be the one to suffer from the shortcomings.” *Id.*

If PJ believed or intended that some present or past written or oral undertaking or understanding was to survive the Termination Agreement, it was his duty to make this clear in the Termination Agreement. Having failed to include any such “outward expression,” he cannot now rely on any such “secretly held intention.” *Blakeley v. Rabon*, 221 S.E.2d 767, 769 (S.C. 1976). If PJ believed the Termination Agreement was contingent upon the parties entering into another agreement, dated December 15 or otherwise, it was his duty to make this clear in the Termination Agreement. *McMaster v. Strickland*, 409 S.E.2d 440, 442 (S.C. App. 1991) (the decision to take a chance on something happening in the future which will make a current contract more favorable or palatable is not a basis for invalidating that contract if the future event does not take place unless a condition or contingency to that effect is placed in the contract). At most, given the non-existence of the “December 15 Option Agreement,” this provision of the Termination Agreement indicated an agreement to agree in the future. Such agreements, however, are not enforceable if, as here, the material terms are left to future determination. *Ellis v. Taylor*, 449 S.E.2d 487, 489 (S.C. 1994).

**IV. There is no evidence, and it is undisputed, that the parties never entered any agreement after executing the Termination Agreement.**

After entering the Termination Agreement *as requested by PJ*, the parties continued to discuss the possibility of PJ obtaining 7.5% of NARP’s stock. It is undisputed and PJ admitted, however, that the parties never reached an agreement. (R. 290; 385; 524).

NARP is a Delaware corporation. Delaware law provides that any option to purchase stock must be in writing and approved by NARP’s Board of Directors – Delaware law also requires that any option agreement must set forth the specific terms of the option (e.g., amount of

stock, the duration of the option, the consideration paid for the option).<sup>3</sup> It is undisputed that PJ and NARP never entered a written option agreement meeting these requirements. Thus, there is no evidence of any enforceable option agreement that was excepted from the operation of the Termination Agreement.

In short, the undisputed evidence demonstrates that the parties never entered any contract, written or oral, after the parties executed the Termination Agreement.

**V. There is no evidence of any “promissory estoppel” before or after the parties executed the Termination Agreement.**

Promissory estoppel arises only upon proof of the following elements: (1) an unambiguous promise by the promisor, *i.e.*, NARP here; (2) reasonable reliance on the promise by the promisee, *i.e.*, PJ here; (3) reliance by the promisee (PJ) was expected by and foreseeable to the promisor (NARP); and (4) injury caused to the promisee (PJ) by his reasonable reliance, *i.e.*, detrimental reliance. *Rushing v. McKinney*, 633 S.E.2d 917 (S.C. App. 2006). There could be no promissory estoppel prior to the execution of the Termination Agreement. Until that time, PJ had a contractual right under the 2000 Agreement to demand 7.5% of NARP’s stock in exchange for RMI issuing 7.5% of its stock to Bob. This was still possible prior to the Termination Agreement, because PJ had not yet sold RMI’s assets and goodwill.

Moreover, given the adversarial nature of the discussions and negotiations, which included representation by attorneys and the exchange of draft written agreements, PJ could not have reasonably relied on any oral promise. In addition, any promises and reliance occurring

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<sup>3</sup> Under Delaware law, an option to purchase stock from a corporation must meet these requirements. 8 Del. C. § 157; *Grimes v. Alton, Inc.*, 804 A.2d 256 (Del. 2002). South Carolina law has statutorily adopted the “internal affairs doctrine,” which precludes South Carolina from regulating the internal affairs of a foreign corporation authorized to do business in South Carolina, like NARP here. S.C. Code Ann. § 33-15-105(c). An option to purchase stock from a corporation is firmly established as an internal affairs matter. *Mariasch v. Gillette Co.*, 521 F.3d 68, 72 (1<sup>st</sup> Cir. 2008), *citing, quoting, and applying inter alia* *Rogers v. Guaranty Trust Co. of New York*, 288 U.S. 123, 129 (1933) and *Beard v. Elster*, 160 A.2d 731, 735 (Del. 1960). Thus, the requirements of Delaware law for options to purchase stock from a corporation must be met in South Carolina, and it is undisputed such did not happen in this case.

before the execution of the Termination Agreement were captured and extinguished by the merger clause of that Agreement, which PJ drafted and presented, and he is bound by the plain meaning of the language he used in that Agreement, including the merger clause. As a matter of law, in light of the plain language of the merger clause, any reliance on pre-Agreement "promises" would be unreasonable and would not be expected by or foreseeable to NARP. Thus, as a matter of law, for each of the foregoing reasons, there can be no promissory estoppel claim based on conduct before the execution of the Termination Agreement.

The merger clause in the Termination Agreement captured and extinguished "*all* prior discussions and agreements, *both* oral and written, between the parties." (R. 924b, ¶ 6) (emphasis added). Thus, any promissory estoppel had to arise after the Termination Agreement.

There is no evidence of promissory estoppel after the execution of the Termination Agreement. PJ's promissory estoppel claim rested upon evidence of "promises" allegedly made before the execution of the Termination Agreement, which failed for the reasons noted above. Assuming there were any evidence of "promissory estoppel" after the Termination Agreement, PJ could not have reasonably relied on any such oral promise. By this time, the adversarial nature of the discussions, the involvement of attorneys, and the use of written draft agreements related to PJ's proposed purchase of NARP stock had increased significantly, and no reasonable person could believe an oral promise was binding. These same circumstances establish that NARP would not expect or foresee that PJ would rely on any oral statements. Moreover, there is no evidence of any detrimental reliance on any promise made after the Termination Agreement, *i.e.*, there is no evidence that PJ suffered any injury in reliance on any "promises" made after the Termination Agreement.

In short, there is no evidence of promissory estoppel either before or after the Termination Agreement. PJ's claim rested on conduct occurring before the Termination Agreement, and any such claim was captured and extinguished by the merger clause, which PJ drafted and requested NARP to sign.

**VI. The trial court erred in denying NARP's directed verdict motions.**

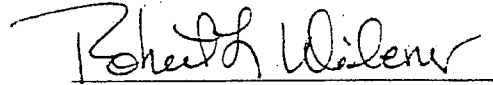
The Termination Agreement plainly and unconditionally terminated the 2000 Agreement and any related agreements, discussions, or promises. It is undisputed that the parties never entered any agreement after the Termination Agreement. There is no evidence of any promissory estoppel after the Termination Agreement. Accordingly, the trial court erred in denying NARP's directed verdict motions.

**CONCLUSION**

For all of the foregoing reasons, and for the reasons set forth in NARP's Appellant and Reply Briefs and oral argument, which are incorporated herein by reference, it is respectfully submitted that this Court should grant rehearing and issue an amended opinion that reverses the appealed order and remands for the entry of judgment in favor of NARP that PJ has no right to purchase 7.5% of NARP's stock.

In the alternative, NARP respectfully requests that this Court issue an amended opinion addressing the threshold question of whether the Termination Agreement was ambiguous – which is to be determined solely based upon the language of the Agreement – and applying the proper (*de novo*) standard of review to this question of law. The Agreement must first be found to be ambiguous before this Court's analysis of the conflicting evidence becomes relevant.

Respectfully Submitted,



Robert L. Widener  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

Bernie W. Ellis  
McNair Law Firm, P.A.  
Post Office Box 447  
Greenville, South Carolina 29602  
(864) 271-4940

Attorneys for Appellant-Respondent

November 28, 2011  
Columbia, SC

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No.: 07-CP-23-3206

North American Rescue Products, Inc., .....Appellant-Respondent,

v.

P. J. Richardson, .....Respondent-Appellant.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Appellant-Respondent's Petition for Rehearing depositing copies in the United States Mail, postage prepaid, on November 28, 2011 addressed to the attorneys of record, as follows:

Lane W. Davis, Esq.  
NELSON MULLINS RILEY &  
SCARBOROUGH, LLP  
Post Office Box 10084  
Greenville, South Carolina 29603

C. Mitchell Brown, Esq.  
NELSON MULLINS RILEY &  
SCARBOROUGH, LLP  
Post Office Box 11070  
Columbia, South Carolina 29211-1070

  
Ann Shuler



THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2007-CP-23-3206

North American Rescue Products, Inc., ..... Appellant/Respondent,

v.

P.J. Richardson, ..... Respondent/Appellant.

**PETITION FOR REHEARING**

**INTRODUCTION**

In Opinion No. 4909 filed November 9, 2011, a Panel of this Court affirmed the judgment below which granted Richardson specific performance. The Panel, in large part, adopted the reasoning and grounds set forth by Richardson in his briefing. However, respectfully, the Panel overlooked or misapprehended matters related to the meaning of the trial court's judgment and the jury's verdict. Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent/Appellant P.J. Richardson ("Richardson") hereby files this petition for rehearing. Richardson respectfully submits that rehearing and/or issuance of a new opinion is warranted based on this Court's misapprehension of his argument related to the price he would pay for the percentage ownership share of NARP in light of the trial court's specific performance judgment.

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## ARGUMENT

**The Panel misapprehended the judgment and should rehear this matter because the contract this Court found capable of being performed did have a "method of payment" term.**

Throughout the Opinion, the Court uses the phrase "method of payment" in stating that the parties' contract was silent on this point. However, the "method of payment" was agreed upon based on the jury's findings that the 2000 Agreement, as orally amended in Charleston, was a binding and enforceable contract.

In the Opinion, the Court rightly recognizes that as a matter of fact, the Reeves Company had sold. Therefore, Richardson did not have a company with stock that he could exchange for the equal part ownership share of NARP. Given that Reeves had already sold, it had an identifiable value and 7.5% of the identified value of the Reeves Company amounted to \$415,988. Accordingly, 7.5% of the Reeves Company's sale price was the "value" that was to be exchanged under the contract between the parties (as orally amended), for 7.5% share of NARP.

Because this Court correctly found the 2000 Agreement capable of being performed, it should enforce the contract as agreed by the parties instead of imposing a new term relating to value on the parties. *See Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 147 S.E.2d 481 (1966) (noting that a court need only provide reasonable term in an agreement when the parties left the issue open).

Richardson's analysis is proper because, as correctly noted in the Opinion, the trial court submitted a special verdict form to the jury. (Special Verdict Form; R. p. 2.) That verdict form contained written questions for findings which might properly be made under the pleadings and evidence. (*Id.*) The Court accurately notes that neither party

challenged the verdict form used or the form of the judgment. The trial court entered the form of the judgment based on the jury's answers to the interrogatories contained on the special verdict form. (Judgment; R. p. 1.) Based on the pleadings and the answers to the interrogatories, the trial court entered judgment in favor of Richardson "under the doctrine of specific performance." (*Id.*)

Rule 49 of the South Carolina Rules of Civil Procedure provides in pertinent part:

**(a) Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court *may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence*; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. . . .

Rule 49(a), SCRPC (emphasis added). Following the jury's return of the special verdict, the trial court is charged with preparing the form of the judgment. Rule 58, SCRPC. It is well settled that "[a] judgment is effective only when reduced to writing and entered into the record." *Johnson v. S.C. Dep't of Prob.*, 372 S.C. 279, 284, 641 S.E.2d 895, 898 (2007) (citing Rule 58(a)(2), SCRPC). Rule 58 provides that "*upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly prepare the form of the judgment . . .*" Rule 58, SCRPC (emphasis added).

In accordance with the above procedures, the trial court submitted a special verdict form containing written questions as to factual findings that might be made under the evidence presented at trial. On the special verdict form, the trial court inquired of the jury "[c]an [b]oth parties perform under the 2000 Agreement as amended in Charleston?" (Special Verdict Form at ¶ 3; R. p. 2.) The jury responded, "Yes." On the same day the

jury answered the special interrogatories, the trial court entered judgment for Richardson under the specific performance doctrine. (Judgment; R. p. 1.) Hence, this Court should reissue its Opinion and rule that the trial court correctly and lawfully entered a judgment in favor of Richardson under the doctrine of specific performance, and that the method of payment was agreed to be the exchange of the Reeves sale proceeds monies for the NARP stock.. *Ex parte Bland*, 380 S.C. 1, 16, 667 S.E.2d 540, 547 (2008) (quoting *Summer v. Bankhead*, 119 S.C. 78, 111 S.E. 891 (1922)) (stating “[w]hether to grant specific performance is a matter committed to ‘sound judicial discretion.’”).

A question arises respecting the meaning to be given to the portion of the verdict form containing the amount of \$2,936,300. As the record demonstrates, this is an amount that does not appear in any agreement reached by the parties. Rather, this amount was provided by the jury in connection with Richardson’s promissory estoppel claim, had the jury found no contract existed.

Richardson’s claims in this case were for specific performance and promissory estoppel. South Carolina recognizes that promissory estoppel and contract enforcement claims are separate and distinct causes of action. *Duke Power Co. v. South Carolina Public Service Com’n*, 284 S.C. 81, 326 S.E.2d 395 (1985). If the jury agreed that a contract existed, which it did, then the trial court could grant the remedy of specific performance. See *Wright v. Patrick*, 262 S.C. 434, 441, 205 S.E.2d 175, 178 (1974) (noting that “[t]he discretionary power of an equity court to decree specific performance can never come into question or be exercised until and unless it first be factually established that there was a contract and that the promisee performed.”). However, if the jury had concluded that no contract existed, the trial court could still have rendered

judgment in Richardson's favor on his claim for promissory estoppel because it is a remedy provided when no contract is found to exist but a party has relied on a promise to his detriment. See *Ackerman v. The Money Store*, 728 A.2d 873 (N.J. Sup. Ct. Law Div. 1998) (referring to plaintiff promissory estoppel "cause of action" and noting that while consideration is required for a breach of contract, a promise is still enforceable pursuant to a claim of promissory estoppel even where consideration is lacking).

Thus, promissory estoppel is a means for enforcing incomplete agreements. Had no enforceable agreement existed, the price on the verdict form would have been used to issue a promissory estoppel judgment by the trial court. But the trial court did not have to do that based on the jury's findings here. The trial court did not have to utilize the part of the verdict form containing a price amount for the purchase of NARP's stock. Instead, the jury answered questions that the parties had a contract, and that contract provided for a swap of the percentage ownership of each company's stock. The value of the percentage share of Reeves had been reduced to a sum certain in light of its recent sale—\$415,988. Accordingly, the amount provided for by the jury on the verdict form was not needed by the trial court in awarding specific performance. Therefore, this Court should grant rehearing and/or issue a new opinion to correct the Opinion on this point.

### CONCLUSION

Based on the foregoing, Richardson respectfully requests this Court grant rehearing and/or issue a revised opinion recognizing that the judgment ordered the parties to specifically perform under the 2000 Agreement as modified at the Charleston meeting—that this Court correctly found to be effective. Thus, Richardson has a right to

a 7.5% interest share in NARP in exchange for \$415,988—the proceeds from his sale of Reeves Company.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: A. Mattison Bogan  
C. Mitchell Brown  
William C. Wood, Jr.  
A. Mattison Bogan  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

*Attorneys for P.J. Richardson*

November 28, 2011

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2007-CP-23-3206

North American Rescue Products, Inc., ..... Appellant/Respondent,

v.

P.J. Richardson, ..... Respondent/Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent/Appellant P.J. Richardson, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Petition for Rehearing

Counsel Served:

Robert L. Widener, Esquire  
McNair Law Firm, PA  
Post Office Box 11390  
Columbia, SC 29211

SC Court of Appeals

NOV 28 2011

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Bernie W. Ellis, Esquire  
McNair Law Firm, PA  
Post Office Box 447  
Greenville, SC 29602



Lisa P. Whitehurst  
Administrative Assistant

November 28, 2011



THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

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Case No. 07-CP-23-3206

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North American Rescue Products, Inc.,.....Appellant-Respondent,

v.

P. J. Richardson,.....Respondent-Appellant.

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**RETURN TO PETITION FOR REHEARING**

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Appellant-Respondent (NARP), subject to its request for relief in its Petition for Rehearing, respectfully submits this Return to Respondent-Appellant's (PJ's) Petition for Rehearing.

**ARGUMENTS**

- I. This Court correctly found there was conflicting evidence on the terms of the "Charleston amendments" to the 2000 Agreement.**

This Court correctly found the parties presented conflicting evidence on PJ's theory that NARP had agreed to accept 7.5% of the Reeves asset sale as the price for PJ to buy 7.5% of NARP's stock. PJ ignores this in his rehearing petition – he never addresses the question of the conflicting evidence. Rather, he treats the jury verdict as accepting his theory, but nothing in the Verdict Form supports this assertion. The Verdict Form simply and only asked: "Can both

parties perform under the 2000 Agreement as amended in Charleston?" The Verdict Form did not ask the jury to resolve the conflicting evidence on the Charleston amendments regarding price, and PJ never objected to its failure to do so. Nothing in the Verdict Form indicates the jury accepted PJ's theory. Thus, there is no basis for PJ's argument on rehearing that "the method of payment was agreed to be the exchange of the Reeves sale proceeds monies for the NARP stock." (Pet. at 4). PJ is asking this Court to resolve a factual dispute on appeal, something this Court cannot do in reviewing a jury's verdict.

**II. PJ's argument that the jury's finding that \$2.9 Million dollars was the sales price was limited to his promissory estoppel theory is not properly before this Court and is manifestly without merit.**

PJ argues that the jury's \$2.9 Million dollar finding "was provided by the jury in connection with [PJ's] promissory estoppel claim, had the jury found no contract existed." (Pet. at 4). This argument is not properly before this Court. First, PJ never raised this issue to the trial court at any stage of the proceedings. Second, and more importantly, PJ never raised this issue to this Court until his rehearing petition.

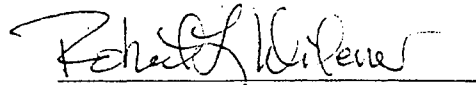
In any event, PJ's argument is manifestly without merit. Nothing in the Verdict Form or the trial court's instructions to the jury on filling out the Verdict Form indicates the "price" question was limited to PJ's claim for promissory estoppel. Moreover, as this Court correctly found, the trial court made it clear that the jury would be required to answer all questions in this case, including whether a contract existed and the terms of that contract, including the price. The trial court drafted the Verdict Form and, if it or the parties had intended the "price" question to be limited to promissory estoppel, the Verdict Form or the trial court's instructions thereon would have directed the jury to not answer the "price" question if the jury found that a contract existed. Finally, PJ's argument hinges on his false premise that "promissory estoppel is a means

for enforcing incomplete agreements.” (Pet. at 5). In fact, promissory estoppel is a means for creating quasi-contractual obligations based on the parties’ conduct, not for enforcing incomplete agreements.

### CONCLUSION

For all of the foregoing reasons, PJ’s Petition for Rehearing should be denied.

Respectfully Submitted,



Robert L. Widener  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

Bernie W. Ellis  
McNair Law Firm, P.A.  
Post Office Box 447  
Greenville, South Carolina 29602  
(864) 271-4940

Attorneys for Appellant-Respondent

December 7<sup>th</sup>, 2011  
Columbia, SC

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No.: 07-CP-23-3206

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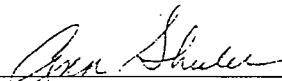
P. J. Richardson, .....Respondent-Appellant.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Appellant-Respondent's Return to Petition for Rehearing depositing copies in the United States Mail, postage prepaid, on December 28, 2011 addressed to the attorneys of record, as follows:

Lane W. Davis, Esq.  
NELSON MULLINS RILEY &  
SCARBOROUGH, LLP  
Post Office Box 10084  
Greenville, South Carolina 29603

C. Mitchell Brown, Esq.  
NELSON MULLINS RILEY &  
SCARBOROUGH, LLP  
Post Office Box 11070  
Columbia, South Carolina 29211-1070

  
Ann Shuler

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
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Steven H. John, Circuit Court Judge

Case No. 2007-CP-23-3206

North American Rescue Products, Inc., ..... Appellant/Respondent,

v.

P.J. Richardson, ..... Respondent/Appellant.

**P.J. RICHARDSON'S RETURN TO  
NORTH AMERICAN RESCUE PRODUCTS, INC.'S  
PETITION FOR REHEARING**

**INTRODUCTION**

In Opinion No. 4909 filed November 9, 2011, a Panel of this Court affirmed the judgment below which granted Richardson specific performance. Appellant/Respondent North American Rescue Products, Inc. ("NARP") has petitioned for rehearing. As shown herein, this Court has previously considered and rejected the arguments offered by NARP in its petition for rehearing and NARP seeks for this Court to simply revisit the same issues. Hence, NARP's petition for rehearing should be denied<sup>1</sup>.

<sup>1</sup> Respectfully, the Panel overlooked or misapprehended matters related to the meaning of the trial court's judgment and the jury's verdict. As a result, Richardson has sought rehearing based on his argument related to the price he could pay for the percentage ownership share of NARP in light of the trial court's specific performance judgment. Richardson's Petition for Rehearing should be granted and NARP's should be denied.

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### Argument

- I. This Court properly upheld the trial court's denial of NARP's motion for directed verdict because evidence demonstrated that Richardson possessed a contractual right to purchase 7.5% of NARP's stock and that right had not been terminated.**

NARP argues it should have obtained a directed verdict based on the written document containing a "termination" provision. This Court properly rejected NARP's arguments on appeal because ample evidence existed that the document containing the purported termination provision was only a single portion of an overall three-step agreement. Further, ample evidence existed demonstrating that the full three-step agreement was never fully executed and that the parties continued to be bound by the 2000 Agreement as orally modified in Charleston. Finally, the termination agreement was ambiguous in any event standing alone.

- A. Regardless of whether a document existed containing a termination provision that agreement was not a stand-alone agreement.**

This Court properly upheld the trial court's denial of NARP's directed verdict motions with respect to its arguments that the document containing the termination provision ended Richardson's right to purchase 7.5% of NARPs' stock. In light of the evidence as to the additional steps in the three-pronged agreement and the all the reasonable inferences arising therefrom, the trial court properly sent the issue of the parties' intentions to the jury. "Although as a general rule contracts are to be construed by the court, where a contract is capable of more than one construction, the question of what the parties intended becomes one of fact to be submitted to jury." *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 325 S.C. 231, 234, 482 S.E.2d 554, 555-56 (1997) (internal citations omitted).

Here, there was conflicting testimony as to the force and effect of the document containing the termination provision. Richardson offered ample evidence that the document containing termination provision was merely one phase of a three-part agreement. (Richardson Ex. 21, 23, 25, 38; Tr. p. 350, 424, 521; R. pp. 1047, 1048, 1049, 1057; R. pp. 301, 375, 472.) In contrast, NARP offered testimony claiming that the document signed in November 2004 containing the termination provision was the end-all-be-all and that the document forever ended the parties' rights under the 2000 Agreement as modified. (NARP Ex. 10; R. p. 925.) However, even NARP's evidence refuted this end-game contention. (NARP Ex. 6, 7, 9; R. p. 924a, 1048, 1049.) Castellani testified the Termination agreement alone did not represent what was agreed upon in Atlanta (R. 286). This is because what was agreed upon was a three-part multifaceted agreement as described above. An e-mail exhibit from Castellani on May of 2005 referenced his "share" of the Reeves sale (R. 1057), again demonstrating that a scenario where the parties had terminated all rights in each other's companies and walked away from one another for good based on the Termination agreement was not true.

Accordingly, the differing views of the parties as to the force and effect of the document containing the termination provision created a jury issue as to the parties' intent. The trial judge properly sent this issue to the jury which concluded the termination provision did not end Richardson's right to purchase NARP stock. *Soil Remediation Co. v. Nu-Way Env'tl., Inc.*, 325 S.C. at 234, 482 S.E.2d at 555-56. No rehearing should be granted on this point.

Moreover, NARP repeatedly encourages this Court to read any ambiguities in the November document against Richardson, as his attorney drafted the agreement. (Tr. p.

350; R. p. 301). However, NARP's attorney, Curt Stodghill, worked on two segments of the tri-partite agreement—for the reaffirmance of the right to purchase 7.5% of stock and the charitable donation. (Tr. p. 350; R. p. 301). These two portions of the agreement and the document containing the termination provision were intended to operate together. Accordingly, the purported ambiguities should not be read against Richardson. Both parties, with the help of counsel, drafted the attempted agreements, and their varying pieces. Moreover, this is not an adhesion contract setting. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26-27, 644 S.E.2d 663, 669 (2007) (“[A]n adhesion contract is a standard form contract offered on a ‘take-it-or-leave-it’ basis with terms that are not negotiable.”). Thus, the contract terms should not be construed against Richardson. *Wilson Group, Inc. v. Quorum Health Res., Inc.*, 880 F.Supp. 416, 426 n.10 (D.C. S.C. 1995) (stating that the rule of construction that construes ambiguities against a contract drafter is “not automatically applied when there is no evidence of adhesion or unequal bargaining power”). In addition, since the Termination Agreement is in the nature of a waiver or release, such documents are to be construed strictly *against* waiver. *Fisher v. Stevens*, 584 S.E.2d 149 (Ct. App. 2003). Hence, the varying interpretations merely necessitated that the evidence be submitted to the jury to determine the parties' intent.

It is true that the document with the termination provision contains a merger clause stating, “[t]his agreement sets forth the entire agreement and understanding of the parties relating to the subject matter contained herein, and merges all prior discussions and agreements, both oral and written, between the parties.” However, in *Lingefelt v. Forest Hills Homes, Inc.*, 305 S.C. 197, 406 S.E.2d 394 (Ct. App. 1991), this Court interpreted a contract containing a similar merger clause, reading: “[t]his agreement



contains the entire understanding between us and no other representation, verbal or written, has been made which is not set forth herein.” *Id.* at 200, 406 S.E.2d at 396. The *Lingefelt* Court held, “the doctrine of merger is inapplicable to a consistent parol agreement that was not intended to be merged into the written agreement.” *Id.* at 201, 406 S.E.2d at 396.

NARP’s arguments on rehearing fail to recognize that contracts can have multiple parts and be made of several documents or oral agreements. Thus, the inclusion of a merger clause does not eliminate the fact that the document with the merger clause and termination provision was just one part of the overall contract. *Klutts Resort Realty, Inc. v. Down’Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). (“[T]he instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole. This is true even though the transaction consumed more than one day; the date of the writings constituting such transaction is immaterial.”); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 92, 594 S.E.2d 485, 492 (Ct. App. 2004) (“[T]wo contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole.”); *Housing Auth. of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 336, 588 S.E.2d 617, 621 (Ct. App. 2003) (“Under South Carolina law, two contracts executed at different times but which relate to the same subject matter and are entered into by the same parties are to be construed as one contract and considered as a whole.”); *Bishop Realty & Rentals, Inc. v. Perk, Inc.*, 292 S.C. 182, 184-85, 355 S.E.2d 298, 300 (Ct. App. 1987) (“Where instruments entered into by the same parties at different times relate to the same subject

matter, the instruments will be construed together to determine the entire agreement between the parties. If the provisions of one instrument limit, explain, or otherwise affect the provisions of the other, they will be given effect to accomplish the entire agreement between the parties.”) (internal citations omitted).

Also, the Termination agreement was ambiguous standing alone. The trial court stated “the terms of [of the Termination Agreement] were absolutely ambiguous. Read as a whole, it borders on being completely un-understandable.” (R. 423). The Termination Agreement twice references an exception to its scope concerning Richardson’s right to purchase 7.5% of NARP stock from NARP and forecast the execution of an agreement reaffirming the rights of the earlier 2000 Agreement as modified. These references indicate intent *not* to make the 7.5% agreement part of the document containing the termination provision. The future date also shows that the document with the termination provision was not the only document making up the entire agreement of the parties. NARP’s proposed solution to this problem is to ignore or say this language in the Termination Agreement is meaningless. This proposed solution has no basis in the law, however. An interpretation of a contract which gives reasonable meaning to all contract provisions will be preferred to one which leaves a portion of the writing useless, meaningless or inexplicable. 17A Am. Jur. 2d Contracts, Section 377 (2004). Thus, the trial judge properly submitted the issue to the jury for its consideration. If NARP believed the jury’s special verdict conclusion with respect to the termination provision document was inconsistent with other parts of its verdict, it was incumbent upon NARP to make a motion for new trial based on such inconsistency before the jury departed. *Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554-55, 560 S.E.2d 894,

896 (2002) (holding a party waived its right to object to an inconsistent verdict by failing to raise the objection prior to the jury being discharged). It did not do so, and in fact has never raised inconsistency of verdict as an issue.

Accordingly, in light of the fact that the parties' three-pronged agreement never materialized, the parties were bound by and were operating under the prior 2000 Charleston agreement, as amended. This Court correctly upheld the trial court's decision to allow the issue of whether Richardson had the right to buy 7.5% of NARP's stock to go to the jury. The jury found the rights were not terminated and the trial court ordered the 2000 Agreement as modified to be specifically performed. This Court was right not to disturb this finding and NARP's arguments do not warrant rehearing.

**B. Delaware law does not come into question with respect to the only contract capable of being performed—the 2000 Agreement as modified in Charleston.**

This Court correctly declined to apply Delaware law to this case. But NARP continues to argue that the option agreement for Richardson to purchase 7.5% of NARP stock is invalid under Delaware law. This argument concerns part of the three-pronged contract that never materialized. Since the parties never reached a final agreement on the three-part contract, the parties were instead operating and were bound by the 2000 Agreement as modified in Charleston. The Court rightly considered the issues in this case under South Carolina law.

The law is clear, contracts are governed by the State's law where the contract is formed. *Doctors Hosp. of Augusta, L.L.C. v. CompTrust AGC Workers' Comp. Trust Fund*, 371 S.C. 5, 9, 636 S.E.2d 862, 864 (2006) (“[A] contract is controlled by the laws of the State in which it is made and is to be performed.”); *Conway v. Charleston Lincoln*

*Mercury Inc.*, 363 S.C. 301, 305, 609 S.E.2d 838, 841 (Ct. App. 2005) (applying Virginia law because the oral contract was allegedly made in Virginia). In South Carolina “[t]he necessary elements of a contract are an offer, acceptance, and valuable consideration.” *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003).

The Record contains clear evidence that a valid and enforceable agreement was created in Charleston, the jury found the agreement could be performed, and the Court ordered it to be performed. The evidence at trial supports the fact that the parties orally amended their agreement in Charleston to reduce the percentage that each could acquire of the other company from 25% to 7.5% and that Richardson could exchange the cash equivalent of the 7.5% interest from the proceeds from the sale of Reeves. As was testified to at trial, Richardson stated that the 2004 amendment of the 2000 agreement modified the percentage share from 25% to 7.5%. Richardson also testified that he was seeking to have the court enforce his ability to acquire 7.5% of the stock of NARP. Richardson stated that the amendment was aimed at making the exchange of ownership shares easier in light of the sale of Reeves. Castellani, on behalf of NARP, testified that the meeting in Charleston resulted in a reduction of the percentage of shares from 25% to 7.5%—a “like for like” exchange. (Tr. p. 238; R. p. 234.) Castellani also agreed that the parties “did that deal and then [ ] hugged and kissed and sealed the deal[.]” (*Id.*) Later, at trial, Castellani testified that “[w]e agreed to this in Charleston.” (Tr. p. 331; R. p. 284.) Richardson also agreed that there was a “meeting of the minds in Charleston.” (Tr. p. 585; R. p. 536.) Thus, the parties’ agreement was clear and both understood the agreement.

The existence of a valid contract was proper and warranted a judgment for specific performance. “South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) (quoting *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis in original)). Thus, “[s]pecific performance will not be ordered unless the contract expresses the true intent of the parties and is fair, just and equitable.” *Amick v. Hagler*, 286 S.C. 481, 484, 334 S.E.2d 525, 527 (Ct. App. 1985) (citing *McChesney v. Smith*, 105 S.C. 171, 176, 89 S.E. 639, 641 (1916)).

Thus, this Court should reject NARP’s mischaracterization of the judgment and attempts to cloud the issues in the case by relying on one portion of a three-step agreement. NARP’s arguments regarding Delaware law have no application whatsoever to the contract that the trial court entered judgment to enforce via the doctrine of specific performance. Rehearing is not warranted on this point.

**II. This Court properly upheld the trial court’s denial of NARP’s directed verdict motion as to promissory estoppel because evidence existed that Richardson relied on NARP’s promise to sell Richardson 7.5% of NARP stock.**

NARP argues any promises or agreements between NARP and Richardson were extinguished by the document containing the termination provision and merger clause and, thus, Richardson’s right to rely on these promises was also extinguished. But as properly found by the jury, the termination provision did not terminate Richardson’s right to acquire 7.5% of stock in NARP. As a result, NARP’s argument on this point should be rejected. Richardson reasonably relied on NARP’s promises regarding his ability to

purchase 7.5% of NARP's stock. The evidence presented an issue for the jury, and the trial court properly denied NARP's directed verdict motion.

The elements of promissory estoppel are: "(1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise." *Powers Const. Co., Inc. v. Salem Carpets, Inc.*, 283 S.C. 302, 306, 322 S.E.2d 30, 33 (Ct. App. 1984).

Richardson provided ample evidence to establish a promissory estoppel claim and to survive NARP's directed verdict motion. In addition to the above, Castellani testified that after the Termination Agreement, he agreed to let Richardson acquire NARP stock. (R. 190). Richardson sold Reeves Company and has set aside the proceeds from the sale of Reeves so he could exchange them for a 7.5% share in NARP. Thus, Richardson relied on the promise that NARP would sell him the shares. NARP has failed to perform by not tendering the shares for the proper purchase amount. Hence, this Court should affirm the trial court's judgment.

As demonstrated by the voluminous evidence, Richardson reasonably relied on the promise to permit him to purchase part of NARP's stock, and Richardson's reliance was foreseeable and expected by NARP. Accordingly, evidence was presented to establish every element of a promissory estoppel claim, making NARP's directed verdict motion untenable. Thus, this Court properly upheld the trial court's denial of NARP's directed verdict motion. Rehearing on this point should not be granted.

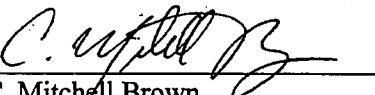
Finally, a close review of NARP's directed verdict motions at trial reveals that the arguments NARP advances on appeal were not made to the trial court. No where at the trial court level did NARP argue there had been no "reasonable reliance." (R. 679). At the trial court level, and in the face of conflicting evidence, NARP argued the Termination Agreement enabled the sale of Reeves, and that this should have worked an "estoppel" against Richardson. (R. 686). This is not an argument that Richardson's *promissory estoppel claim* was destroyed by the merger language in the Termination Agreement. Hence, for these reasons too, the petition for rehearing should be rejected.

### CONCLUSION

Based on the foregoing, and on all briefing and prior arguments, which are hereby incorporated herein by reference, NARP's petition for rehearing should be denied.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By:   
C. Mitchell Brown  
William C. Wood, Jr.  
A. Mattison Bogan  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

*Attorneys for P.J. Richardson*

Columbia, South Carolina  
December 28, 2011

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2007-CP-23-3206

RECEIVED  
DEC 28 2011  
SC Court of Appeals

North American Rescue Products, Inc., ..... Appellant/Respondent,

v.

P.J. Richardson, ..... Respondent/Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent/Appellant P.J. Richardson, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

P.J. Richardson's Return to North American Rescue Products, Inc.'s Petition for Rehearing

Counsel Served:

Robert L. Widener, Esquire  
McNair Law Firm, PA  
Post Office Box 11390  
Columbia, SC 29211



Bernie W. Ellis, Esquire  
McNair Law Firm, PA  
Post Office Box 447  
Greenville, SC 29602



Lisa P. Whitehurst  
Administrative Assistant

December 28, 2011

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

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Case No. 07-CP-23-3206

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North American Rescue Products, Inc.,.....Appellant-Respondent,

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REPLY TO RETURN TO  
PETITION FOR REHEARING

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Appellant-Respondent (NARP) respectfully submits this Reply to Respondent-Appellant's (PJ's) Return to NARP's Petition for Rehearing.

REPLY ARGUMENTS

**I. The Facts for Purposes of NARP's Directed Verdict Motion**

Based on the undisputed facts in the Record, and viewing the disputed facts in the light most favorable to PJ, the "facts" for NARP's directed verdict motion are set forth below. NARP contested many of these "facts," and the jury rejected many of these "facts," but they are assumed to be true for purposes of NARP's directed verdict motion.

1. January 1, 2000: The parties entered the 2000 Agreement which *inter alia* included an agreement for Bob to receive 25% of the stock in PJ's company (RMI), and

PJ to receive 25% of the stock in Bob's company (NARP). The parties never performed this stock swap.

2. PJ begins exploring the possibility of selling his company (RMI) to a third party.

3. July 29, 2004: Bob and PJ meet in Charleston. They agree to reduce the stock percentage from 25% to 7.5%. They agree that PJ can purchase 7.5% of NARP's stock by paying 7.5% of the proceeds from his sale of RMI.<sup>1</sup>

4. The parties continue to discuss alternative means for PJ to purchase or acquire 7.5% of NARP's stock.

5. October 4, 2004: PJ receives a draft stock option agreement which would give PJ the option to purchase 7.5% of NARP's stock at a penny per share. This is part of the so-called three-part agreement and was conditioned upon PJ making a contribution to a charity of Bob's choice. PJ signs the option and dates it October 4, 2004, but never tells anyone, and he thereafter makes counterproposals. He never agrees to make the required charitable donation.

6. The parties continue to discuss alternatives for PJ to purchase or acquire 7.5% of NARP's stock.

7. November 4, 2004: At PJ's request, the parties signed the Termination Agreement drafted by PJ. It expressly terminates any and all agreements pre-dating the Termination Agreement, including any and all agreements related to the 2000 Agreement. It provides that a December 15 option is not terminated by the Termination Agreement. Nothing in the Termination Agreement makes its termination provisions dependent upon any event or agreement.

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<sup>1</sup> The stock percentage reduction is undisputed. The alleged agreement that PJ could buy 7.5% of NARP for 7.5% of the RMI sale proceeds was a hotly contested issue. For purposes of the directed verdict motion only, however, PJ's testimony must be assumed true (though it was later rejected by the jury as recognized by this Court).

8. The parties continue to discuss the possibility of PJ purchasing or acquiring 7.5% of NARP's stock, but it is undisputed they never reach any agreement.

9. January 2005: PJ sells RMI's assets.

10. The parties continue to discuss the possibility of PJ purchasing or acquiring 7.5% of NARP's stock, but it is undisputed they never reach any agreement.

11. December 6, 2005: NARP sends letter asking whether PJ had decided to abandon the discussions and any attempt to purchase NARP's stock.

12. January 6, 2006: PJ writes letter stating he had not reached any such conclusion and planned to get back to NARP in the first quarter of 2006.

13. April 17, 2007: PJ sends letter claiming right to purchase 7.5% of NARP's stock at one penny per share under the draft Option Agreement that he signed and dated October 4, 2004 without telling anyone (and was never signed by Bob or NARP). PJ does not mention the 2000 Agreement, the Charleston Agreement, the so-called tripartite agreements, the Termination Agreement, or any agreement to purchase NARP's stock for 7.5% of the proceeds from his sale of his company. He later disavows this claim at trial.

Thereafter, NARP commenced the present action on May 15, 2007.<sup>2</sup>

## **II. PJ's arguments in his Return are without merit.**

NARP's petition for rehearing rests upon four basic grounds: (1) the Termination Agreement is not ambiguous and must be enforced as written; (2) this Court erroneously considered conflicting evidence on the parties' intent without first identifying an ambiguity in the Termination Agreement; (3) assuming the existence of any ambiguity, it must be construed against PJ as the drafter of the Termination Agreement; and (4) there is no evidence of any

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<sup>2</sup> For a detailed recitation of the foregoing facts and supporting citations, see NARP's App. Br. of App-Resp. at 2-5.

agreement or promissory estoppel after the Termination Agreement. PJ's Return rests upon numerous responses. None of them have any merit.

First, PJ argues there was evidence that the Termination Agreement was part of a tripartite agreement that was never fully executed.<sup>3</sup> (Ret. at 2-5). Nothing in the Termination Agreement made it conditional upon any other agreement. If PJ wanted it to be conditional, it was his duty as the drafter to so provide. He did not, because he wanted an unconditional termination of Bob's ownership interest to close the sale of RMI.

Second, PJ recites conflicting testimony on the "force and effect" of the Termination Agreement. (Ret. at 3). Any such conflict is irrelevant unless and until there is an ambiguity in the contract itself.

Third, PJ argues any ambiguities should not be resolved against him, because NARP "worked on" the other two parts of the so-called tripartite agreement. (Ret. at 4). Those agreements were never finalized and never signed. Had they been signed, and had there been an ambiguity in them, then those ambiguities would have been resolved against NARP. PJ cannot rely on nonexistent agreements to excuse his failure to draft an agreement that provided everything he now wants.

Fourth, PJ argues the merger clause does not preclude a consistent parol agreement. (Ret. at 4-5). PJ's seeks to enforce an alleged parol agreement (that NARP had agreed to accept cash in the amount of 7.5% of the RMI sales proceeds in exchange for 7.5% of NARP's stock under the 2000 Agreement as amended at the Charleston Meeting), which is the exact opposite of the Termination Agreement, not consistent with it.

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<sup>3</sup> PJ describes the Termination Agreement as a "document containing a 'termination' provision." (Ret. at 2). The entire document was about terminating the 2000 Agreement and any related agreements!

Fifth, PJ argues the Termination Agreement must be construed in light of other agreements. (Ret. at 5-6). Every case cited by PJ involved two or more executed agreements. The only executed agreement here is the Termination Agreement. PJ cannot use unexecuted agreements to interpret an executed agreement, and he cites no authority for doing so.

Sixth, PJ argues that the Termination Agreement was ambiguous, because it referenced a “future” December 15 option agreement. (Ret. at 6). Contrary to PJ’s argument, nothing in the Termination Agreement indicated what the terms of that agreement would be. More importantly, nothing in the Termination Agreement made it conditional upon the existence of this “future” agreement, and it is undisputed the parties never entered this “future” agreement. If there were to be any such condition, it was PJ’s duty to as the drafting party to expressly include the appropriate proviso. Moreover, the Termination Agreement simply provided that it had no effect on any such “future” agreement – nothing indicates the reference to the December 15 option agreement reflected an intent to preserve the 7.5% agreement that had been expressly and repeatedly terminated by the earlier provisions of the Termination Agreement. In addition, and at best, the reference to a December 15 option was an agreement to agree in the future, which is unenforceable under South Carolina law. Finally, and assuming the reference to a December 15 option created any ambiguity, it must be construed against PJ as the drafting party.

Seventh, PJ argues NARP should have challenged the jury’s verdict as being inconsistent. (Ret. at 6-7). The jury’s verdict is completely irrelevant to the question of whether NARP was entitled to a directed verdict. Had the NARP been granted a directed verdict, as should have been done, then there would not have been a jury verdict.

Eighth, PJ challenges NARP’s argument on Delaware law by mischaracterizing NARP’s argument. (Ret. at 7-9). As argued in NARP’s rehearing petition, any option agreement as

envisioned by the Termination Agreement had to be approved by NARP's Board of Directors based on Delaware law and South Carolina's acceptance of that law under the "internal affairs doctrine" codified at S.C. Code Ann. § 33-15-105(c). (See NARP Pet. at 5-6 & n.3). Contrary to PJ's argument, this has nothing to do with PJ's claimed bilateral contract to purchase 7.5% of NARP's stock for 7.5% of the proceeds from PJ's sale of his company, an agreement that was expressly and thoroughly eliminated by the Termination Agreement.<sup>4</sup>

Ninth, PJ argues there was sufficient evidence of promissory estoppel. (Ret. at 9-10). The only "promise" asserted by PJ is the "promise" made in Charleston to modify the 2000 Agreement and sell him 7.5% of NARP's stock for 7.5% of the proceeds from the sale of RMI. The Termination Agreement expressly and repeatedly terminated any such agreement or promise. There is no evidence of, and PJ never testified to, any such promise or agreement being made after the Termination Agreement.

### CONCLUSION

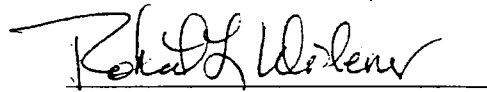
PJ wrote the Termination Agreement. He then signed the Termination Agreement. He then requested and received NARP's signature on the Termination Agreement. He then used the Termination Agreement to sell his business free of any ownership interest by NARP or Bob. He then tried to enforce a contract for a penny per share. He then realized he could not enforce that non-existent agreement. Now, he wants to enforce alleged agreements and promises that were specifically and repeatedly terminated, settled, discharged, and released by the Termination Agreement. To that end, he now disavows the Termination Agreement. Preventing this type of chicanery is precisely why our Supreme Court has repeatedly required courts to "enforce contracts as written, regardless of the wisdom or folly, apparent unreasonableness, or the parties'

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<sup>4</sup> In making his nonresponsive arguments, PJ ignores his concession at trial that the internal affairs doctrine applied and that any option agreement had to be approved by NARP's Board of Directors. (See R. 787-789).

failure to guard their rights carefully.” *E.g., U.S. for Use and Benefit of Williams Elec. Co., Inc. v. Metric*, 480 S.E.2d 447, 450 (S.C. 1997), citing *C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Com’n*, 373 S.E.2d 584 (S.C. 1988). For this reason, and for the reasons set forth above and in NARP’s Petition for Rehearing, it is respectfully submitted that this Court should grant rehearing and issue an amended opinion that reverses the denial of NARP’s directed verdict motion.

Respectfully Submitted,



Robert L. Widener  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

Bernie W. Ellis  
McNair Law Firm, P.A.  
Post Office Box 447  
Greenville, South Carolina 29602  
(864) 271-4940

Attorneys for Appellant-Respondent

January 12, 2012  
Columbia, SC



THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No.: 07-CP-23-3206

North American Rescue Products, Inc.,.....Appellant-Respondent,

v.

P. J. Richardson,.....Respondent-Appellant.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Appellant-Respondent's Reply to Return to Petition for Rehearing depositing copies in the United States Mail, postage prepaid, on January 12, 2012 addressed to the attorneys of record, as follows:

Lane W. Davis, Esq.  
NELSON MULLINS RILEY &  
SCARBOROUGH, LLP  
Post Office Box 10084  
Greenville, South Carolina 29603

C. Mitchell Brown, Esq.  
NELSON MULLINS RILEY &  
SCARBOROUGH, LLP  
Post Office Box 11070  
Columbia, South Carolina 29211-1070

  
Ann Shuler

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2007-CP-23-3206

North American Rescue Products, Inc., ..... Appellant/Respondent,

v.

P.J. Richardson, ..... Respondent/Appellant.

**P.J. RICHARDSON'S REPLY TO NORTH AMERICAN RESCUE PRODUCTS,  
INC.'S RETURN TO HIS PETITION FOR REHEARING**

In accordance with Rule 240 of the South Carolina Appellate Court Rules, Respondent/Appellant P.J. Richardson ("Richardson") hereby files his reply to North American Rescue Products, Inc.'s ("NARP") Return to Richardson's Petition for Rehearing. Richardson's Petition for Rehearing should be granted in order to correct this Court's conclusion as to what amount Richardson is entitled to pay for a 7.5% share of NARP.

**I. Richardson is not asking this Court to make any factual determinations.**

NARP inaccurately describes Richardson's argument as one requesting this Court to "resolve a factual dispute on appeal." (NARP Return at p. 2). NARP's recasting of Richardson's presentation of the issues is not supported by any of the briefing or the Record before this Court. Contrary to NARP's contention otherwise, Richardson is requesting that this Court enforce the *judgment* of the trial court as written, which

ordered specific performance of the 2000 contract as orally amended in Charleston, which the jury found was capable of performance and not terminated. That agreement provided for the exchange Richardson seeks this Court to recognize in accordance with the trial court's *judgment* (the value of 7.5% of the stock of the former Reeves Company for 7.5% of NARP). The parties' agreement that the trial court ordered to be specifically performed provided every essential term for performance including what Richardson would pay for the 7.5 % share of NARP which amounts to \$415,988. Hence, the trial court granted the remedy of specific performance in favor of Richardson but this Court's opinion fails to properly give validity to the language of the trial court's *judgment*.

Further, what the jury intended by filling out the price term portion of the verdict form does not matter at this juncture<sup>1</sup>. The judgment speaks for itself and this Court should not rely upon the verdict form to read something into the trial court's *judgment* that is not present on the face of the judgment or necessary for the enforcement of the judgment.

## **II. Richardson's argument about the price term is before the Court.**

NARP attempts to convince this Court that Richardson's argument about what the \$2,936,000 number on the verdict form means is not properly before the Court. NARP's argument is without merit. NARP is the cause of the entire debate as it now relates to that number on the verdict form and was the very reason this Court permitted Richardson's appeal to proceed on the basis that NARP's interpretation aggrieved Richardson. Richardson is free to offer a rationale for that number in light of NARP's repeated instance that it is the price Richardson must pay for the shares of NARP stock.

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<sup>1</sup> Nevertheless, by way of explanation, Richardson suggests this figure for payment for the NARP stock represents the promissory estoppel figure.

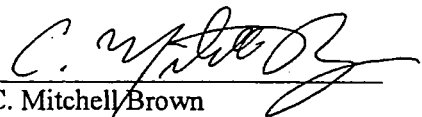
Logically, the number relates to the promissory estoppel claim because the contract, if one existed (which the jury found one to exist), had terms that everyone, including NARP's principal, understood.

**Conclusion**

For these grounds and those in Richardson's Petition for Rehearing, this Court should grant rehearing for the purpose of rectifying its opinion as to the price that Richardson could pay for the requisite share of NARP stock.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: 

C. Mitchell Brown  
William C. Wood, Jr.  
A. Mattison Bogan  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

*Attorneys for P.J. Richardson*

January 12, 2011

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent/Appellant P.J. Richardson, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

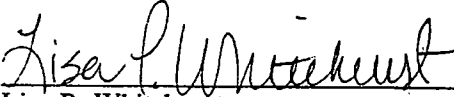
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Counsel Served:

Robert L. Widener, Esquire  
McNair Law Firm, PA  
Post Office Box 11390  
Columbia, SC 29211

Bernie W. Ellis, Esquire  
McNair Law Firm, PA  
Post Office Box 447  
Greenville, SC 29602

  
\_\_\_\_\_  
Lisa P. Whitehurst  
Administrative Assistant

January 18, 2012

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
In the Court of Common Pleas  
Steven H. John, Circuit Court Judge

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Case No. 07-CP-23-3206

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North American Rescue Products, Inc.,.....Appellant-Respondent,

v.

P. J. Richardson,.....Respondent-Appellant.

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APPELLANT-RESPONDENT'S MOTION TO DISMISS  
APPEAL OF RESPONDENT-APPELLANT

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"Only a person aggrieved by a ruling may appeal." *Burns v. Gardner*, 493 S.E.2d 356, 361 (S.C. App. 1997) (emphasis added), *applying* Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.") and S.C. Code Ann. § 18-1-30 (1976) ("Any party aggrieved may appeal in the cases prescribed in this Title."). Appellant-Respondent (NARP) moves to dismiss the appeal of Respondent-Appellant (PJ) under this fundamental rule of law. PJ "appeals" but he does not allege any error by the trial court, nor does he seek reversal of any ruling by the trial court. Rather, he repeatedly argues this Court should affirm the judgment that he appealed. Accordingly, he does not claim to be aggrieved and, therefore, his appeal must be dismissed.

## BACKGROUND FACTS

This case presented the question of whether the Respondent-Appellant (PJ) had the right to purchase 7.5% of Appellant-Respondent's (NARP's) stock and, if so, at what price. The trial court submitted these questions to the jury under a special verdict form with numerous questions. (See Tab A). The jury found that PJ was entitled to purchase 7.5% of NARP's stock and found he should pay \$2,936,300.00 for the stock. (Tab A at p. 4, Question 8). After receiving the jury's answers, the trial court simply attached the verdict form to a Form 4 Judgment Form and wrote thereon: "Judgment for [PJ] under specific performance doctrine." (Tab A). It is thus clear that the trial court ordered specific performance of the contract and price found by the jury. There is no other reasonable reading of the judgment.

Long before either party filed its Initial Brief of Appellant, NARP tendered 7.5% of its stock at \$2,936,300.00 in satisfaction of the appealed judgment. PJ rejected this tender, contending the price was \$415,000.00. NARP moved this Court for a limited remand to make a Rule 60(b) motion before the trial court based on PJ's rejection of the tender. PJ successfully opposed this motion in this Court.

On appeal, PJ treats the appealed judgment as if the trial court ordered NARP to sell 7.5% of its stock to him for \$415,000.00. Based on this reading of the judgment, PJ repeatedly argues in his Brief of Appellant that this Court should affirm the judgment that he appealed. Thus PJ does not claim to be aggrieved by the appealed order, which is the threshold requirement for being an appellant.<sup>1</sup>

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<sup>1</sup> The only price set forth by the jury in the verdict form is \$2,936,300.00. (Tab A at p. 4, Question 8). PJ never mentions this price in his brief, but he contends the price should be \$415,000.00, which is a price that: (1) can be found only by reference to testimony in the transcript; (2) was disputed at trial by NARP; (3) was never found by the jury or the trial court; and (4) most importantly, is not set forth anywhere in the judgment or verdict form. It is inconceivable that the trial court intended to order specific performance of a sales contract without setting a price in the judgment, and the only price appearing anywhere in the verdict or judgment is \$2,936,300.00.



## ARGUMENT

The right to appellate review “is restricted to persons or parties aggrieved by the decision below.” *Bivens v. Knight*, 173 S.E.2d 150, 152 (S.C. 1970) (emphasis added); accord *First Union Nat’l Bank of S.C. v. Soden*, 511 S.E.2d 372, 378 (S.C. App. 1998) and *Burns v. Gardner*, 493 S.E.2d 356, 361 (S.C. App. 1997). Appellate courts have a “duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court.” *Cisson v. McWhorter*, 177 S.E.2d 603, 605 (S.C. 1970) (emphasis added); accord *Carson v. Adgar*, 486 S.E.2d 3, 6-7 (S.C. 1997). A party is “aggrieved in a legal sense” if the order causes injury to his person or property by denying some personal or property right or by imposing a burden or obligation upon the party. *Bivens v. Knight*, 173 S.E.2d 150, 152 (S.C. 1970), citing *Parker v. Brown*, 10 S.E.2d 625 (S.C. 1940) and *Bowles v. Dannin*, 2 A.2d 892 (R.I. 1938); accord *Powell v. Bank of America*, 665 S.E.2d 237, (S.C. App. 2008).

On appeal, PJ asserts the “trial court correctly and lawfully entered a judgment in [his] favor” and repeatedly argues (9 times) that “this Court should affirm the trial court’s judgment.” (Tab B at 20 & 21, and at 11, 12, 14, 16, 18) (emphasis added). He never argues that the appealed order has caused any harm to his person or property. (Tab B, *passim*). Thus, this Court has a “duty to reject [his] appeal.” *Cisson*, 177 S.E.2d at 605; accord *Carson*, 486 S.E.2d at 6-7.

If an appellant takes a position on appeal that renders him not aggrieved by the appealed order, then he has no right to appeal and the appeal must be dismissed. *Bivens*, 173 S.E.2d at 152. PJ’s position on appeal is that the appealed order should be affirmed, thereby rendering him not aggrieved by the appealed order.

If a reversal of the trial court’s judgment would not benefit or improve the appellant’s position, then the appellant is not aggrieved and cannot appeal. *Cisson v. McWhorter*, 177 S.E.2d

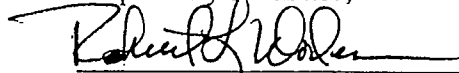
603, 605 (S.C. 1970); accord *Knight v. Autumn*, 245 S.E.2d 602, 604 (S.C. 1978) and *Bivens*, 173 S.E.2d at 152. PJ does not seek reversal; he argues only that this Court should affirm.

PJ admits (9 times) that his dispute with NARP over the meaning of the appealed order is the basis for his appeal. (Tab B at 2, 5 & n.1, 10- 12, 14, 18). This is not the stuff of appeals. As an appellant, PJ's only permissible dispute is with the appealed order, and PJ never argues there is anything wrong with the order. His brief reads like a respondent's brief, but no issue over the meaning of the appealed order is properly before this Court. This issue has never been presented to the trial court, nor has it been raised in NARP's Brief of Appellant (which is limited to questions of whether the trial court erred in denying NARP's directed verdict motions). PJ cannot thrust this issue upon this Court by filing an appellant's brief in which he never claims to be aggrieved by the appealed order.

### CONCLUSION

Only an aggrieved party may appeal. PJ does not claim to be aggrieved. Accordingly, this Court has a "duty to reject" PJ's appeal. For this reason, and for the reasons set forth above, it is respectfully submitted that the appeal of Respondent-Appellant should be dismissed.

Respectfully Submitted,



Robert L. Widener  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

Bernie W. Ellis  
McNair Law Firm, P.A.  
Post Office Box 447  
Greenville, South Carolina 29602  
(864) 271-4940  
Attorneys for Appellant-Respondent

December 18, 2009  
Columbia, SC

**A**

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2007CP2303206

North American Rescue Products Inc vs. P J Richardson

Verified

CHECK ONE:

ENTERED COMPUTER

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☐ Statement of Judgment by the Court:

*Judgment for the Defendant under specific performance doctrine*

Dated at Greenville, South Carolina, this

*29th day of August, 2008.*

Court Reporter: *April Herron*

*24th of Sept, 2008*  
*added of Sept 1, 2008*  
PRESIDING JUDGE - Steven H. John

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Bernie Wellington Ellis McNair Law Firm, PA P.O. Box 447  
Greenville, SC 29602

A. Marvin Quattlebaum Jr. Nelson Mullins Riley &  
Scarborough, LLP P.O. Box 10084 Greenville, SC 29603  
Rivers Samuel Stilwell Nelson Mullins Riley & Scarborough,  
LLP P.O. Box 10084 Greenville, SC 29603  
Lane Whittaker Davis Nelson Mullins Riley & Scarborough  
Llp P.O. Box 10084 Greenville, SC 29603

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4

Paul B. Wickensimer - Clerk of Court

CPFORM4M

**VERDICT FORM**

1. Did North American Rescue Products, Inc. and P.J. Richardson give each other the right to acquire 7.5% of each other's stock?

X  
Yes

\_\_\_\_\_  
No

ENTERED COMPUTER

2. Do you find that North American Rescue Products agreed to let P.J. Richardson acquire 7.5% of the capital stock of North American Rescue Products, Inc. in exchange for money, rather than the issuance of 7.5% of capital stock?

X  
Yes

\_\_\_\_\_  
No

3. Can Both parties perform under the 2000 Agreement as amended in Charleston?

X  
Yes

\_\_\_\_\_  
No

4. Did the parties (North American Rescue Products, Inc. and P.J. Richardson) enter into a contract, that is the November 2004 Termination, Settlement and Release Agreement?

X  
Yes

\_\_\_\_\_  
No

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
DAVE B. WICKENHOFER

2008 SEP -2 A 10:43

5. If the Termination, Settlement and Release Agreement is a contract, does it end both parties' rights to acquire 7.5% of the capital stock of each other?

\_\_\_\_\_  
Yes

~~\_\_\_\_\_  
No~~

- a. If you answer YES, then answer Both i and ii.

- i. Did P.J. Richardson reasonably rely on North American Rescue Products, Inc. to his detriment?

\_\_\_\_\_  
Yes

\_\_\_\_\_  
No

- ii. Did North American Rescue Products, Inc. reasonably rely on P.J. Richardson to its detriment.

\_\_\_\_\_  
Yes

\_\_\_\_\_  
No

6. Do you find that P.J. Richardson was a Director of North American Rescue Products, Inc. when the Termination, Settlement and Release Agreement was entered into?

~~\_\_\_\_\_  
Yes~~

\_\_\_\_\_  
No

- a. If you answer NO, Skip to Number 8.

7. Did P.J. Richardson owe a fiduciary duty to North American Rescue Products, Inc. when the Termination, Settlement and Release Agreement was entered into?

☒ Yes

☐ No

- a. If you answer NO, skip to Number 8.
- b. If you answer YES, did P.J. Richardson breach a fiduciary duty owed to North American Rescue Products, Inc.?

☐ Yes

☒ No

- i. If you answer NO, skip to Number 8.
- ii. If you answer YES, should P.J. Richardson return all or a portion of the \$50,000 paid to Mr. Richardson as a Director of North American Rescue Products, Inc.?

☐ Yes

☐ No

1. If YES, how much?

\$ \_\_\_\_\_

**IMPORTANT INSTRUCTIONS FOR THE REMAINING QUESTIONS:** The Jury must look at both 8 and 9, and then must decide to answer 8 or 9 - not both! After answering 8 or 9, proceed to 9.

8. Is P.J. Richardson entitled to receive 7.5% of the outstanding capital stock of North American Rescue Products, Inc.?

X  
Yes

No

- a. If you answer YES, what should P.J. Richardson pay to North American Rescue Products for 7.5% of the common capital stock?

\$ 2,936,300.00

~~Forfeiture~~

2,936,300.00

OR;

9. Did the parties enter into an agreement arising from their meeting in Atlanta?

        
Yes

        
No

- a. If you answer NO, STOP and notify Bailiff.

- b. If you answer YES:

- i. Did P.J. Richardson offer to perform under the agreement?

        
Yes

        
No

1. If NO, STOP and notify Bailiff.

- ii. If YES, Did North American Rescue Products breach the agreement?

        
Yes

        
No

1. If you answer YES what damages, if any, should be paid to P.J. Richardson by North American Rescue Products, Inc.?

a. \$                     

Charles Varner  
Foreman



**B**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

---

Case No. 2007-CP-23-3206

---

North American Rescue Products, Inc., ..... Appellant/Respondent

v.

P.J. Richardson, ..... Respondent/Appellant

---

INITIAL BRIEF OF RESPONDENT/APPELLANT P.J. RICHARDSON

---

C. Mitchell Brown  
William C. Wood, Jr.  
A. Mattison Bogan  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

Attorneys for P.J. Richardson

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Statement of Issues

- I. Did the trial court properly order the remedy of specific performance following the jury's determination that a binding and enforceable contract existed between the parties?
- II. Did the trial court properly enter the form of the judgment in this case—specific performance—based on the jury's answers to the interrogatories on the special verdict the trial court submitted to the jury?

### Statement of the Case

This case involves a dispute over P.J. Richardson's ("Richardson") entitlement to a 7.5% stock ownership stake in North American Rescue Products, Inc. ("NARP"). The trial court granted Richardson specific performance of the parties' agreement, giving Richardson such an ownership stake. NARP has appealed. Richardson has cross-appealed to contest NARP's attempt to limit and impose conditions upon the judgment granting specific performance.

NARP filed suit on May 17, 2007, seeking a declaration that Richardson was not entitled to purchase 7.5% of the stock of NARP at one cent per share. (Compl.; R. p. \_\_\_\_.) NARP amended the complaint to assert a claim of breach of fiduciary duty against Richardson, a former member of the NARP board. (Amend. Compl.; R. p. \_\_\_\_.)

Richardson answered and counterclaimed. (Rev. Amended Answer & Counterclaim; R. p. \_\_\_\_.) In his first counterclaim, Richardson alleged breach of contract and sought specific performance of one of two alternate agreements giving him a 7.5% ownership position in NARP, or alternatively, money damages for NARP's failure to honor the agreements. (*Id.* at ¶¶ 38-69; R. p. \_\_\_\_.)

The matter was tried before a jury August 25-29, 2008. At the close of the evidence, Richardson amended his pleadings to conform to the evidence presented at trial. (Tr. pp. 719-727; R. p. \_\_\_\_; R. p. \_\_\_\_.) Counsel for Richardson presented the motion to amend stating "the claim that we would like to pursue is that the 2000 agreement was modified orally in Charleston." (Tr. p. 719-720; R. p. \_\_\_\_.) The modification of the agreement in Charleston "changed the amount of the respected [sic]

shares from 25 percent . . . to 7.5.” (Tr. p. 719-720; R. p. \_\_\_\_.) Further, the modification of the contract “was done in the context of the pending sale of Reeves.”

(Id.) In his motion, counsel went on to state:

And in that context, therefore, Mr. Castellani promised to give seven and a half percent of shares in his—of the shares of his company, however that would be styled, in return for 7.5 percent of the proceeds of the sale of Reeves.

(Tr. p. 720; R. p. \_\_\_\_.) The trial court granted Richardson’s motion to amend stating “[i]n looking at the revised amended answer and counterclaim, I’m not sure it’s even necessary to grant the motion, it might very well be encompassed in that but I am granting the motion to amend the pleadings to conform to the proof.” (Tr. p. 727; R. p. \_\_\_\_.)

The matter was submitted to the jury on a special verdict form posing specific fact questions and requiring the jury to give categorical answers. (Special Verdict Form; R. p. \_\_\_\_.) Neither party objected to the form of the special verdict.

The jury answered the questions posed. It concluded, among other things, that NARP had given Richardson the right to 7.5% of its stock and that Richardson had, in turn, given NARP the right to 7.5% of the stock of Reeves Manufacturing, Richardson’s former company. The jury concluded that Richardson could fulfill his part of this agreement by giving a cash equivalent, rather than actual Reeves Manufacturing stock, due to the sale of Reeves. The jury found that the parties could perform under the 2000 agreement, as later modified, and that none of the parties’ later agreements terminated the right of Richardson to acquire 7.5% of NARP’s stock. (Special Verdict Form; R. p. \_\_\_\_.) Specifically on these items, the Special Verdict Form provided:



1. Did North American Rescue Products, Inc. and P.J. Richardson give each other the right to acquire 7.5% of each other's stock?
2. Do you find that North American Rescue Products agreed to let P.J. Richardson acquire 7.5% of the capital stock of North American Rescue Products, Inc. in exchange for money, rather than the issuance of 7.5% of capital stock?
3. Can both parties perform under the 2000 Agreement as amended in Charleston?
4. Did the parties (North American Rescue Products, Inc. and P.J. Richardson) enter into a contract, that is the November 2004 Termination, Settlement, and Release Agreement?

(Special Verdict Form at ¶ 1-4; R. p. \_\_\_\_.) The jury answered each of the above special interrogatories in the affirmative. (*Id.*) Moreover, the special verdict form inquired as to whether any other agreement "end[ed] both parties' rights to acquire 7.5% of the capital stock of each other?" (*Id.* at ¶ 5.) The jury answered "No." (*Id.*) Based on the jury's answers to the special interrogatories, the trial court then entered judgment in favor of Richardson "under the specific performance doctrine." (Judgment; R. p. \_\_\_\_.)

Post-trial motions for judgment notwithstanding the verdict and to alter or amend the verdict were made immediately after the return of the verdict. (Tr. pp. 912-18; R. p. \_\_\_\_.) The trial court denied all such motions. (*Id.*) The trial court prepared the judgment that day and judgment was entered September 2, 2008. (Judgment; R. p. \_\_\_\_.)

NARP moved to alter or amend the judgment by motion served and filed September 15, 2008. (NARP Motion to Alter or Amend; R. p. \_\_\_\_.) Among other things, in its motion NARP claimed that the jury did not find that NARP had breached any contract and that Richardson failed to demonstrate that he was ready to pay for the

7.5% stake in NARP. (Id.) However, NARP withdrew the motion by notice filed September 23, 2008. (Notice of Withdrawal of Motion to Alter or Amend; R. p. \_\_\_\_.) NARP served and filed its notice of appeal on October 3, 2008, which was received by Richardson on October 6, 2008. (NARP Notice of Appeal; R. p. \_\_\_\_.)

In conjunction with its notice of appeal and under an incorrect interpretation of the judgment rendered by the trial court, NARP sent to counsel for Richardson a purported tender of NARP stock on October 6, 2008, with a demand that Richardson tender \$2,936,300.00 as payment for such stock no later than October 10, 2008, at 4 p.m., supposedly as required by NARP's view of the trial court's judgment for specific performance.<sup>1</sup> (October 6, 2008 letter from Curtis Stodghill; R. p. \_\_\_\_.) This demand was rejected by Richardson. Richardson cross-appealed on October 13, 2008, to challenge NARP's mischaracterization of the trial court's judgment reflected in the October 6 demand letter out of an abundance of caution, in case for some reason the trial court or this Court were to agree with NARP's counsel's mischaracterization. (Richardson's Notice of Cross-Appeal; R. p. \_\_\_\_.) As shown herein, the judgment in favor of Richardson ordering NARP to specifically perform the contract—the agreement as modified in Charleston giving Richardson a 7.5% stake in NARP and

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<sup>1</sup> This demand letter was not presented to the trial court and no motion was ever made by NARP to the trial court asking the trial court to modify its judgment for Richardson “under specific performance doctrine”—all that is stated in the judgment—into a different judgment requiring Richardson to pay \$2,936,300.00 for NARP stock or requiring Richardson to pay for or accept such stock within any arbitrary time limits NARP might choose to impose. Although this letter was not presented to the trial court, it is part of the appellate record because it was attached as an exhibit to NARP's motion for limited remand (which was denied), dated November 19, 2008 and filed in this Court. (Motion for Limited Remand; R. p. \_\_\_\_; Order Denying Motion; R. p. \_\_\_\_.) Hence, NARP's erroneous characterization of the trial court's judgment set forth in this letter is the basis for Richardson's cross appeal.

allowing him to exchange the cash derived from the sale of the Reeves Company for the 7.5% share in NARP—should be affirmed.

#### Statement of the Facts

NARP sued Richardson seeking to extinguish Richardson's rights in an agreement executed between Robert Castellani ("Castellani") and NARP, on one hand, and Richardson and Reeves Manufacturing, Inc. ("Reeves"), on the other. Richardson and Castellani met in 1994 and quickly became friends. At the time when Richardson and Castellani first met, Richardson owned Reeves, an established company, which manufactured various health care and safety products for first responders, homeland security, and some military uses. (Tr. pp. 116-117; *see generally* Tr. pp. 338-717; R. p. \_\_\_\_.) At the time, NARP was a fledgling business with no infrastructure, no employees, and was being operated out of Castellani's home. (Tr. pp. 143-144; 652-653; Richardson Ex. 1 – Reeves Manufacturing, Inc. Castellani Computation; R. p. \_\_\_\_; R. p. \_\_\_\_.)

As the friendship between Castellani and Richardson grew, so did the business relationship between the friends' two companies. Reeves began providing infrastructure and support to NARP. This included the nuts and bolts of NARP such as Mr. Richardson's wife, Billie Richardson, keeping the books and monitoring receivables and payables. (Tr. pp. 118; 652-653; R. p. \_\_\_\_.) At the same time, Mrs. Richardson was also a full-time employee of Reeves. (Tr. pp. 655-656; R. p. \_\_\_\_.) Castellani used Reeves' plant in Maryland for storage and warehousing. (Tr. pp. 143-144; R. p. \_\_\_\_.) Reeves similarly provided other services to NARP in addition to administrative services, including supplies and selling various NARP products. (Tr.

pp. 357-359; R. p. \_\_.) During this time-frame, the companies also began cross-selling each other's products. (Tr. pp. 359; 433; R. p. \_\_.)

a. Richardson and Castellani Exchanged a 25% Interest in Each Other's Companies.

Due to the shared interests between the two companies and the importance of cross-selling their products between various customers, Castellani (for himself and NARP) and Richardson (for himself and Reeves) executed an agreement on January 1, 2000 ("2000 Agreement"). The 2000 Agreement formalized the business relationship between the two companies, and allowed Castellani to offset some of his personal risk associated with his fledgling company. (2000 Agreement; R. p. \_\_; Tr. p. \_\_\_\_.) Under the 2000 Agreement, NARP and Reeves agreed to pay each other commissions equal to 25% of the taxable income of their companies for cross-selling each other's respective products. (2000 Agreement; R. p. \_\_; Tr. p. \_\_\_\_.)

In paragraph 7 of the 2000 Agreement, Richardson and Castellani agreed to issue 25% of their companies' respective capital stock to each other. Paragraph 7 states:

7. Restricted Stock: [Reeves] shall issue [Castellani] and NARP shall issue [Reeves] capital stock to 25% (fully diluted) of its issued stock of all classes. Such stock shall be subject to a right by either company to purchase the issued [sic] if the commission arrangement between RMI and RAC or NARP and PJR is terminated. The right shall be exercised by notice to the holder of the stock. In the instance the terminating company shall pay \$100.00 to the person for such stock. If a company exercises its right to purchase the stock and it enters into an agreement to sell or consummate a transaction to sell a material portion of its property other than in the ordinary course of its business or PJR in the case of RMI and RAC in the case of NARP (directly or indirectly through related parties or a series of related transitions) enter into an agreement to sell or otherwise consummate a transaction selling the capital stock they hold in RMI and NARP, respectively, then the

terminated stockholder shall be paid a portion of any consideration received as if they still owned the stock; this provision shall be for a period of the two years from the date of the stock purchased at the \$100.00 price.

(Id.)

The parties performed under the 2000 Agreement for four years, cooperatively assisting each other in growing both NARP and Reeves. No dispute exists that Castellani and Richardson considered each other a 25% owner of the other's company under the 2000 Agreement. (Tr. pp. \_\_\_\_.)

b. Richardson and Castellani Reduced Their Ownership Interests to 7.5% and Amended their Agreement Orally.

On July 29, 2004, Castellani and both Richardsons met in Charleston, South Carolina ("Charleston Meeting"). During this meeting, the parties again affirmed their respective ownership interests but agreed to modify the 2000 Agreement. They agreed to reduce their percentage of ownership from 25% to 7.5%. (Tr. pp. 237-238; R. p. \_\_\_\_.) The agreement was modified because Richardson was about to sell Reeves to DHS (now called EMS). (Tr. pp. 378-380; R. p. \_\_\_\_.) Thus, the parties agreed that Richardson could acquire his 7.5% ownership interest in NARP from proceeds from the pending sale of Reeves. (Tr. pp. 601; 664-666; R. p. \_\_\_\_.) These facts are undisputed and both Castellani and Richardson testified an agreement was reached. (Tr. pp. 237-238; 342-343; 355; R. p. \_\_\_\_.)

The terms of the agreement as modified in Charleston are simple and clear. The parties orally amended their agreement in Charleston to reduce the percentage that each could acquire of the other company from 25% to 7.5%. They further agreed that Richardson could exchange the cash equivalent of the 7.5% interest from the proceeds

from the sale of Reeves. As was testified to at trial, Richardson stated that the 2004 amendment of the agreement modified the percentage share from 25% to 7.5%. (Tr. pp. 355-356; R. p. \_\_\_\_.) The parties' amendment was aimed at making the exchange of ownership shares easier in light of the sale of Reeves. (Tr. p. 420; 540-544 R. p. \_\_\_\_.) At trial, Castellani testified that the meeting in Charleston resulted in a reduction of the percentage of shares from 25% to 7.5%—a “like for like” exchange. (Tr. p. 238; R. p. \_\_\_\_.) Castellani stated that “[w]e agreed to this in Charleston.” (Tr. p. 331; R. p. \_\_\_\_.) Richardson also agreed that there was a “meeting of the minds in Charleston.” (Tr. p. 585; R. p. \_\_\_\_.)

Rather than honor the parties' agreement, Castellani, on behalf of NARP, sued Richardson, alleging various causes of action related to the parties' ongoing relationship, and seeking to extinguish Richardson's rights thereunder. Damages were also sought damages based on the alleged malfeasance of Richardson. (Compl.; R. p. \_\_\_\_.) As a result, Castellani and NARP never performed under the agreement and failed to tender Richardson the shares in exchange for the proceeds from the sale of Reeves (which proceeds amounted to \$415,988). (Tr. pp. 136-139; 344-349; 425-426; 587; Reeves Manufacturing Inc. Castellani Computation; R. p. \_\_\_\_; R. p. \_\_\_\_.)

At trial, Richardson stated that he remained ready, willing, and able to perform the contract as modified. Richardson stated that “[m]y intention was to carry out and honor this agreement with Bob [Castellani] by paying out with the proceeds of the sale of Reeves. (Tr. pp. 372-373; R. p. \_\_\_\_.) Richardson further stated that “I am bound now to honor that agreement.” (Tr. p. 586; R. p. \_\_\_\_.) Richardson knew he only had to deliver a check to NARP for the proceeds from the sale of Reeves to comply with

the amended agreement. (Tr. p. 588; R. p. \_\_\_\_.) Richardson stated “that’s what it was, write him a check.” (Tr. p. 608; R. p. \_\_\_\_.) Richardson admitted that “we’ve never hesitated or changed our position of what Bob [Castellani] is entitled to. He was entitled to 7½ percent of what we sold Reeves for . . . .” (Tr. p. 592; R. p. \_\_\_\_). Moreover, Richardson testified that the money from the sale of Reeves was in his account and could he “cut a check for that money to Bob [Castellani] today if he would take it”—that is, if Castellani would give Richardson his 7.5% interest in NARP. (Tr. p. 609; 590; R. p. \_\_\_\_.)

Based on the evidence presented at trial, the jury found that the parties’ could perform under the 2000 agreement as modified in 2004 in Charleston. (Special Verdict Form; R. p. \_\_\_\_.) Based on this finding by the jury, the Court ordered the remedy of specific performance in favor of Richardson. (Judgment; R. p. \_\_\_\_.) Because of the position that NARP has taken as to the meaning of judgment as entered by the Court, Richardson filed this cross-appeal out of an abundance of caution.

#### Standard of Review

In an action tried by a jury, where the circuit court concurs in the jury’s findings of fact, the appellate court must affirm those findings if there is any evidence reasonably supporting the jury’s conclusions. Thigpen v. Thigpen, 217 S.C. 322, 60 S.E.2d 621 (1950).

### Law/Analysis

- I. The trial court properly ordered the remedy of specific performance following the jury's determination that a binding and enforceable contract existed between the parties.

Following the entry of the judgment in this action, NARP took the position that in order for Richardson to obtain his 7.5% interest in NARP, he had to pay \$2,936,300.00 (two million, nine hundred and thirty six thousand and three hundred and 00/100 dollars) for his shares of stock. (October 6, 2008 letter from Curtis Stodghill; R. p. \_\_\_\_.) However, NARP's position ignores the claim for specific performance of the contract between the parties as orally amended in Charleston. As a result of NARP's misapprehension of the judgment in this case, Richardson filed this cross-appeal.

As is shown herein, the trial court properly entered judgment in favor of Richardson and lawfully ordered NARP to specifically perform its obligations under the parties' 2000 agreement as orally amended following the 2004 meeting in Charleston, South Carolina. The jury found that a contract existed. The terms of the contract are clear. The trial court ordered the parties to specifically perform that contract. Therefore, the judgment in favor of Richardson must be affirmed as set forth herein.

In order to award the remedy of specific performance, a party must show: "(1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract." Campbell v. Carr, 361 S.C. 258, 264-65, 603 S.E.2d 625, 628 (Ct. App. 2004) (citing Guignard v. Atkins,



282 S.C. 61, 64, 317 S.E.2d 137, 140 (Ct. App. 1984)). “Whether to grant specific performance is a matter committed to ‘sound judicial discretion.’” Ex parte Bland, 380 S.C. 1, 16, 667 S.E.2d 540, 547 (2008) (quoting Summer v. Bankhead, 119 S.C. 78, 111 S.E. 891 (1922)). Absent an abuse of discretion, the trial court’s judgment must be upheld. Id. “An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support.” Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). No such errors exist in this case and the judgment is supported by the evidence. The jury found that a contract existed as orally modified and both parties were capable of performing. The judgment should be affirmed as set forth herein, and not in the manner interpreted by NARP.

**A. The Record contains clear evidence of a valid agreement.**

The Record contains clear evidence that a valid and enforceable agreement existed. In the year 2004, the parties modified their agreement that was previously identified as the “Outline of the Business Relationship Between North American Rescue Products, Inc. and Reeves Manufacturing.” (Agreement dated January 1, 2000; Tr. p. 206; R. p. \_\_\_\_; R. p. \_\_\_\_.) The modified agreement provided that Richardson could acquire a 7.5% share of NARP in exchange for the proceeds of the sale of Reeves—\$415,988. (Tr. pp. 355-356; 585; 420; 540-544; 238; 331; R. pp. \_\_\_\_.) Richardson presented evidence that this was the agreement of the parties and the jury found that this agreement existed and could be performed. (Special Verdict Form; R. p. \_\_\_\_.) Thus, the position taken by NARP as to their interpretation of the judgment must be rejected and the judgment ordering specific performance affirmed as set forth herein.

In finding a valid contract sufficient to fulfill the first requirement for an award of specific performance as set forth in Campbell v. Carr, South Carolina's courts recognize that "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Clardy v. Bodolosky, 2009 S.C. App. LEXIS 124, at \*6 (Ct. App. May 5, 2009) (quoting Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis in original)). Thus, "[s]pecific performance will not be ordered unless the contract expresses the true intent of the parties and is fair, just and equitable." Amick v. Hagler, 286 S.C. 481, 484, 334 S.E.2d 525, 527 (Ct. App. 1985) (citing McChesney v. Smith, 105 S.C. 171, 176, 89 S.E. 639, 641 (1916)).

The evidence at trial supports the fact that the parties orally amended their agreement in Charleston to reduce the percentage that each could acquire of the other company from 25% to 7.5% and that Richardson could exchange the cash equivalent of the 7.5% interest from the proceeds from the sale of Reeves. As was testified to at trial, Richardson stated that the 2004 amendment of the agreement modified the percentage share from 25% to 7.5%. (Tr. pp. 355-356; R. p. \_\_\_\_.) Richardson also testified that he was seeking to have the court enforce his right to acquire 7.5% of the stock of NARP. (Id.; Tr. p. 585; R. p. \_\_\_\_.) Richardson stated that the amendment was aimed at making the exchange of ownership shares easier in light of the sale of Reeves. (Tr. p. 420; 540-544; R. p. \_\_\_\_.) Castellani, on behalf of NARP, testified that the meeting in Charleston resulted in a reduction of the percentage of shares from 25% to 7.5%—a "like for like" exchange. (Tr. p. 238; R. p. \_\_\_\_.) Castellani also

agreed that the parties "did that deal and then [ ] hugged and kissed and sealed the deal[.]" (Id.) Later, at trial, Castellani testified that "[w]e agreed to this in Charleston." (Tr. p. 331; R. p. \_\_\_\_.) Richardson also agreed that there was a "meeting of the minds in Charleston." (Tr. p. 585; R. p. \_\_\_\_.) Thus, the parties' agreement was clear and both understood the agreement.

As a result, the record contains ample evidence that the parties had a valid and enforceable agreement that the jury found was capable of being performed. Thus, this Court should reject NARP's mischaracterization of the judgment and affirm the judgment as entered by the trial court—ordering specific performance of the contract as modified in Charleston under which Richardson has a right to a 7.5% interest share in NARP in exchange for \$415,988.

**B. The agreement had been partly carried into execution on one side with the approbation of the other.**

Richardson has performed his part of the contract. Richardson sold Reeves Company and has set aside the proceeds from the sale of Reeves which the contract provided he could exchange for a 7.5% share in NARP. (Tr. pp. 355-356; R. p. \_\_\_\_.) However, NARP has failed to perform by not tendering the shares for the proceeds from Reeves. Thus, NARP stands in the way of executing the contract.

The second requirement that must be fulfilled before a court can order specific performance is that the agreement has been partly carried into execution by one party based on the agreement with the other party. Campbell v. Carr, 361 S.C. at 264-65, 603 S.E.2d at 628. In Gibson v. Hrysikos, 293 S.C. 8, 358 S.E.2d 173 (Ct. App. 1987), the court granted the request for specific performance finding that certain actions

constituted part performance, which took the contract out of the statute of frauds and satisfied the second element of the specific performance test. Id. at 13-16, 358 S.E.2d at 175-77. Recently, this Court noted in Clardy that “[t]he doctrine of substantial performance was conceived for the case where a plaintiff’s partial performance has already given to a defendant substantially all that he bargained for and is of such a nature that it cannot be returned.” Clardy v. Bodolosky, 2009 S.C. App. LEXIS 124, at \*9 (Ct. App. May 5, 2009) (quoting Coastal Seafood Co., Inc. v. Alcoa S.C., Inc., 298 S.C. 466, 467-68, 381 S.E.2d 502, 503 (Ct. App. 1989)) (holding that the Clardys had satisfied the second element by their substantial performance with the consent of the other party).

After the sale of Reeves, Richardson kept the proceeds from the sale in order to pay NARP and Castellani for the 7.5% share in the company. (Tr. p. 590; R. p. \_\_\_\_.) At trial and now, Richardson has the funds ready to pay to NARP and Castellani if the shares are tendered. (Tr. pp. 609; 590; R. p. \_\_\_\_.) Richardson kept those funds in order to perform his obligations under the agreement. (Tr. pp. 435-436; 540-544; R. p. \_\_\_\_.) Richardson’s actions were undertaken as a result of the understanding and agreement reached with Castellani on behalf of NARP. (Tr. pp. 341-344; 608-609; R. p. \_\_\_\_.) Thus, Richards acted on the approval of the agreement by Castellani and had every expectation that NARP and Castellani would perform their part of the agreement. (Tr. pp. 514; 518; 530; R. p. \_\_\_\_.)

As a result, Richardson properly demonstrated that he has performed as envisioned under the parties’ agreement with the approval of NARP after the contract was modified. Further, Richardson’s actions in saving those proceeds and his stated

tender of them in open court to exchange for the stock shares demonstrate that he partly performed his part as envisioned under the agreement. This Court should affirm the trial court's judgment accordingly.

C. The party who comes to compel performance must have performed his or her part, or be and remain able and willing to perform his or her part of the contract.

Richardson demonstrated that he performed under the contract and that he remains ready, willing, and able to perform his part of the contract. Nonetheless, NARP did not tender the 7.5% of stock as required under the agreement. Based on Richardson's demonstration to perform, this Court should affirm the trial court's judgment.

The party seeking specific performance must be able to demonstrate that he was ready and willing to perform his part of the contract. Gibson v. Hrysikos, 293 S.C. at 13-14, 358 S.E.2d at 176. In a case finding that a party failed to meet its burden in requesting the remedy of specific performance, the South Carolina Supreme Court noted that a party requesting specific performance

"must aver that he has performed his part of the contract or that he is willing and ready to perform it, and that he has performed all conditions precedent to the taking effect of the obligation of the defendant, including the payment to be made thereon, or some valid excuse for his failure to perform or offer to perform."

Ingram v. Kasey's Assocs., 340 S.C. 98, 106-07, 531 S.E.2d 287, 291 (2000) (quoting 71 Am. Jur. 2d Specific Performance § 201 (1973)). Thus, South Carolina courts have found that pleading an ability to immediately tender money to fulfill the terms of a contract is sufficient to demonstrate that a party is "ready, able and willing to perform his part of the contract." See Elliott v. Dew, 264 S.C. 40, 47-48, 212 S.E.2d 421, 424

(1975) (affirming the recommendation of specific performance and noting that “[i]t was sufficient for the respondent to plead a tender of the purchase money and to offer by his complaint to pay whatever amount of money was necessary to consummate the transaction and to pay that sum when determined by the court.”).

As was shown at trial, Richardson was ready willing and able to perform the contract as modified, and the pleadings were amended to conform with the evidence at trial. Richardson averred that “[m]y intention was to carry out and honor this agreement with Bob [Castellani] by paying out with the proceeds of the sale of Reeves. (Tr. pp. 372-373; R. p. \_\_\_\_.) Richardson further stated that “the only memorialization we had of it was the oral agreement, meaning the 2000 agreement . . . I am bound now to honor that agreement.” (Tr. p. 586; R. p. \_\_\_\_.) Richardson knew he only had to deliver a check to NARP for the proceeds from the sale of Reeves to comply with the amended agreement. (Tr. p. 588; R. p. \_\_\_\_.) Specifically, Richardson testified that “we would write a check for whatever that number was, yet to be determined, and we would pay it.” (Tr. p. 589; R. p. \_\_\_\_.) That was all Richardson had to do to perform—“that’s what it was, write him a check.” (Tr. p. 608; R. p. \_\_\_\_.) Richardson admitted that “we’ve never hesitated or changed our position of what Bob [Castellani] is entitled to. He was entitled to 7½ percent of what we sold Reeves for . . . .” (Tr. p. 592; R. p. \_\_\_\_.) Moreover, Richardson testified that the money from the sale of Reeves was in his account and could he “cut a check for that money to Bob [Castellani] today if he would take it” if Castellani would give Richardson his 7.5% interest in NARP. (Tr. p. 609; 590; R. p. \_\_\_\_.)

Accordingly, NARP's position as to the remedy the judge ordered is not consistent with the judgment in this case. When asked "[c]an [b]oth parties perform under the 2000 Agreement as amended in Charleston?" the jury answered "Yes." (Special Verdict Form at ¶ 3; R. p. \_\_\_\_.) Thus, Richardson was willing and remains willing to perform. As a result, he met his burden in demonstrating his entitlement to the remedy of specific performance as to each element under the law. Hence, this Court should affirm the trial court's judgment ordering NARP to specifically perform under the contract as orally modified in Charleston, South Carolina.

**II. The trial court properly entered the form of the judgment in this case—specific performance—based on the jury's answers to the interrogatories on the special verdict the trial court submitted to the jury.**

As detailed above, the trial court submitted a special verdict form to the jury. (Special Verdict Form; R. p. \_\_\_\_.) That verdict form contained written questions for findings which might properly be made under the pleadings and evidence. (*Id.*) The trial court then entered the form of the judgment based on the jury's answers to the interrogatories contained on the special verdict form. (Judgment; R. p. \_\_\_\_.) Based on the pleadings and the answers to the interrogatories, the trial court entered judgment in favor of Richardson "under the doctrine of specific performance." (*Id.*)

Examining the Rules of Civil Procedure in the context of the actions of the trial court in this case, it is clear that the trial court properly ordered relief—by way of specific performance—in favor of Richardson. The starting point of the examination is Rule 49 of the South Carolina Rules of Civil Procedure which provides in pertinent part:

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court *may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence*; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. . . .

Rule 49(a), SCRCP (emphasis added).

Following the jury's return of the special verdict, the trial court is charged with preparing the form of the judgment. Rule 58, SCRCP. It is well settled that "[a] judgment is effective only when reduced to writing and entered into the record." Johnson v. S.C. Dep't of Prob., 372 S.C. 279, 284, 641 S.E.2d 895, 898 (2007) (citing Rule 58(a)(2), SCRCP). Rule 58 provides:

(a) Entry Upon Verdict or Decision. Subject to the provisions of Rule 54(b): . . .

(2) upon a decision by the court granting other relief, or *upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly prepare the form of the judgment*, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court, *and after review and approval by the court, the clerk shall promptly enter it.*

*Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record.* Entry of the judgment should not be delayed for the taxing of costs.

Rule 58, SCRCP (emphasis added).

Here, the trial court submitted a special verdict form containing written questions as to factual findings that might be made under the evidence presented at trial. On the special verdict form, the trial court inquired of the jury "[c]an [b]oth parties



perform under the 2000 Agreement as amended in Charleston?” (Special Verdict Form at ¶ 3; R. p. \_\_\_\_.) The jury responded, “Yes.” The trial court also inquired as to whether any other agreement “end[ed] both parties’ rights to acquire 7.5% of the capital stock of each other?” (Id. at ¶ 5.) To which the jury answered “No.” (Id.) On the same day the jury answered the special interrogatories, the trial court entered judgment for Richardson under the specific performance doctrine. (Judgment; R. p. \_\_\_\_.)

The trial court correctly and lawfully entered a judgment in favor of Richardson under the doctrine of specific performance. As shown above, ample evidence existed regarding the contract as modified in Charleston. Moreover, the pleadings and the record clearly indicate that Richardson sought the remedy of specific performance and outlined the contract he wanted to be performed. Specifically, in his amended counterclaim Richardson alleged that he was “entitled to specific performance of the overall agreement and the Option Contract along with money damages accruing during the interim period during which Plaintiff [NARP] failed to perform.” (Rev. Amended Answer & Counterclaim at ¶ 66; R. p. \_\_\_\_.) In addition, Richardson amended his counterclaim at trial to conform to the evidence presented, stating that the modification of the agreement in Charleston “changed the amount of the respected shares from 25 percent . . . to 7.5.” (Tr. p. 720; R. p. \_\_\_\_.) Further, the modification of the contract “was done in the context of the pending sale of Reeves.” (Id.) In his motion, counsel went on to state:

And in that context, therefore, Mr. Castellani promised to give seven and a half percent of shares in his—of the shares of his company, however that would be styled, in return for 7.5 percent of the proceeds of the sale of Reeves.

(Tr. p. 720; R. p. \_\_\_\_.) The trial court granted Richardson's motion to amend. (Tr. p. 727; R. p. \_\_\_\_.)

The evidence and the pleadings support the trial court's decision to enter the form of the judgment it did here—specific performance—based on the jury's answers to the special interrogatories the trial court asked. Hence, this Court should affirm the decision of the trial court to grant Richardson the remedy of specific performance and this Court should not disturb the trial court's sound decision. Ex parte Bland, 380 S.C. 1, 16, 667 S.E.2d 540, 547 (2008) (quoting Summer v. Bankhead, 119 S.C. 78, 111 S.E. 891 (1922)) (stating “[w]hether to grant specific performance is a matter committed to ‘sound judicial discretion.’”

#### Conclusion

Accordingly, this Court should affirm the trial court's judgment ordering the parties to specifically perform under the 2000 Agreement as modified at the Charleston meeting. Thus, Richardson has a right to a 7.5% interest share in NARP in exchange for \$415,988—the proceeds from his sale of Reeves Company, and this Court should so rule.

*Signatures Attached*

Respectfully submitted,

By: A. Mattison Bogan  
C. Mitchell Brown  
William C. Wood, Jr.  
A. Mattison Bogan  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

Attorneys for P.J. Richardson

September 22, 2009  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No.: 07-CP-23-3206

North American Rescue Products, Inc., .....Appellant-Respondent,

v.

P. J. Richardson, .....Respondent-Appellant.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Appellant-Respondent's Motion to Dismiss Appeal of Respondent-Appellant by depositing a copy in the United States Mail, postage prepaid, on December 18, 2009 addressed to the attorneys of record, as follows:

Lane W. Davis, Esq.  
Rivers S. Stilwell, Esq.  
A. Marvin Quattlebaum, Jr., Esq.  
NELSON MULLINS RILEY &  
SCARBOROUGH, LLP  
Post Office Box 10084  
Greenville, South Carolina 29603

C. Mitchell Brown  
William C. Wood, Jr.  
A. Mattison Bogan  
NELSON MULLINS RILEY &  
SCARBOROUGH, LLP  
Post Office Box 11070  
Columbia, South Carolina 29211-1070

  
Ann Shuler

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

SC Court of Appeals

Steven H. John, Circuit Court Judge

Case No. 07-CP-23-3206

North American Rescue Products, Inc., ..... Appellant/Respondent,

v.

P.J. Richardson, ..... Respondent/Appellant.

**P.J. RICHARDSON'S RETURN TO NORTH AMERICAN RESCUE  
PRODUCT'S MOTION TO DISMISS**

Pursuant to Rule 240, SCACR, P.J. Richardson ("Richardson") hereby files his return to North American Rescue Products, Inc.'s ("NARP") motion to dismiss Richardson's cross-appeal. For the reasons outlined herein, if this Court should issue an order expressly stating that it agrees with Richardson's interpretation of the judgment, Richardson will agree he is not aggrieved and will voluntarily dismiss his appeal. Failing that, this Court should deny NARP's motion for the reasons outlined below.<sup>1</sup>

**Background**

Following the jury verdict in this matter, the trial court entered judgment in favor of Richardson and ordered NARP to specifically perform the contract entered into

<sup>1</sup> Should this Court grant NARP's motion to dismiss, Richardson will be forced to petition the South Carolina Supreme Court for a writ of certiorari. This would result in the appeal then being active in both courts since NARP's appeal challenging whether the trial court erred in denying its directed verdict motions would still be ongoing in this Court. Such a division in the appeal would not serve judicial efficiency or economy.

between the parties as modified in Charleston. That contract provided that in consideration for a 7.5% share of the proceeds of the sale of Reeves Company Richardson would get a 7.5% share in NARP—a “like for like” exchange. (Tr. p. 238; R. p. \_\_\_\_.) 7.5% of the proceeds of the sale of Reeves Company amounted to \$415,988. The judgment entered by the trial court stated “[j]udgment for the Defendant [Richardson] under specific performance doctrine.” (See Judgment, Exhibit A.) Thus, the contract ordered to be performed is the “like for like” exchange orally modified contract.

However, NARP has continually attempted to add conditions not included in the contract to the trial court’s judgment ordering specific performance and to interpret the judgment otherwise. NARP seeks to change one of the contract’s essential terms—the price—and attempts to require Richardson to pay over \$2.9 million for the 7.5% interest in NARP. NARP argues the judgment requires Richardson to pay over \$2.9 million for the 7.5% stock interest in NARP, while Richardson contends it need only pay the \$415,988 described above.<sup>2</sup> Thus, NARP contends the judgment requires

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<sup>2</sup> In furtherance of its position that Richardson must pay over \$2.9 million for his interest in NARP, NARP relies on a single special interrogatory presented to the jury on its verdict form—not the actual judgment. (See Special Verdict Form at interrogatory no. 8.a., Exhibit B.) In response to this interrogatory the jury stated that Richardson would have to pay \$2,936,300 for 7.5% of the outstanding capital stock in NARP. (Id.) This interrogatory was relevant only if the jury found that the termination provision ended the parties’ rights under the 2000 agreement as modified in Charleston. However, the jury found that the parties’ rights were not terminated under the Agreement and that the 2000 Agreement as modified was fully enforceable. (See Special Verdict Form at interrogatory nos. 1, 2, 3, and 5, Exhibit B.) As a result, the price for the 7.5% interest in NARP that Richardson was to pay was the 7.5% share of the sale of the proceeds of Reeves. Thus, the \$2,936,300 figure is irrelevant. The trial court recognized that this number was not relevant when it entered a judgment stating simply “[j]udgment for the Defendant [Richardson] under specific performance doctrine. (Judgment, Exhibit A.) If NARP had an objection to the special

Richardson to pay over \$2.5 million more than Richardson believes the judgment requires or could require. Certainly, a \$2.5 million dispute such as this makes Richardson an "aggrieved" party if NARP's contention regarding the meaning of the judgment were correct.

#### Law/Analysis

**I. This Court has already ruled on the issues NARP seeks to put before this Court in its motion to dismiss.**

**A. NARP's motion to dismiss is an improper attempt to seek rehearing of this Court's prior order denying its motion for limited remand.**

On November 19, 2008, NARP moved this Court for a limited remand of the appeal in order to have the trial court mark the judgment satisfied. (See NARP Mot. for Limited Remand at p. 3, Exhibit C.) NARP requested this relief because it wrote a letter to undersigned and asked that Richardson pay \$2,936,000 for the 7.5% interest in NARP. (Id. at p. 2-3.) Richardson did not pay this amount but instead appealed because the demand would have required Richardson to pay \$2.5 million more for his interest in NARP in contravention to the judgment in the case and the terms of the parties' contract. This Court denied NARP's motion for limited remand by Order dated January 27, 2009. (See Order of the Honorable Jasper M. Cureton, Jr. dated

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interrogatories or wished to seek clarification from the trial court as to their meaning or effect on the judgment, it should have raised this objection or question at trial. NARP failed to raise any objection or question regarding the interrogatories or verdict form at trial and it is barred from attempting to do so now on appeal. See Liberty Mut. Ins. Co. v. Gould, 266 S.C. 521, 529-30, 224 S.E.2d 715, 718 (1976) (holding a party may not on appeal complain of error when the party failed to object to the jury charge and special interrogatories at trial); SCDOT v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007) (stating that it is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error).

January 27, 2009, Exhibit D.) The denial order did not set forth an express basis, nor is that required.

The South Carolina Appellate Court Rules do not permit rehearing on petitions or motions unless the appellate court's orders finally determine the parties' rights on appeal. See Rule 221(c), SCACR. Here, the denial of the motion for limited remand did not finally determine the issues on appeal in this matter. Thus, a rehearing petition would not be appropriate. However, NARP has now recast its rehearing petition as a "motion to dismiss." Yet, a careful reading of the motion, Richardson's return, and NARP's reply shows that it is simply another attempt by NARP to have this Court give approval to NARP's far-fetched interpretation of the unambiguous judgment in this case. (See Exhibit C; see also Richardson's Return to the Motion for Limited Remand, Exhibit E and NARP's Reply, Exhibit F.) The Court did not approve of NARP's first attempt to have this Court condone NARP's unilateral alteration of the judgment in this case and the Court should not permit it now. As a result, this Court should deny the motion and not allow NARP to circumvent the rules and essentially seek rehearing of its prior denied motion by recasting its motion under a different name.

**B. If this Court agrees with Richardson's position and issues an order expressly stating its agreement as to the judgment to be enforced, Richardson will voluntarily dismiss his appeal.**

Richardson does not want to burden this Court with an unwarranted appeal or any unnecessary filings. Richardson will voluntarily dismiss his appeal if this Court will note its express agreement that the judgment of the trial court only requires that Richardson pay \$415,988 for the 7.5% interest in NARP. As stated above, the Court's first order on NARP's attempt to re-write the judgment simply stated that the motion



for limited remand was "denied." (See Order of the Honorable Jasper M. Cureton, Jr. dated January 27, 2009, Exhibit D.) However, if this Court were to issue an order expressly stating that the reason it denied the motion for limited remand (and this motion to dismiss) was because the judgment as entered by the trial court does not require Richardson to pay over \$2.9 million for its interest in NARP, and is instead a judgment under the specific performance doctrine of the orally modified contract as described herein, then Richardson will voluntarily dismiss its appeal because such an express order will end NARP's attempt to enforce an judgment that does not exist.

NARP claims that Richardson is not aggrieved because Richardson asks for the judgment of the lower court to be affirmed. (See NARP Motion to Dismiss at p. 3.) However, NARP leaves out the critical detail that the parties differ as to what the judgment means. Under NARP's interpretation, Richardson would have to pay over \$2.5 million more for his 7.5% share in NARP. Such a position greatly aggrieves Richardson in that he would have to pay significantly more money for the interest in NARP than he ever bargained for and/or agreed to. The contract cannot be rewritten now; not by the Court or the opposing party. Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties."); Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 411, 656 S.E.2d 775, 781 (Ct. App. 2008) ("[A] court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction.").

The disagreement between the parties is one that can easily be resolved by the Court by the issuance of an express order. The issuance of an order of this type is

warranted here because the procedural history in this case is clear. At trial, the jury answered the questions posed. It concluded, among other things, that NARP had given Richardson the right to 7.5% of its stock and that Richardson had, in turn, given NARP the right to 7.5% of the stock of Reeves Manufacturing, Richardson's former company. The jury concluded that Richardson could fulfill his part of this agreement by giving a cash equivalent, rather than actual Reeves Manufacturing stock, due to the sale of Reeves. The jury found that the parties could perform under the 2000 agreement, as later modified, and that none of the parties' later agreements terminated the right of Richardson to acquire 7.5% of NARP's stock. (Special Verdict Form, Exhibit B.) Specifically on these items, the Special Verdict Form provided:

1. Did North American Rescue Products, Inc. and P.J. Richardson give each other the right to acquire 7.5% of each other's stock?
2. Do you find that North American Rescue Products agreed to let P.J. Richardson acquire 7.5% of the capital stock of North American Rescue Products, Inc. in exchange for money, rather than the issuance of 7.5% of capital stock?
3. Can both parties perform under the 2000 Agreement as amended in Charleston?
4. Did the parties (North American Rescue Products, Inc. and P.J. Richardson) enter into a contract, that is the November 2004 Termination, Settlement, and Release Agreement?

(Special Verdict Form, Exhibit B.) The jury answered each of the above special interrogatories in the affirmative. (*Id.*) Moreover, the special verdict form inquired as to whether any other agreement "end[ed] both parties' rights to acquire 7.5% of the capital stock of each other?" (*Id.* at ¶ 5.) The jury answered "No." (*Id.*) Based on the jury's answers to the special interrogatories, the trial court then entered judgment in

favor of Richardson “under the specific performance doctrine.” (Judgment, Exhibit A.)

The record is also full of evidence demonstrating what price Richardson was to pay pursuant to his contract—the only contract capable of being performed—with NARP and the other express terms of the agreement. In the year 2004, the parties modified their agreement that was previously identified as the “Outline of the Business Relationship Between North American Rescue Products, Inc. and Reeves Manufacturing.” (Agreement dated January 1, 2000, Exhibit G; see also Tr. p. 206, Exhibit H.) The modified agreement provided that Richardson could acquire a 7.5% share of NARP in exchange for the proceeds of the sale of Reeves—\$415,988. (Tr. pp. 355-356; 585; 417; 420; 425; 540-544; 237-238; 331, Exhibit I.) At trial, Richardson stated that the amendment was aimed at making the exchange of ownership shares easier in light of the sale of Reeves. (Tr. p. 420; 540-544 at Exhibit I.) Castellani, on behalf of NARP, testified that the meeting in Charleston resulted in a reduction of the percentage of shares from 25% to 7.5%—a “like for like” exchange. (Tr. p. 238 at Exhibit I.) Castellani also agreed that the parties “did that deal and then [ ] hugged and kissed and sealed the deal[.]” (Id.) Later, at trial, Castellani testified that “[w]e agreed to this in Charleston.” (Tr. p. 331 at Exhibit I.) Richardson also agreed that there was a “meeting of the minds in Charleston.” (Tr. p. 585 at Exhibit I.) Thus, the parties’ agreement was clear and both understood the agreement. Moreover, Richardson testified that the money from the sale of Reeves was in his account and could he “cut a check for that money to Bob [Castellani] today if he would take it” if Castellani would give Richardson his 7.5% interest in NARP. (Tr. p. 609; 590, Exhibit J.) This case

could easily be put to a close but NARP has attempted to muddy the waters with its own interpretation of the judgment.

Accordingly, in the interests of judicial economy and efficiency, if this Court issues an order stating that the judgment requires the parties to specifically perform the contract actually entered into—7.5% of the proceeds of the sale of Reeves in exchange for a 7.5% share in NARP—Richardson will dismiss his appeal.<sup>3</sup>

**II. Richardson is an aggrieved party; therefore, his appeal should not be dismissed.**

Notwithstanding the points above, Richardson is clearly aggrieved by the interpretation NARP has taken with respect to the judgment in this case. Richardson had a contract requiring him to pay only \$415,988 for his interest in NARP. Now NARP is demanding that he pay \$2,936,000 under the same contract. Such a unilateral alteration of the contract and the judgment in this case cannot be permitted.

The law recognizes that despite having been a “winning” party below, a party can be aggrieved by a judgment or order in light of the effect or position or interpretation given to the judgment or order by the court or opposing party. State v. Gregorie, 339 S.C. 2, 4, 528 S.E.2d 77, 78 (2000) (holding appeal was proper when defendant won below but was aggrieved by the circuit court’s order remanding the case to the magistrate for a new trial, as the remand implicated double jeopardy); Cobb v. Benjamin, 325 S.C. 573, 580, 482 S.E.2d 589, 592 (Ct. App. 1997) (holding party was aggrieved and appeal was proper even though judgment essentially provided the party’s

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<sup>3</sup> If this Court issues such an order, the only issues remaining before this Court are those raised by NARP as to whether the trial court erred in denying NARP’s directed verdict motions. The trial court did not err in submitting the matter to the jury.

requested relief). Moreover, Richardson's appeal is proper as it arises in a context that requires this Court to interpret the trial court's judgment ordering specific performance and it is proper for this Court to interpret the trial court's order. See Wayburn v. Smith, 263 S.C. 518, 522, 211 S.E.2d 560, 561 (1975) (demonstrating appellate courts may interpret an order of the lower court); Management Recruiters of Greenville v. R.J.R. Mech., Inc., 304 S.C. 399, 401, 404 S.E.2d 908, 909 (Ct. App. 1991) (construing a judgment of the trial court by determining the trial court's intent and carefully reviewing the order); Petition of White, 299 S.C. 406, 412, 385 S.E.2d 211, 215 (Ct. App. 1989) (illustrating that an appellate court may interpret a judgment by a trial court by stating "[a]s a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the parties or the court, as gathered, not from an isolated part of the contract or judgment but from all its parts").

Here, the trial court ordered, "[j]udgment for the defendant [Richardson] under specific performance doctrine." (See Judgment, Exhibit A.) This judgment for specific performance clearly requires the parties to perform under a contract. The parties and the Court need only to look to the record to find the terms of the contract. Despite the ease in finding the terms the parties agreed to, NARP now argues the trial court's award of specific performance incorporated a brand new term fundamentally rewriting the contract by changing an essential term—the price—to an amount regarding which there was no meeting of the minds between the parties. In its motion to dismiss, NARP argues Richardson is not an aggrieved party and should not be permitted to "thrust this issue [of interpreting the judgment] upon this Court." However, it is

NARP's novel spin with regard to the judgment that thrusts this issue upon this Court and necessitates this appeal by Richardson.

Richardson clearly falls within the definition of an aggrieved party, which is "[a] party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." BLACK'S LAW DICTIONARY 1144 (7th ed. 1999). Richardson is adversely affected by the judgment, according to NARP's interpretation, and thus, must appeal. Were a court to follow NARP's flawed logic and ignore the contract's price achieved by a meeting of the minds, Richardson's right to purchase NARP stock would be compromised, and the trial court judgment would be in error. Therefore, Richardson is an aggrieved party, and Richardson's appeal should not be dismissed.

Further, prevailing parties are permitted to appeal "where the order of judgment in question is apparently favorable but is actually adverse." 5 Am. Jur. 2d *Appellate Review* § 243 (2007); see also State v. Gregorie, 339 S.C. 2, 4, 528 S.E.2d 77, 78 (2000) (holding appeal was proper when defendant won below but was aggrieved by the circuit court's order remanding the case to the magistrate for a new trial as the remand implicated double jeopardy); Cobb v. Benjamin, 325 S.C. 573, 580, 482 S.E.2d 589, 592 (Ct. App. 1997) (holding party was aggrieved and appeal was proper even though judgment essentially provided the party's requested relief). Again, if a court were to adopt NARP's interpretation of the judgment, then the judgment would not be favorable to Richardson and would be in error. Therefore, Richardson must appeal and this is Richardson's opportunity to do so.

**III. Richardson's interpretation of the judgment is the only reasonable reading of the judgment.**

In its motion to dismiss, NARP claims its interpretation of the trial court's judgment that the order of specific performance authorized the sale of NARP's stock for a price set by the jury, is the only reasonable reading. As detailed herein, this contention is erroneous. First, for a court to compel specific performance there must be a valid agreement. Ingram v. Kasey's Assocs., 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000). Therefore, it is nonsensical for NARP to argue that the trial court intended to remove an essential term from this valid agreement and introduce a new price set by a jury, to which there was no meeting of the minds between the parties.

NARP argues that the trial court must have intended to introduce this new price to the agreement because "[i]t is inconceivable that the trial court intended to order specific performance of a sales contract without setting a price in the judgment." (NARP Motion to Dismiss p. 2 n.1.) However, a court need not include the price in the judgment itself when ordering specific performance because the contract provides the price and the record includes the terms of the contract. Trial courts frequently order specific performance without reciting the terms of the contract in their orders—because those terms are already of record. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 806 (Ct. App. 2009) (stating the master-in-equity ordered the specific performance of an oral contract and looking to the evidence to determine the oral contract and the admissibility of the evidence); Campbell v. Carr, 361 S.C. 258, 263-66, 603 S.E.2d 625, 627-29 (Ct. App. 2004) (stating the master-in-equity ordered

specific performance of the contract and looking to the contract for the price to determine if the price was adequate). A review of the records on appeal in Fesmire and Campbell indicates the masters ordered specific performance of the contracts there without setting forth the exact terms of those contracts in their orders, as the contracts were in evidence and already in the record. This is all that occurred here.

In this case, the parties agreed in Charleston that Richardson could purchase 7.5% of NARP stock for 7.5% of the proceeds of the sale price of Richardson's company (Reeves). Therefore, the parties had a meeting of the minds regarding price. The jury so found. NARP may not now destroy this contract by changing an essential term after the fact by trying to create ambiguity where none exists.

Further, as stated, this Court and the parties need to merely look to the record to determine the terms of the contract. McMaster v. Strickland, 322 S.C. 451, 455, 472 S.E.2d 623, 626 (1996) (looking to the record for support for the award of attorneys' fees); Reese v. Holmes, 26 S.C. Eq. (5 Rich. Eq.) 531, 549, 1852 WL 2575 \*12 (1852) (looking to the record to interpret a judgment in order to give the judgment its intended efficacy). The record includes the initial 2000 Agreement entered into by Richardson and Robert Castellani, NARP's founder, who formed a close relationship during the development of their companies. (Exhibit G.) In the 2000 Agreement the parties contracted to exchange a 25% interest in each other's companies. (Exhibit G.) The record also includes evidence of a meeting in Charleston in July 2004, where Richardson and Castellani agreed to reduce their percentage of ownership from 25% to 7.5%. (Tr. pp. 237-38 at Exhibit I.) This modification occurred because Richardson was about to sell his company, and the parties agreed Richardson could acquire his



7.5% interest in NARP in exchange for the monetary value of 7.5% of the proceeds from the pending sale of Richardson's company. (Tr. p. 417, 420 at Exhibit I.) This percentage of the proceeds from the sale of Richardson's company equaled \$415,988, a definite and essential term of the contract. (Tr. p. 425 at Exhibit I.)

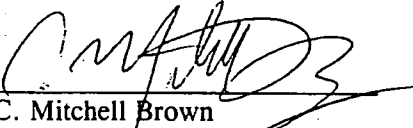
Following the trial, the jury specifically found the 2000 Agreement entered into by Richardson and NARP could still be performed as modified by the parties during their meeting in Charleston. This contract was still in place and was not ended by the parties' 2004 termination, settlement and release agreement, as also found by the jury. Therefore, the 2000 Agreement as amended in Charleston is the contract to be performed under the trial court's judgment for specific performance.

#### **Conclusion**

Accordingly, if this Court issues an order expressly agreeing with Richardson's position as to the meaning of the judgment, Richardson will dismiss his appeal. Failing that, this Court should deny NARP's motion to dismiss because Richardson is clearly aggrieved by the interpretation NARP attempts to give to the judgment which would result in Richardson having to pay over \$2.5 million more for his 7.5% interest in NARP, and because NARP's motion is really an improper attempt to obtain rehearing of its previously rejected motion to remand.

Respectfully submitted,

*Signatures Attached*

By:   
C. Mitchell Brown  
William C. Wood, Jr.  
A. Mattison Bogan  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

Attorneys for P.J. Richardson

January 2<sup>nd</sup>, 2010  
Columbia, South Carolina

# **EXHIBIT A**

**(Judgment)**

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2007CP2303206

North American Rescue Products Inc vs. P J Richardson

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a).  
SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
☐ Other: \_\_\_\_\_

**IT IS ORDERED AND ADJUDGED:**

☐ See attached order;

☐ Statement of Judgment by the Court:

*Judgment for the Defendant under specific performance doctrine*

Dated at Greenville, South Carolina, this  
*29th day August, 2008.*

Court Reporter: *April Herron*

*Steven H. John*  
PRESIDING JUDGE - Steven H. John

*Sept 1st 2008*  
This judgment was entered on the \_\_\_\_\_ and a copy mailed first class this \_\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

Bernie Wellington Ellis McNair Law Firm, PA P.O. Box 447  
Greenville, SC 29602

A. Marvin Quattlebaum Jr. Nelson Mullins Riley &  
Scarborough, LLP P.O. Box 10084 Greenville, SC 29603  
Rivers Samuel Stilwell Nelson Mullins Riley & Scarborough,  
LLP P.O. Box 10084 Greenville, SC 29603  
Lane Whittaker Davis Nelson Mullins Riley & Scarborough  
LLP P.O. Box 10084 Greenville, SC 29603

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

CRCP APP-24 FORM 4

Paul B. Wickensimer - Clerk of Court

CP FORM 11

**EXHIBIT B**  
**(Special Verdict Form)**

**VERDICT FORM**

1. Did North American Rescue Products, Inc. and P.J. Richardson give each other the right to acquire 7.5% of each other's stock?

☒ Yes ☐ No

2. Do you find that North American Rescue Products agreed to let P.J. Richardson acquire 7.5% of the capital stock of North American Rescue Products, Inc. in exchange for money, rather than the issuance of 7.5% of capital stock?

☒ Yes ☐ No

3. Can Both parties perform under the 2000 Agreement as amended in Charleston?

☒ Yes ☐ No

4. Did the parties (North American Rescue Products, Inc. and P.J. Richardson) enter into a contract, that is the November 2004 Termination, Settlement and Release Agreement?

☒ Yes ☐ No

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1008 SEP -2 A 10:43

5. If the Termination, Settlement and Release Agreement is a contract, does it end both parties' rights to acquire 7.5% of the capital stock of each other?

\_\_\_\_\_  
Yes

~~\_\_\_\_\_  
No~~

- a. If you answer YES, then answer Both i and ii.

- i. Did P.J. Richardson reasonably rely on North American Rescue Products, Inc. to his detriment?

\_\_\_\_\_  
Yes

~~\_\_\_\_\_  
No~~

- ii. Did North American Rescue Products, Inc. reasonably rely on P.J. Richardson to its detriment.

\_\_\_\_\_  
Yes

~~\_\_\_\_\_  
No~~

6. Do you find that P.J. Richardson was a Director of North American Rescue Products, Inc. when the Termination, Settlement and Release Agreement was entered into?

~~\_\_\_\_\_  
Yes~~

\_\_\_\_\_  
No

- a. If you answer NO, Skip to Number 8.

7. Did P.J. Richardson owe a fiduciary duty to North American Rescue Products, Inc. when the Termination, Settlement and Release Agreement was entered into?

  /    
Yes

            
No

a. If you answer NO, skip to Number 8.

b. If you answer YES, did P.J. Richardson breach a fiduciary duty owed to North American Rescue Products, Inc.?

            
Yes

  X    
No

i. If you answer NO, skip to Number 8.

ii. If you answer YES, should P.J. Richardson return all or a portion of the \$50,000 paid to Mr. Richardson as a Director of North American Rescue Products, Inc.?

            
Yes

            
No

1. If YES, how much?

\$



**IMPORTANT INSTRUCTIONS FOR THE REMAINING QUESTIONS:** The Jury must look at both 8 and 9, and then must decide to answer 8 or 9 - not both! After answering 8 or 9, proceed to 9

8. Is P.J. Richardson entitled to receive 7.5% of the outstanding capital stock of North American Rescue Products, Inc.?

X  
Yes

No

- a. If you answer YES, what should P.J. Richardson pay to North American Rescue Products for 7.5% of the common capital stock?

\$ 2,936,300.00

Two thousand  
2,936,300.00

OR:

9. Did the parties enter into an agreement arising from their meeting in Atlanta?

        
Yes

        
No

- a. If you answer NO, STOP and notify Bailiff.

- b. If you answer YES:

- i. Did P.J. Richardson offer to perform under the agreement?

        
Yes

        
No

1. If NO, STOP and notify Bailiff.

- ii. If YES, Did North American Rescue Products breach the agreement?

        
Yes

        
No

1. If you answer YES what damages, if any, should be paid to P.J. Richardson by North American Rescue Products, Inc.?

a. \$                     

*Ch. 10, 11, 12*

*1000.00*

**EXHIBIT C**  
**(NARP's Motion for Limited Remand)**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 07-CP-23-3206

North American Rescue Products, Inc.....Appellant-Respondent,

v.

P. J. Richardson.....Respondent-Appellant.

MOTION FOR LIMITED REMAND AND TO HOLD  
APPELLATE TIMELINES IN ABEYANCE PENDING A RULING ON REMAND

Pursuant to Rule 224, SCACR, and Rule 60(b), SCRCP, the Appellant-Respondent (Plaintiff) moves for a limited remand to make a motion under Rule 60(b)(5), SCRCP, to have the judgment marked satisfied. To best serve judicial economy, Plaintiff further requests that the time for perfecting this cross-appeal (except for production of the already ordered trial transcript) be held in abeyance pending a ruling on remand, so that any appeal from any order on remand can be consolidated with this cross-appeal. The grounds for this motion are as follows:

(1) Plaintiff commenced this action against the Respondent-Appellant (Defendant) seeking a declaratory judgment that there was no agreement between the parties for Defendant to own or acquire stock in Plaintiff, and for breach of fiduciary

duty. Defendant answered and counterclaimed for breach of contract and specific performance, demanding a jury trial on his counterclaims.

(2) The case was tried before a jury without objection by Defendant. The trial court submitted the case to the jury under a special verdict form. Defendant did not object to this procedure or to the form or content of the special verdict form.

(3) The jury answered the questions on the special verdict form and found that Defendant was "entitled to receive 7.5% of the outstanding capital stock of [Plaintiff] North American Rescue Products, Inc." for the price of \$2,936,300.00. (Tab A at 4, Ques. 8). The trial court denied all post-trial motions by both parties.

(4) The trial court entered judgment for Defendant by attaching the Special Verdict Form to a standard judgment form and ordering thereon: "Judgment for the Defendant under specific performance doctrine." (Tab A). Thus, the trial court granted Defendant specific performance of the contract found by the jury.

(5) Defendant did not make any motions challenging the above-noted entry of judgment on the jury's special verdict.

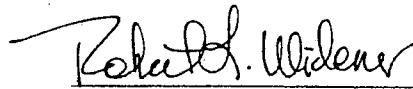
(6) Both parties have appealed. The principal thrust of Plaintiff's appeal will be that there is no binding contract between the parties and, therefore, Plaintiff is entitled to judgment on all counterclaims by Defendant. It is unknown what issues Defendant will raise in its cross-appeal.

(7) On October 6, 2008, by hand delivery of a letter to Defendant's Counsel, Plaintiff gave notice that, on October 10, 2008, it would tender performance of the judgment of specific performance entered by the trial court on the jury's special verdict, to-wit: it would deliver 7.5% of its stock to Defendant in exchange for the \$2,936,300.00

found by the jury and ordered specifically performed by the trial court. (Tab B). On October 9, Defendant rejected the tendered performance, thus making it clear that Defendant is not "ready, willing and able" to perform the contract found by the jury and ordered specifically performed by the trial court.

Based on the foregoing circumstances, Plaintiff seeks leave to move before the trial court under Rule 60(b)(5), SCRPC, to have the judgment marked satisfied. It is likely that the party losing the Rule 60(b)(5) motion will appeal to this Court. In the interest of judicial economy, any such appeal should be consolidated with the current cross-appeal. For this reason, Plaintiff further requests that the timelines for perfecting the currently pending cross-appeal be held in abeyance pending a decision on remand.

Respectfully Submitted,



Robert L. Widener  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800  
Attorneys for Appellant-Respondent

November 19, 2008  
Columbia, SC

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2007CP2303206

North American Rescue Products Inc vs. P J Richardson

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: \_\_\_\_\_

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

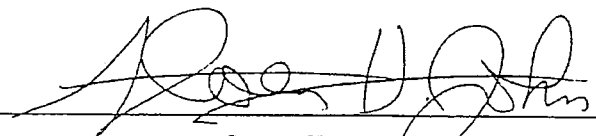
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*Judgment for the Defendant under specific performance doctrine*

Dated at Greenville, South Carolina, this

*29th day of August, 2008.*

Court Reporter: April Herron

*29th day of August, 2008*  
  
PRESIDING JUDGE - Steven H. John

This judgment was entered on the *29th day of August, 2008* and a copy mailed first class this *29th day of August, 2008* to attorneys of record or to parties (when appearing pro se) as follows:

*29th day of August, 2008*  
/ Bernie Wellington Ellis McNair Law Firm, PA P.O. Box 447  
Greenville, SC 29602

A. Marvin Quattlebaum Jr. Nelson Mullins Riley &  
Scarborough, LLP P.O. Box 10084 Greenville, SC 29603  
Rivers Samuel Stilwell Nelson Mullins Riley & Scarborough,  
LLP P.O. Box 10084 Greenville, SC 29603  
Lane Whittaker Davis Nelson Mullins Riley & Scarborough  
LLP P.O. Box 10084 Greenville, SC 29603

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24 FORM 4

Paul B. Wickensimer - Clerk of Court

CLERK OF COURT

VERDICT FORM

1. Did North American Rescue Products, Inc. and P.J. Richardson give each other the right to acquire 7.5% of each other's stock?

~~Yes~~

\_\_\_\_\_

Yes

No

2. Do you find that North American Rescue Products agreed to let P.J. Richardson acquire 7.5% of the capital stock of North American Rescue Products, Inc. in exchange for money, rather than the issuance of 7.5% of capital stock?

~~Yes~~

\_\_\_\_\_

Yes

No

3. Can Both parties perform under the 2000 Agreement as amended in Charleston?

~~Yes~~

\_\_\_\_\_

Yes

No

4. Did the parties (North American Rescue Products, Inc. and P.J. Richardson) enter into a contract, that is the November 2004 Termination, Settlement and Release Agreement?

~~Yes~~

\_\_\_\_\_

Yes

No

SEP 2 2 43 PM '04

5. If the Termination, Settlement and Release Agreement is a contract, does it end both parties' rights to acquire 7.5% of the capital stock of each other?

\_\_\_\_\_

Yes

~~\_\_\_\_\_~~

No

- a. If you answer YES, then answer Both i and ii.

- i. Did P.J. Richardson reasonably rely on North American Rescue Products, Inc. to his detriment?

\_\_\_\_\_

Yes

\_\_\_\_\_

No

- ii. Did North American Rescue Products, Inc. reasonably rely on P.J. Richardson to its detriment.

\_\_\_\_\_

Yes

\_\_\_\_\_

No

6. Do you find that P.J. Richardson was a Director of North American Rescue Products, Inc. when the Termination, Settlement and Release Agreement was entered into?

~~\_\_\_\_\_~~

Yes

\_\_\_\_\_

No

- a. If you answer NO, Skip to Number 8.



7. Did P.J. Richardson owe a fiduciary duty to North American Rescue Products, Inc. when the Termination, Settlement and Release Agreement was entered into?

Yes                      No

- a. If you answer NO, skip to Number 8.
- b. If you answer YES, did P.J. Richardson breach a fiduciary duty owed to North American Rescue Products, Inc.?

Yes                      No

- i. If you answer NO, skip to Number 8.
- ii. If you answer YES, should P.J. Richardson return all or a portion of the \$50,000 paid to Mr. Richardson as a Director of North American Rescue Products, Inc.?

Yes                      No

1. If YES, how much?

\$

**IMPORTANT INSTRUCTIONS FOR THE REMAINING QUESTIONS:** The Jury must look at both 8 and 9, and then must decide to answer 8 or 9 - not both! After answering 8 or 9, proceed to 9.

8. Is P.J. Richardson entitled to receive 7.5% of the outstanding capital stock of North American Rescue Products, Inc.?

X Yes                      No

- a. If you answer YES, what should P.J. Richardson pay to North American Rescue Products for 7.5% of the common capital stock?

\$ 2,936,300.00

**OR;**

9. Did the parties enter into an agreement arising from their

                     Yes                                           No

- a. If you answer NO, STOP and notify Bailiff.

- b. If you answer YES:

- i. Did P.J. Richardson offer to perform under the

                     Yes                                           No

1. If NO, STOP and notify Bailiff.

- ii. If YES, Did North American Rescue Products breach the agreement?

                     Yes                                           No

1. If you answer YES what damages, if any, should be paid to P.J. Richardson by North American Rescue Products, Inc.?

a. \$                     

*Charles Verner*  
*Foreman*

*2,936,300.00*  
*21*

STODGHILL Law Firm  
V.C.B.A.L.Y.E.R.S.

6 October 2008

By Hand Delivery  
C/O Rivers S. Stillwell, Esquire  
Lane W. Davis, Esquire  
A. Marvin Quattlebaum, Esquire  
Nelson Mullins  
104 South Main Street  
Greenville, SC 29601

Reference: North American Rescue Products, Inc. v. P.J. Richardson  
Judgment of Specific Performance

Gentlemen:

By delivery of this letter to you on behalf of your client P.J. Richardson, and in accord with the referenced, North American Rescue, Incorporated (NAR) will tender seven and one-half percent (7.5%) of the outstanding common capital stock of NAR (the Stock) to Mr. Richardson at my offices located in the NBSC Building, 201 E. McBee Avenue, Suite 300-A, Greenville, SC 29601, Friday 10 October 2008 at 4:00 p.m. EDT.

An accurate photo static copy of fully executed properly issued stock certificate number 29 for 118.32 shares representing the Stock is enclosed with this letter. Also enclosed is an accurate photo static copy of the North American Rescue Products, Inc. Stockholder Agreement and First Amendment along with Fourth New Stockholder Signature Page.

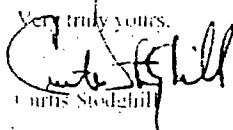
If Mr. Richardson intends to receive the Stock pursuant to the referenced, then he must tender (i) Two Million Nine Hundred Thirty Six Thousand Three Hundred Dollars (\$2,936,300); and (ii) the fully executed and completed Fourth New Stockholder Signature Page, which is included with this letter, by delivery to me, of both (i) and (ii) at the designated location and time of NAR's Stock tender. If Mr. Richardson intends to pay by check, it must represent collected funds.

Please note that NAR served its notice of appeal related to the referenced, which will be withdrawn if Mr. Richardson accepts NAR's tender as described herein.

Please govern yourself accordingly.

With kind regards, I am

Very truly yours,

  
Curtis Stodghill

Robert A. Castellani  
Bernie W. Ellis

# **EXHIBIT D**

**(January 27, 2009 Order of Judge Cureton)**



rec'd 1/28/09  
30528/01500

## The South Carolina Court of Appeals

JEANETTE F. BARBER  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
www.sccourts.org

January 27, 2009

Robert L. Widener, Esquire  
McNair Law Firm, PA  
P.O. Box 11390  
Columbia, SC 29211

Re: North American Rescue v. Richardson

Dear Mr. Widener:

Enclosed is a copy of an Order of the Court concerning your Motions in the above case.

Counsel for the Appellant/Respondent must notify this office immediately upon receipt of the transcript.

Very truly yours,

  
CLERK

JFB/et

cc: Bernie Wellington Ellis, Esquire  
C. Mitchell Brown, Esquire  
William C. Wood, Jr., Esquire  
A. Mattison Bogan, Esquire  
Lane W. Davis, Esquire  
Rivers S. Stilwell, Esquire  
A. Marvin Quattlebaum, Jr., Esquire

# The South Carolina Court of Appeals

North American Rescue Products, Inc., Appellant/Respondent,

v.

P. J. Richardson,

Respondent/Appellant.

The Honorable Steven H. John  
Greenville County  
Trial Court Case No. 2007-CP-23-03206

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## ORDER

---

Appellant/Respondent North American Rescue Products, Inc. filed a motion for limited remand and to hold appellate timelines in abeyance. After review, the motion is denied.

Appellant/Respondent's motion for an extension to file a reply to the motion is granted.

AND IT IS SO ORDERED.

*Stephen H. John* A.S.

Columbia, South Carolina

January 27, 2009

FILED

1/27/09

cc: Bernie Wellington Ellis, Esquire  
Robert L. Widener, Esquire

# **EXHIBIT E**

**(Richardson's Return to Motion for Limited Remand)**

RECEIVED

DEC 08 2008

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2007-CP-23-3206

North American Rescue Products, Inc., .....

Appellant/  
Respondent,

v.

P.J. Richardson, .....

Respondent/  
Appellant.

**Respondent/Appellant's Memorandum in Opposition  
to the Motion for Limited Remand and  
to Hold Appellant Timelines in Abeyance**

Pursuant to Rule 224, SCACR, Respondent/Appellant P.J. Richardson

("Richardson") submits this memorandum in opposition to Appellant/Respondent North American Rescue Products, Inc.'s ("NARP") motion for a limited remand and to hold appellate timelines in abeyance. For the reasons set forth below, NARP's motion should be denied.

**I. NARP's Requested Relief is Inconsistent with Its Appeal.**

As stated in NARP's motion, its contention on appeal, as was its contention throughout the trial, is "that there is no binding contract between the parties." (NARP Mot. ¶ 6.) The motion presented to the Court, however, rests upon the exact opposite factual contention -- that a valid and enforceable contract exists and the judgment related to that contract should be marked as satisfied. NARP contends, incorrectly, that



the judgment being appealed only established a contractual right to purchase 7.5% of NARP's stock for \$2,936,000.00 in a lump sum and as a whole (as opposed to a right to purchase stock up to that amount), and upon restrictive, arbitrary timing terms imposed by NARP's counsel in a letter dated October 6, 2008, wholly apart from any language contained anywhere in the judgment or the jury's verdict. (Motion ¶ 7.) NARP argues that because Richardson did not comply with the terms arbitrarily imposed by its counsel upon the contract, which it contends on appeal does not even exist, that it has somehow "satisfied" the judgment.

If NARP is now conceding that some contract exists, it should not have appealed, but it did. NARP should not be allowed to simultaneously assert factually inconsistent positions in the trial court and on appeal. Cf. Cothran v. Brown 357 S.C. 210, 592 S.E.2d 629 (2004) (outlining the elements of judicial estoppel and noting it "is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding").<sup>1</sup> For these reasons, the Court should deny the motion.

**II. NARP's Request is Futile as It is Not Entitled to the Relief Requested.**

NARP is not entitled to the relief it ultimately seeks in its remand motion; therefore, remand and a stay are futile and should be denied. This is true for two reasons.

First, assuming for sake of argument that NARP's characterization of the judgment as only granting specific performance of a contract to purchase 7.5% of

---

<sup>1</sup> Richardson does not assert that counsel for NARP is trying to intentionally mislead the Court, the fourth element of a judicial estoppel claim.

NARP's stock for \$2,390,000.00 is correct, NARP is not entitled to the relief it claims in the remand motion. NARP's claim is not grounded in the language of the judgment or even the jury's verdict. Rather, NARP's argument rests upon arbitrary and unreasonable conditions or terms of its own making that compelled Richardson to act within a time arbitrarily set by NARP. The terms were not stated in the written judgment of the trial court, but imposed by a letter of NARP's counsel dated October 6, 2008. Because the terms are no part of the judgment, any alleged failure by Richardson to comply with the terms cannot constitute a "satisfaction" of the judgment.

Second, NARP's characterization of the judgment entered by the trial court is incorrect. As Richardson will argue more fully on appeal, the judgment of the trial court is plain on its face. It entered a judgment for specific performance in favor of Richardson. It did not enter a judgment requiring Richardson to pay NARP a specific sum for a specific percentage of NARP's stock in an all or nothing deal. The judgment certainly does not state that Richardson had to pay a specific amount by any arbitrary date NARP might happen to set in an entirely separate letter from counsel at an arbitrary place designated by NARP and with a specific form of payment arbitrarily chosen by NARP.

As noted by our supreme court, "[i]t is the settled rule of this Court that an appeal will not lie from a verdict; it must be from a judgment . . . ." Hanner v. Hillcrest Land Co., 165 S.C. 298, 163 S.E. 727, 728 (1932). It is the terms of the judgment that control and that judgment is for "specific performance," a cause of action alleged in Richardson's complaint with a request for specific relief, not a contract of

NARP's own imagining which is says it is repudiating on appeal and which it repudiated at trial.

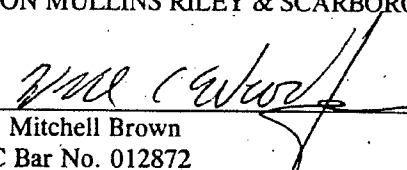
**III. Nothing is Pending in the Trial Court Requiring a Remand to that Court.**

NARP's motion is procedurally defective in any event and should be denied. Nothing is pending in the trial court upon which the trial court may act should the Court remand the case. Hence, there is no reason for a remand.

**Conclusion**

For the reasons set forth above, NARP's motion should be denied.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

C. Mitchell Brown  
SC Bar No. 012872  
E-Mail: mitch.brown@nelsonmullins.com  
William C. Wood, Jr.  
SC Bar No. 015111  
E-Mail: bill.wood@nelsonmullins.com  
A. Mattison Bogan  
SC Bar No. 72629  
E-Mail: matt.bogan@nelsonmullins.com  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Rivers S. Stilwell  
SC Bar No. 002108  
E-Mail: rivers.stilwell@nelsonmullins.com  
Lane W. Davis  
E-Mail: lane.davis@nelsonmullins.com  
S.C. Bar No. 68796  
104 South Main Street / Ninth Floor  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

December 8, 2008

Attorneys for P.J. Richardson

# **EXHIBIT F**

**(NARP's Reply to Motion for Limited Remand)**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 07-CP-23-3206

North American Rescue Products, Inc.....Appellant-Respondent.

v.

P. J. Richardson.....Respondent-Appellant.

REPLY TO RETURN TO MOTION FOR LIMITED REMAND AND TO HOLD  
APPELLATE TIMELINES IN ABEYANCE PENDING A RULING ON REMAND

**I. Plaintiff's remand motion is not procedurally defective.**

Defendant contends the remand motion should be denied, because there is nothing pending in the trial court. (Ref. at 4, Arg. III). This argument is manifestly without merit. Rule 60(b), SCRCP plainly contemplates a motion *after* commencement of an appeal (as here), and requires the would-be movant to first obtain leave of the appellate court.<sup>1</sup> *A priori*, there is nothing pending in the trial court at that time. The current motion complies precisely with Rule 60(b); the first sentence of the motion "moves for a limited remand *to make a motion* under Rule 60(b)(5), SCRCP." (Motion at 1) (emphasis added).

<sup>1</sup> Rule 60(b), SCRCP provides in pertinent part: "*During the pendency of an appeal*, leave to make the motion must be obtained from the appellate court." (Emphasis added).

**II. The trial court entered a judgment of specific performance on the contract found by the jury.**

The case was tried to the jury under a special verdict form. The jury found a contract for \$2.9 Million (Motion Tab A at 4). The trial court immediately heard and denied all post-trial motions by Defendant. Thereafter, the trial court entered judgment by attaching the completed verdict form to a Form 4 Judgment and handwriting thereon: "Judgment for the Defendant under specific performance doctrine." (Motion Tab A at 1).

Defendant contends the judgment is "plain on its face." (Ret. at 3). Plaintiff agrees. The trial court plainly granted Defendant specific performance on the contract found by the jury. Nothing permits any other conclusion.

Defendant posits alternative "faces" for the judgment, but he never shows that face plainly. First, he suggests the judgment was for "a right to purchase stock *up to that amount*." (Ret. at 2) (emphasis added). Second, he suggests the judgment was *not* for him "to pay [Plaintiff] a specific sum for a specific percentage of [Plaintiff's] stock in an *all or nothing deal*." (Ret. at 3) (emphasis added). These suggestions hint at a judgment for some other sum and/or some other percentage of stock, perhaps at his option to decide the amount or percentage of stock, but he never states this plainly. Nothing in the judgment or the attached jury verdict remotely supports these suggestions.

Third, and perhaps to make his position somewhat more precise, Defendant suggests the specific performance judgment is for "a cause of action alleged in [Defendant's Counterclaim] with a request for specific relief." (Ret. at 3). Curiously, Defendant never plainly identifies this

counterclaim/cause of action. More importantly, nothing in the judgment or the attached jury verdict supports this suggestion.<sup>2</sup>

The only cause of action that fits Defendant's "specific relief" definition is the Eleventh Defense and Counterclaim in his Revised Amended Answer and Counterclaim. (Tab 1 at pp.6-10). There, Defendant alleged alternative contract theories and sought specific performance of them. (Id.).

Defendant demanded a jury trial on his counterclaims. The case was placed on the jury roster, called to trial at a jury term of Common Pleas, and tried before a jury, all without any objection by Defendant. The trial court charged the jury on contract law and submitted all contract issues to the jury, including the question of whether there was a contract and, if so, for how much (again without any objection by Defendant). The jury specifically found that the only contract was for \$2.9 Million. Thus, without any objection by Defendant, the jury considered and rejected the theories upon which Defendant now relies to construe the judgment, which is not subject to construction in any event, because it is "plain on its face."

In short, the only contract for which the trial court could grant specific performance was the \$2.9 Million contract found by the jury in the verdict form attached to the judgment. There is no finding of any other contract for which the trial could have granted specific performance. See *Ingram v. Kasey, Assocs.*, 531 S.E.2d 287, 291 (S.C. 2000) (to order specific performance, the court must find there is an agreement).<sup>3</sup>

---

<sup>2</sup> Though unclear, Defendant may be suggesting or attempting to create some type of ambiguity in the judgment. Any such suggestion or attempt manifestly fails because *inter alia*: (1) the judgment is "plain on its face" and grants specific performance of the \$2.9 Million contract found by the jury; and (2) Defendant waived any "ambiguity" issue by failing to make a post-trial motion on that basis. *Nelums v. Cousins*, 403 S.E.2d 681, 681-682 (S.C. App. 1991) (any contention that order or judgment is unclear must first be raised to the trial court in a Rule 59(e) motion).

<sup>3</sup> Quoting *Hanner v. Hillcrest Land Co.*, 163 S.E. 727, 728 (S.C. 1932). Defendant asserts: "[i]t is the settled rule of this Court that an appeal will not lie from a verdict; it must be from a judgment...." (Ret. at 3). The purpose of this assertion quotation is unclear. *Hanner* plainly and only holds that an appeal cannot be commenced until after judgment has been entered on a verdict. Here, judgment has been entered on the verdict.

**III. Plaintiff properly tendered performance of the judgment entered by the court.**

At various places throughout his Return, Defendant complains that Plaintiff's tender of judgment was ineffective, because it imposed an "arbitrary" time, place, and form of payment. (Args. I and II at Ret. 2, 2-3).

The tender required any payment by check to be "collected funds," e.g. a certified check. (Motion at Tab B). Any reasonable payor or payee would expect (and even demand) that a check for \$2.9 Million be in "collected funds." There is manifestly nothing arbitrary about this.

The tender identified the Greenville office of Plaintiff's attorney as the place of tender. There is manifestly nothing arbitrary about this. The case was tried in Greenville; Defendant maintains a residence (condominium) in Greenville; and his attorney's office is in Greenville.

There is manifestly nothing arbitrary about the tender's time of performance. To obtain specific performance, the party seeking it must show he "has been *and remains able and willing* to perform [his] part of the contract. *Ingram*, 531 S.E.2d at 291 (emphasis added). The Supreme Court has rejected Defendant's implicit assertion that he is entitled to some "reasonable time" after obtaining the judgment of specific performance to perform his part of the contract. *Id.* at 291, n.1, *rev'g* 493 S.E.2d 856 (S.C. App. 1997).

Defendant has never suggested what would be a reasonable time, place, or form of payment, nor does he do so here. More importantly, he has never said he was or remains "ready, willing, and able" to perform the contract found by the jury under *any* reasonable circumstances, nor does he do so here. The reason is clear. Defendant either cannot or will not pay the \$2.9 Million found by the jury at any reasonable time or place with any commercially reasonable form of payment. This is precisely why the judgment should be marked satisfied.



Plaintiff remains "ready, willing, and able" to perform the contract found by the jury. Plaintiff challenges Defendant to tell this Court that he is "ready, willing, and able" to do so at *any* reasonable time in the very near future, at *any* reasonable place, and with *any* commercially reasonable form of payment. If he does so, Plaintiff will appear and perform at that time and place. If he does not, his complaints about arbitrariness are meaningless and spurious.

**IV. There is nothing inconsistent about tendering performance of a judgment during the pendency of an appeal from that judgment.**

Plaintiff specifically advised Defendant that it would withdraw the current appeal if he accepted the tendered performance of judgment. There is nothing inconsistent about this. If Defendant accepts the challenge made in Argument III, *supra*, and the parties close thereon, Plaintiff will withdraw the current appeal. There is nothing inconsistent about this either.

Defendant misstates Plaintiffs' position to create a non-existent inconsistency. Plaintiff continues to assert there is no binding contract with Defendant, but its tender is not based on the contrary or "repudiating" position that a binding contract does exist. (Ret. at 1, 3-4). Rather, its tender is based on the existence of the judgment on the contract found by the jury.

As a party to the judgment, Plaintiff has the absolute right to satisfy it rather than continue the current appeal, even if it believes the judgment is wrong. In like manner, Defendant has the right to accept the tender and forego his appeal, or reject the tender and appeal to establish a different judgment or otherwise reverse it, but the judgment entered on the contract found by the jury must be marked satisfied under either choice by Defendant.<sup>4</sup>

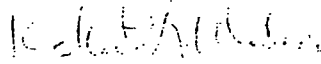
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<sup>4</sup> Defendant seemingly asserts that Plaintiff's tender is barred by the doctrine of judicial estoppel, because Plaintiff's appeal is pending before this Court. (Ret. at 2). Judicial estoppel requires a showing *inter alia* of two "totally inconsistent" by the same party, taken in the same proceeding, as part of "an intentional effort to mislead the court." *Cochran v. Brown*, 592 S.E.2d 629, 632 (S.C. 2004). Defendant concedes there has been no intentional effort to mislead the court (Ret. at 2, n.1), thereby negating any claim for judicial estoppel. Moreover, Plaintiff's positions are not inconsistent and, in particular, they are not "totally inconsistent." Rather, they are alternative positions that hinge entirely upon whether Defendant accepts the tender of the judgment he obtained against Plaintiff.

**V. Conclusion**

For all of the foregoing reasons, and for the reasons set forth in Plaintiff's motion, it is respectfully submitted that this Court should grant the limited remand motion for Plaintiff to make its Rule 60(b)(5), SCRCP motion.

Respectfully Submitted,



Robert L. Widener  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

Attorneys for Appellant-Respondent

December 23, 2008  
Columbia, SC



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

North American Rescue Products, Inc.      Civil Action No. 2007-CP-23-3206

Plaintiff,

vs.

P.J. Richardson,

Defendant.

**REVISED AMENDED ANSWER &  
COUNTERCLAIM**  
(Jury Trial Requested)

Defendant, P.J. Richardson ("Richardson"), answering the First Amended Complaint (treated simply as "Complaint") of Plaintiff would respectfully show as follows:

Unless specifically admitted, all allegations in the Complaint are denied.

**FOR A FIRST DEFENSE**

1. The allegations contained in Paragraph 1 are admitted.
2. The allegations contained in Paragraph 2 are admitted.
3. In relation to the allegations in Paragraph 3, Richardson admits that he owns a condominium in Greenville County, South Carolina, where he intermittently stays while visiting the area.
4. In relation to the allegations in Paragraph 4, Richardson admits that he owns an option, or otherwise possesses a right to own and/or purchase, shares in Plaintiff, which is headquartered in Greenville County.
5. In relation to the allegations in Paragraph 5, Richardson admits that he has demanded that he be allowed to purchase 7.5% of the stock of Plaintiff at one cent (\$.01) per share. In the alternative, Richardson also admits that he would be entitled to own no less than 7.5% of NARP's stock if the parties' option agreement is deemed unenforceable. To the

extent the allegations contained in Paragraph 5 of the Complaint differ from the same, they are denied.

6. In relation to the allegations contained in Paragraph 6, Richardson admits that Plaintiff has wrongfully denied the existence of an agreement between North American Rescue Products, Inc. ("NARP") and Richardson, wherein 7.5% of the stock of Plaintiff would be delivered to Richardson at a price of one cent (\$.01) per share. Alternatively, if the option agreement is deemed unenforceable, Richardson further admits that NARP has wrongfully refused to acknowledge his 7.5% ownership interest in NARP under a prior stock agreement. To the extent the allegations contained in Paragraph 6 differ from the same, they are denied.

7. With respect to the allegations contained in Paragraph 7 of the Complaint, Richardson is informed and believes that no response is necessary. To the extent a response is required, the Paragraph's allegations are denied.

8. The allegations contained in Paragraph 8 of the Complaint are denied.

9. The allegations contained in Paragraph 9 of the Complaint are denied.

10. With respect to the allegations contained in Paragraph 10 of the Complaint, Richardson is informed and believes that no response is necessary. To the extent a response is required, the Paragraph's allegations are denied.

11. With respect to the allegations contained in Paragraph 11 of the Complaint, Richardson admits that he was elected to the board of directors of Plaintiff and was compensated for the same. In relation to the more specific allegations, Richardson craves reference to the applicable business documents that would reflect such information.

12. In response to the allegations contained in Paragraph 12 of the Complaint, Richardson admits that a meeting occurred in Atlanta, Georgia in the fall of 2004 and that legal counsel was present. All remaining allegations in the Paragraph are denied.

13. In response to the allegations contained in Paragraph 13 of the Complaint, Richardson admits that he delivered to Robert Castellani a document entitled, "Agreement of Termination, Settlement and Release." Richardson further admits that the document was consistent with the parties' agreement from Atlanta and was a component part of an overall agreement reached by the parties.

14. In relation to Paragraph 14 of the Complaint, Richardson craves reference to the document cited in the Paragraph. To the extent the Paragraph's allegations differ from the same, they are denied. Richardson would further show that the document cited in the Paragraph was a component part of an overall deal, which he was informed and believed, was reached by the parties.

15. The allegations contained in Paragraph 15 of the Complaint constitute conclusions of law, for which no response is necessary. However, Richardson does acknowledge that, as a member of the Board of Directors of NARP, he owed certain duties and obligations to NARP, which he honored.

16. Richardson denies the allegations contained in Paragraph 16 of the Complaint.

17. Richardson denies the allegations contained in Paragraph 17 of the Complaint.

18. Richardson denies the allegations contained in Paragraph 18 of the Complaint and the Prayer for Relief.

**FOR A SECOND DEFENSE**  
**(Failure to State a Claim)**

- 19. The preceding paragraphs are incorporated herein by reference.
- 20. Plaintiff's claims for relief fail to state a claim upon which relief can be granted.

**FOR A THIRD DEFENSE**  
**(Estoppel)**

- 21. The preceding paragraphs are incorporated herein by reference.
- 22. Plaintiff's claims for relief are barred in whole, or in part, by the doctrine of estoppel.

**FOR A FOURTH DEFENSE**  
**(Waiver)**

- 23. The preceding paragraphs are incorporated herein by reference.
- 24. Plaintiff's claims for relief are barred in whole, or in part, by the doctrine of waiver.

**FOR A FIFTH DEFENSE**  
**(Statute of Frauds)**

- 25. The preceding paragraphs are incorporated herein by reference.
- 26. Plaintiff's claims for relief are barred in whole, or in part, by the statute of frauds.

**FOR A SIXTH DEFENSE**  
**(Ratification)**

- 27. The preceding paragraphs are incorporated herein by reference.
- 28. Plaintiff's claims for relief are barred in whole, or in part, by the doctrine of ratification.

**FOR A SEVENTH DEFENSE**  
**(Improper Declaratory Relief)**

29. The preceding paragraphs are incorporated herein by reference.

30. Under the facts of the instant case, Plaintiff's claims for declaratory relief are improper under the South Carolina Declaratory Judgment Statute as codified at S.C. Code §15-53-10 *et seq.*

**IN THE ALTERNATIVE FOR AN EIGHTH DEFENSE**  
**(Mutual Mistake)**

31. The preceding paragraphs are incorporated herein by reference.

32. In the alternative, to the extent Plaintiff relies upon the doctrine of mutual mistake, and to the extent a finding of the same is made by the fact-finder in this case, Richardson would be entitled to be restored to his original position of owning no less than 7.5% of the outstanding stock in NARP, because any agreements terminating, superseding, or modifying that ownership interest would be null and void based upon Plaintiff's accepted proof of mutual mistake:

**FOR A NINTH DEFENSE**  
**(Statute of Limitations)**

33. The preceding paragraphs are incorporated herein by reference.

34. Plaintiff's claim for breach of fiduciary duty is barred by the applicable statute of limitations.

**FOR A TENTH DEFENSE**  
**(Laches)**

35. The preceding paragraphs are incorporated herein by reference.

36. Plaintiff's claim for breach of fiduciary duty is barred by the doctrine of laches.



**FOR AN ELEVENTH DEFENSE & BY WAY OF COUNTERCLAIM**  
**(Breach of Contract & Specific Performance)**

37. The preceding paragraphs are incorporated herein by reference.

38. NARP is a Delaware corporation with its principal place of business in Greenville, South Carolina. NARP is owned, in part, by Robert Castellani ("Castellani").

39. Richardson and Castellani first met in 1994. At that time, NARP was in the business of selling stretchers for use by the military.

40. Richardson owned and operated a company named Reeves Manufacturing, Inc. (treated herein as "Reeves").

41. Between 1996 and 2000, Reeves and NARP began doing business with each other.

42. Cross-selling their respective customers became an important aspect of the two companies' business relationship.

43. While each company sold related products, NARP and Reeves often had different customers.

44. Frequently, Reeves' customers would buy from NARP and vice versa.

45. In January of 2000, Richardson (on behalf of Reeves and himself) and Castellani (on behalf of NARP and himself) executed an agreement (treated herein as "2000 Agreement") to formalize their respective companies' business relationship.

46. A copy of the parties' 2000 Agreement is attached hereto as Exhibit A and incorporated herein by reference.

47. Pursuant to the 2000 Agreement, NARP and Reeves agreed to pay each other commissions equal to 25% of the taxable income of their companies for cross-selling each other's respective products. (Exhibit A, p.1, ¶4.)

48. Also according to the 2000 Agreement, Richardson and Castellani each agreed on behalf of Reeves and NARP to issue to each other 25% of the capital stock of their respective companies. (Exhibit A, p. 1, ¶7.) Although this stock was never physically issued and exchanged, it was understood that each held a 25% interest in the other's company.

49. For years the parties operated under the 2000 Agreement and cooperatively assisted each other in growing both companies. Throughout this time, both Richardson and Castellani acknowledged a 25% ownership interest in each other's companies.

50. Several years later, the parties began to rethink the 25% ownership interest in each other's companies.

51. The parties agreed to amend the percentage each owned in the other party's company from a 25% to 7.5% ownership interest. No formal writing was ever executed in relation to the reduction of the parties' ownership interest but both parties agree such a reduction in ownership occurred.

52. Throughout the fall of 2004, the parties discussed treating Richardson's ownership interest as an option to purchase stock. The parties exchanged draft option agreements reflecting their agreement that Richardson owned a 7.5% equity interest in NARP. A copy of these draft option agreements is attached hereto as Exhibit B. The draft option agreements reflected that Richardson would have the right to purchase 7.5% of NARP's stock at \$0.01 per share.

53. In October of 2004, the parties met in Atlanta ("Atlanta Meeting") and once again endeavored to restructure their respective ownership interests in each other's companies.

54. Out of this meeting, the parties reached a new agreement. Under the new arrangement, Castellani agreed to release his interest in Reeves Manufacturing ("Reeves") in exchange for 7.5% of the proceeds from the sale of Reeves, which was imminently to occur. Richardson likewise agreed to release his interest in NARP in exchange for an option to purchase 7.5% of the stock in NARP ("Option Agreement"). Each term of the parties' overall agreement was dependent upon the other terms. Under such terms, but only under such terms, Richardson agreed to release his ownership interest in NARP in exchange for an option to purchase 7.5% of NARP's stock for \$.01 per share, as previously discussed by the parties.

55. In November of 2004, the parties executed a companion document entitled: "Termination, Settlement and Release" (treated herein as "Termination Agreement.")

56. A copy of this agreement is attached hereto as Exhibit C and is incorporated herein by reference.

57. Under the terms and conditions of the agreement arising out of the Atlanta Meeting, both parties released each other from obligations owed under the 2000 Agreement as modified. (Exhibit C, p. 1, ¶3.) However, as also contemplated by the parties in Atlanta, the Termination Agreement specifically reserved Richardson's option right to purchase 7.5% of the outstanding NARP stock.

58. For Richardson, the option to purchase 7.5% of the outstanding NARP stock for one cent (\$.01) per share constituted a material term of the overall agreement reached by the parties as arising out of the Atlanta meeting.

59. Richardson would not have executed the Termination Agreement if NARP had not promised to execute the Option Agreement (or some other mutually acceptable means of preserving his 7.5% interest in NARP in exchange for 7.5% of the proceeds of the Reeves sale) and if he did not believe the parties otherwise had a binding agreement embracing all component parts of the overall agreement.

60. NARP and Castellani now contend that Richardson has neither a 7.5% ownership interest in NARP nor an option to purchase 7.5% of NARP's outstanding stock.

61. Richardson has made a demand to purchase 7.5% of NARP's outstanding stock at one cent (\$.01) per share, as previously agreed upon by the parties.

62. The parties' overall agreement arising out of the Atlanta meeting, including Richardson's Option Agreement, constitute valid and binding terms of a contract between the parties.

63. By and through its attorney, NARP has refused to honor Richardson's right to purchase 7.5% of NARP's outstanding stock for one cent (\$.01) per share. However, NARP simultaneously contends (mistakenly) that Richardson has released his interest in NARP.

64. NARP has, therefore, breached the overall agreement including the Option Agreement with Richardson.

65. Through the Option Agreement, Richardson has a right to own 7.5% of the outstanding stock in NARP; such stock constitutes a unique property interest for which money damages may not adequately compensate Richardson.

66. Richardson is entitled to specific performance of the overall agreement and the Option Contract along with money damages accruing during the interim period during which Plaintiff has failed to perform.

67. Alternatively, Richardson is entitled to recoup money damages from NARP in an amount equivalent to the value of his 7.5% option interest of the NARP stock along with any consequential or interim damages.

68. NARP has taken the position that the Option Agreement and the remaining documents memorializing the balance of the components of the overall agreement fail to constitute enforceable agreements. If true, Richardson would revert to his prior ownership interest of 7.5% of NARP. Thus, Richardson is alternatively entitled to specific performance of his prior agreement with NARP wherein he possessed a 7.5% ownership interest of the NARP stock.

69. Alternatively, Richardson would be entitled to money damages in an amount equal to no less than 7.5% of the NARP stock as determined by a jury along with all payments he would have been entitled to but did not receive had the parties not attempted to terminate the 2000 Agreement in the first instance.

**FOR A TENTH DEFENSE & BY WAY OF COUNTERCLAIM**  
**(Promissory Estoppel)**

70. The preceding paragraphs are incorporated herein by reference.

71. By and through Castellani, Plaintiff made an unambiguous promise that Richardson possessed a 7.5% ownership interest in NARP.

72. By and through Castellani, Plaintiff further made an unambiguous promise to Richardson that he would be able to purchase 7.5% of NARP's stock for one cent (\$.01) per share.

73. Richardson reasonably relied upon Plaintiff and/or Castellani's promise (on Plaintiff's behalf) with respect to his ownership interest in NARP.

74. Richardson reasonably relied upon Plaintiff and/or Castellani's promise (on Plaintiff's behalf) with respect to his ability to purchase 7.5% of NARP's outstanding stock.

75. Richardson's reliance on Plaintiff's/Castellani's promises in both regards was expected and foreseeable by Plaintiff and Castellani.

76. Richardson has sustained financial injury as a result of his reliance upon Castellani's/Plaintiff's unambiguous promises.

77. Accordingly, Richardson is entitled to recover damages in an amount that would restore him to the position he would have attained had Plaintiff and Castellani fulfilled their promise.

WHEREFORE, having fully answered the Complaint of the Plaintiff, Defendant prays  
for the following:

- A. A dismissal of Plaintiff's Complaint with prejudice;
- B. The relief of specific performance as requested herein;
- C. Alternatively, damages in an amount determined by the jury;
- D. All other relief this Court deems just and proper.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: *RS*

A. M. Quattlebaum, Jr. (SC Bar No. 013048)  
E-Mail Address: marvin.quattlebaum@nelsonmullins.com  
Rivers S. Stilwell (SC Bar No. 002108)  
E-Mail Address: rivers.stilwell@nelsonmullins.com  
Lane W. Davis (SC Bar No. 68796)  
E-Mail Address: lane.davis@nelsonmullins.com  
104 South Main Street, Suite 900  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 250-2300

Attorneys for P.J. Richardson

Greenville, South Carolina

July 23, 2008

# **EXHIBIT G**

**(January 1, 2000 Agreement)**



**OUTLINE OF BUSINESS RELATIONSHIP BETWEEN  
NORTH AMERICAN RESCUE PRODUCTS, INC. AND REEVES MANUFACTURING**

Parties:      **NARP** - North American Rescue Products, Inc., an S-Corporation, organized in South Carolina.  
              **RMI** - Reeves Manufacturing, Inc., a C-Corporation, organized in Maryland.  
              **RAC** - Robert A. Castellani  
              **PJR** - P.J. Richardson

1.    **RMI Business:**      RMI is in the business of designing, manufacturing, and selling certain emergency medical and rescue products. (e.g. stretcher, patient immobilization items, decontamination systems, air shelter)
2.    **NARP Business:**      NARP is in the business of designing, manufacturing, and selling certain emergency medical and rescue products. (e.g. stretcher, patient examination lights, laryngoscopes)
3.    **Cross Selling Activities:**      NARP and RMI products are related in their use, but many of their customers are different. On some occasions NARP sells RMI products directly and RMI sells products to NARP directly. Additionally, on occasions NARP customers buy directly from RMI and RMI customers buy directly from NARP. The cross selling has become an important part of each company's business, and it would work a hardship on either if it ceased. It is in their best interest for the cross selling to continue.
4.    **Commissions:**      NARP will pay over to PJR and RMI will pay over to RAC commissions for selling their respective products. The commission amount shall be equal to 25% of the taxable income (taxable income shall have the meaning set forth in 63 of the Internal Revenue Code of 1986 (Code) calculation before the commission payment. The payment shall be made as payment to independent contractors and not wages. Payments shall be made quarterly on or before 30th day following the end of the each calendar quarter, with adjustment according to the company's federal income tax returns to be made in the succeeding year's payments. These payments shall begin for the 4<sup>th</sup> quarter 1999.
5.    **Independence of Management:**      RMI and NARP shall be independently managed and neither PJR nor RAC shall have the right to interfere with the business practices of the company paying the commission. RMI and NARP, however, shall engage in reasonable management practices of corporations, the stock of which is traded in the public markets in determining and paying over compensation of their respective employees, capitalization of expenditures, inventory, and expenses.
6.    **Termination of Commission:**      If either NARP or RMI determines that payment of the commission amounts is not in the best interest of the company then they shall notify RPJ or RAC, as the case may be, of their desire to terminate the commission arrangement. Within 30 days of notice the terminating company shall pay a terminated party an amount equal to 10% of the arithmetic median of such company's annual gross sales (median shall be calculated over the period of commission arrangement outlined above).
7.    **Restricted Stock:**      RMI shall issue RAC and NARP shall issue PJR capital stock to 25% (fully diluted) of its issued stock of all classes. Such stock shall be subject to a right by either company to purchase the issued if the commission arrangement between RMI and RAC or NARP and PJR is terminated. The right shall be exercised by notice to the holder of the stock. In the instance the terminating company shall pay \$100.00 to the person for such stock. If a company exercises its right to purchase the stock and it enters into an agreement to sell or consummate a transaction to sell a material portion of its property other than in the ordinary course of its business or PJR in the case of RMI and RAC in the case of NARP (directly or indirectly through related parties or a series of related transitions) enter into an agreement to sell or otherwise consummate a

SUBJECT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT OR THE FEDERAL  
ARBITRATION ACT

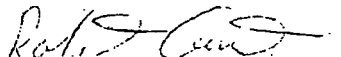
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DEF\_002797

transaction selling \* capital stock they hold in RMI and NA respectively, then the terminated stockholder shall be paid a portion of any consideration received as if they still owned the stock; this provision shall be for a period of the two years from the date of the stock purchased at the \$100.00 price.

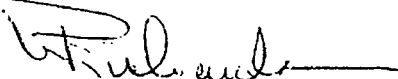
8. **General Stock Rights:** PJR in respect to NARP and RAC in respect to RMI shall not transfer their stock without first offering it for purchase at the same price and terms. If the stockholders of RMI or NARP sell or enter into an agreement to sell more than 50% of the issued of the company, their PJR in respect to NARP and RAC in respect to RMI shall receive a prorata amount of the consideration for such sales (e.g. a sale of 50% of a company's stock for \$1,000 would trigger a right to payment of \$250 to the stockholder holding restricted under the agreement). The holder of restricted stock shall take no action to adversely affect any tax election made by the company which stock he holds.
9. **Arbitration of Disputes:** Any dispute shall be mediated and if not resolved referred to arbitration before only one arbitrator (an experienced commercial lawyer) to the exclusion of the courts. Any arbitration shall proceed in accordance with the current CPR Non-Administered Arbitration Rules in effect on the date of this agreement. The place of arbitration shall be Pickens County, South Carolina. The prevailing parties in arbitration shall be entitled to receive from the other arbitration expenses, including reasonable attorney's fees. This provision shall also apply to the extent of any action taken in a court of law. Judgment upon an arbitrator's decision may be entered by any court having jurisdiction over the affected party.

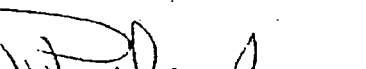
Date: 1-1-00  
Approved:  
North American Rescue Products, Inc.

By:   
Robert A. Castellani, President

By:   
Robert A. Castellani

Date: 1-1-00  
Approved:  
Reeves Manufacturing, Inc.

By:   
P.J. Richardson, President

By:   
P.J. Richardson

SUBJECT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT OR THE FEDERAL  
ARBITRATION ACT

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# **EXHIBIT H**

**(Transcript Excerpt)**

1 ROBERT CASTELLANI-CROSS BY MR. STILLWELL

2  
3 A I think so, I'm not sure.

4 Q Okay, you recognize the caption on it, these are  
5 Plaintiff's answers to interrogatories in this case,  
6 right?

7 A Okay, yeah.

8 Q And you recognize that caption there, NARP vs. P.J.  
9 Richardson. And that's Mr. Ellis' signature on the back  
10 there, right, in November of '07?

11 A That is correct.

12 Q Now, let's turn to page six. Start with number  
13 seven. This is the question we asked, Enumerate all  
14 agreements between the parties that relate to ownership  
15 interest. Do you see that?

16 A I do.

17 Q And the answer there, the first line says, Castellani  
18 and Richardson signed the January 1, 2000 outline of  
19 business relationship. So we asked you what ownership  
20 interest there was and you said the 2000 agreement, right?

21 A You asked to identify all agreements that were  
22 relating to ownership.

23 Q Okay. But the first answer that you gave out was the  
24 2000 agreement, right?

25 A That's related to ownership. We had a right to swap  
stock.

26 Q Okay. It's related to ownership. Let's look down

# **EXHIBIT I**

**(Transcript Excerpts)**

ROBERT CASTELLANI-CROSS BY MR. STILLWELL

237

A Yes.

Q Okay. And at that point, P. J. was already looking at selling his company, wasn't he?

A Yes.

Q Okay. And you weren't interested in selling yours, were you?

A No.

Q Were you interested -- you were interested, weren't you, in reducing P. J.'s ownership share in NARP because you wanted to keep owning NARP?

A Well, what was clear is he was backing out of the deal. Not backing out, that's the wrong way to phrase it. They were looking at retiring and 25 percent was a big slug to leave with me. As I had to make this transition more of a traditional type of business. So I didn't want to, as I started bringing employees on, have that much stock owned by someone who didn't have day-to-day dealing in my company. I just didn't have general investors come and give me money. So it was a mutual agreement.

Q Okay. A mutual agreement to reduce the 7.5 percent, right?

A Correct.

Q And part of your emphasis behind that was because you wanted to keep owning the company, right?

A Yes.

237

ROBERT CASTELLANI-CROSS BY MR. STILLWELL

238

Q Okay.

A But just so you know, I would have owned the company with 7 1/2 percent too.

Q Right, you just owned less of it?

A I would have owned less of it.

Q So y'all had mutually agreeable goals in the Charleston meeting?

A Correct.

Q And it ended up being you'd reduce the 25 percent agreement to 7 1/2, right?

A From 25 to 7 1/2, right.

Q Okay, 25 to 7 1/2?

A Correct.

Q Like for like?

A Correct.

Q And y'all did that deal and then you hugged and kissed and sealed the deal?

A Correct.

Q And that wasn't just a business meeting, it was a personal meeting, wasn't it?

A It was a time to get together and enjoy Charleston and stuff.

Q I mean, what I'm saying is it wasn't just money and corporations, there were feelings involved, too, weren't there?

238

ROBERT CASTELLANI-RECROSS BY MR. STILLWELL

331

correct?

A . Correct.

Q . And where it says me, 91.25 percent, that's your share of the company, right?

A . Yes.

Q . And the P. J., 7.5 percent, is that P. J.'s percentage of the company?

A . P. J. didn't own the company at that point. The 7.5 percent, again, is me treating him as an actual shareholder. If I shared -- I'm assuming this was the same just like when it was 25. All that number means is if I take \$700,000 out of the company, this could have been bonus, taxes or whatever, the disbursement was just like he was an owner. Again, I was treating him like my brother. That's all I'm doing.

Q . Okay. And this --

A . That doesn't say he owns 7 1/2 percent. That means if I'm going to disburse and I did that he would get 7 1/2 percent of the proceeds.

Q . And the 7.5 percent is what y'all agreed to in Charleston, correct?

A . We agreed to this in Charleston.

Q . Now, did I hear you say that the Dobson deal, the perfect deal in your words, was a simple matter?

A . Again, the context, it wasn't the perfect deal from

331



P.J. RICHARDSON-DIRECT BY MR. ELLIS

355

Bob have both testified about this, you all never actually finally entered into an option agreement, right?

A That is correct.

Q Okay. So, sir, isn't it true that the basis of your belief that you had a right to acquire 7 1/2 percent of the stock of NARP came only from the 2000 agreement, is that correct?

A Certainly, I can go back to the 2000 agreement. The 2000 agreement clearly states that was a 25 percent ownership. Bob and I both know, based on subsequent needs in our agreement, that it was no longer 25 percent, but was, in fact, 7 1/2 percent.

MR. STILLWELL: Your Honor, can we do something with the microphone.

THE COURT: Just move just a little bit further away and speak up.

THE WITNESS: Is that better?

BY MR. ELLIS:

Q Yes, sir. Now, just to be sure, we all agree that the 2000 outline that y'all entered into, we all agree that you all knew the percentage of that went from 25 percent to 7 1/2 percent, right?

A Yes, that's correct.

Q And what you're seeking from this Court is an enforcement of a right for you to be able to acquire 7 1/2

355

P.J. RICHARDSON-DIRECT BY MR. ELLIS

356

percent of the stock of North American Rescue Products,  
right?

A That is correct.

Q And the right that you're asserting to do that is  
actually not as is stated in your pleadings in this case,  
right?

A You know, you may have me there because I'm not an  
attorney. I have counsel that has filed those pleadings  
and I would say that's -- I have a base what's there, I  
have a right to 7 1/2 percent of the company.

Q Okay. Okay. What is the contract -- let me see if I  
can dig down, dig down and get to this is a little bit  
closer. This was North American Rescue Exhibit 2. As far  
as ownership interest go, this was the only agreement that  
you and Bob ever had as far as ownership, as far as saying  
this is what your ownership would be, this isn't the onl  
agreement that you all ever finally had an agreement on,  
right?

A That is correct.

Q Because out of Atlanta, at the Atlanta meeting when  
you all were talking about doing something different,  
there were still issues up in the air; isn't that correct.

A That is correct.

Q And those issues were never finally resolved, were  
they?

356

P.J. RICHARDSON-CROSS BY MR. STILLWELL

417

A Thank you.

Q I'm going to move to the beach house. Was this the agreement that y'all modified at the beach house?

A Yes, it is.

Q I guess I should call it a beach condo. I don't want to load that up. Was this the original handshake agreement put down on paper?

A Yes, it was.

Q Tell me about the beach house, about how you went from 25 to 7 1/2, 7 1/2, just briefly.

A Well, the three of us, Billie, Bob and myself, you know, Bob suggested we come down and see his house and while we were there have a meeting and discuss the ownership and business. We all were very busy, so it was an extremely difficult time. This was all, you know, post-911 where businesses -- both businesses were growing very, very quickly, to take a few days off was good. We were all very stressed. But it was a very relaxed meeting. It was no stress, nobody was being forced. We knew at that time, Billie and I, and we shared it with Bob that we were going to be selling our company, so it was just -- it was a good time to get together and share some quality time with a good friend.

Q So it was a mutual thing to go from 25 down to 7.5?

A Yes, it was.

428

P.J. RICHARDSON-CROSS BY MR. STILLWELL

420

THE COURT: I appreciate it. I'm going allow him to do so.

THE WITNESS: You know, at the beach house, we knew we had not exchanged any stock so it became a matter of -- well, at this point in time, is it really worth even going -- getting involved in that. There was so much trust in the relationship that it was just going to be easier to make a simple payment of proceeds when our sale to DHS was completed.

BY MR. STILLWELL:

Q When you sealed that deal at the beach house -- I'm going to try to get you out of the beach house in just a bit, when you sealed the deal at the beach house, was it a handshake or was it more?

A Well, it was certainly a handshake. But like in any of our meetings, when we would leave, we would hug, say hey, I love you, man. I mean, just friends, Christian brothers.

Q Now, I want to move on and talk about the option stuff. Considering y'all were coming out of the beach house and you still hadn't issued stock, did the term option start coming up? Do you remember Curt mentioning an option deal?

A I think the first time that I had heard option deals was either through Bob or from Curt.

431

P.J. RICHARDSON-CROSS BY MR. STILLWELL

425

would be our objective.

Q And that pay was a calculated piece of Reeves sale?

A Just a calculation of what 7 1/2 percent was of the Reeves sale.

Q And you've seen that number we put up, Exhibit 1, it was the \$415,000?

A Yes, sir.

Q And was that document, that Castellani thing, Castellani computation sent to Curt?

A Yes, it was.

Q And I heard Bob say he had never seen it, did you discuss the Castellani computations with Bob during this time?

A I discussed them with Bob on several times.

Q And this was after the termination agreement had already been sold?

A Yes.

Q Okay. Now, y'all never did have that simultaneous closing, did you?

A No, we did not.

Q Did you think, perhaps, at that simultaneous closing that Bob would sign that option agreement and you would give him the money?

A Yes.

Q Okay. But it never happened, did it?

436

P.J. RICHARDSON-DIRECT BY MR. STILLWELL

540

Q Okay. So Bob never told you that the termination agreement that he was talking to you about at Stax had, actually, been ratified by NARP?

A No, he never mentioned that at all.

Q Okay. Let me see if I get this stuff out if you'll give me a second. It will probably save some time. Okay. I think you said yesterday that that termination agreement, you just stuck it in your drawer?

A That's correct.

Q Oh, that was this morning, my days are actually running together. Okay. And that October 4 agreement from Rod and Curt, that was always sitting in your drawer?

A Yes, it was.

Q Okay. After Atlanta, I want to kind of switch facts on you. Talk about what you were doing on the DHS, okay? Who was doing your computations and stuff on your DHS side for you?

A Ed Kidner was the point guy on that.

Q Okay. Was he doing anything in that time after this termination agreement had been signed with calculating Bob's share of the Reeves proceeds?

A Well, yeah, we were looking at the various scenarios, the various ways depending on the -- what the actual purchase price of Reeves would be, what the tax ramification would be for Billie and I on our federal

551

P.J. RICHARDSON-DIRECT BY MR. STILLWELL

541

income tax.

Q Okay.

A As well as the new company and, you know -- they said for a small transaction, this was very complex.

Q Let me look at one. Now, at this point in time, you didn't have -- in December, for instance, before Reeves sold -- Reeves sold when?

A We closed on the transaction on the 5th of January of '05.

Q I think I actually ran onto another board here. I'm going to put this up, it might help you a little bit from this point forward. I promise you we'll move this board faster. You need some water?

A No.

Q Okay.

A At my age, you don't drink a lot of water in these situations.

Q All right. Let me see where we are. Sale of Reeves in January?

A Yes, '05.

Q Let's look at --

MR. STILLWELL: Mandy, this is the January 26 email. You got it? There you go.

BY MR. STILLWELL:

Q Exhibit 54, P. J. He's better with the numbers than

552

P.J. RICHARDSON-DIRECT BY MR. STILLWELL

542

I am now.

MR. STILLWELL: Can you blow that up for us, Mandy?

BY MR. STILLWELL:

Q January 26, P.J., is that after -- that's after the sale of Reeves has already been done, right?

A Yes, that's correct.

Q And this is you, Ed and Rick and you see Billie there. What are these numbers that you're sending to Ed?

A This was in response to a call from Ed, if I can gather the expenses associated with the Reeves transaction.

Q So you're sending Ed the figures so he can do the coding, right?

A That's correct.

Q Right down there at the bottom, it says, There are a couple calculations you will be working on, i.e., our tax exposure and the Castellani computation. What is the Castellani computation?

A That would be the computation of what 7 1/2 percent of the transaction was for Bob.

Q Okay.

MR. STILLWELL: And, Mandy, can you put up Exhibit 1 for just a millisecond?

BY MR. STILLWELL:

Q P.J., right, is that the Castellani computation?

553



P.J. RICHARDSON-DIRECT BY MR. STILLWELL

543

A Yes, it is.

Q Who did that?

A That was done by Ed Kidner.

Q Was that done, at least, partly on the numbers you sent him in that previous email?

A I would assume that was.

Q And that's what it came out to, the 415?

A Yes.

Q Did you ever hear anything back from them about whether the 415 was the right number or anything, I'm talking about Bob and Curt?

A I don't know that there was ever any disagreement on the number.

Q Okay. And the Castellani -- the sharing rate of 7 1/2 percent, that's the .075 right there?

A Yes.

Q What is that Castellani share right there, the share of the proceeds?

A That's the share -- that would be 7 1/2 percent of the share of the sale. I assume those are the deductions that would have been made.

Q I mean, in businessman terms, you are taking it off the bottom line, not the top line, right?

A Correct.

Q You're not seeing any before tax money?

554

P.J. RICHARDSON-DIRECT BY MR. STILLWELL

544

1 A Right.

2 Q Okay. All right. This money, this 415, still got  
3 that money?

4 A Yes, I do.

5 Q Okay. Mr. Ellis asked you a term, did you ever  
6 tender the money, which is a legal term. Did you ever  
7 offer the cash to Bob Castellani?

8 A Yes, I did.

9 Q When was that?

10 A When it was becoming more and more obvious that we  
11 were reaching -- that we had some problems, particularly,  
12 with the Dobson Ministry donation. And I said it would  
13 just seem to be a lot simpler to write you a check and  
14 just pay you this.

15 Q What did Bob say?

16 A No, Bob was stuck on the idea that -- the only option  
17 that he had given us that come from his side, first was  
18 the charitable, then it was the Dobson Ministry. There  
19 was never any other option that we had.

20 Q So you went from the -- I guess the first one was  
21 just pay the money, then a charity, then a --

22 A Right.

23 Q Okay. How many lines did he drive in there?

24 A Three.

25 Q Okay. The Dobson deal, let's talk about that.

555

P.J. RICHARDSON-CROSS BY MR. ELLIS

585

just do the best we can. Sir, the fact of the matter is, though, what you're trying to ask the Court to do is to make Bob Castellani do an agreement the way you want it done?

A I do not agree with that.

Q Okay. But if Bob doesn't agree to give you an option unless you do the charitable trust component of it, then there's not a three-legged agreement, right?

A If Bob would not negotiate further to change from Dobson Ministry and allow us to pay cash, then we have an impasse and I guess that's why we're here.

Q So are you here asking the Court and asking the jury to force Bob to continue to negotiate with you?

A No. I'm here asking the Court to allow us to get our 7 1/2 percent investment in the company.

Q Well, yes, sir, but the only final agreement where you and Bob had a meeting of the minds was back in 2000, right?

A I don't know that I agree with that either. We had a meeting of the minds in Charleston.

Q I apologize. I should have said with respect to the 2000 agreement. You're right, y'all did agree to amend it there, right? Let me just show you from page 81 of your deposition.

A Thank you.

596

# **EXHIBIT J**

**(Transcript Excerpts)**

P.J. RICHARDSON-CROSS BY MR. ELLIS

590

take -- that NARP just take cash instead of doing something differently, Mr. Castellani said no, that's not what I want to do, right?

A That is correct.

Q And as a person who has the privilege to enter into a contract or not enter into a contract, that's a decision he's free to make, right?

A Yes, he can make that request.

Q Even if that's something you don't agree with, right?

A Well, yeah, but, I mean, because the other party makes a decision doesn't mean that it would be finalized on our part. I would have to agree to that.

Q Well, yes, sir, if you wanted to do one thing and he didn't want to do it, you all don't have an agreement, right?

A That's correct.

Q Now, let me talk to you a little bit about the paying of cash to -- about the paying of cash. First of all, you talked about you still have the cash?

A Yes, sir.

Q How much do you have? I'm talking about when you talked about the 7 1/2 percent. What number is that?

A The amount we had up here and whatever interest would have accumulated. I don't know right off hand.

Q Have you maintained that in a separate account?

601

P.J. RICHARDSON-REDIRECT BY MR. STILLWELL

609

THE COURT: I appreciate that. I'll allow him to --

Why don't you rephrase the question.

MR. STILLWELL: Yes, sir, Your Honor.

BY MR. STILLWELL:

Q Was the three-legged stool ever performed?

A By that, you mean all three pieces were signed, no.

Q Okay. And does that change your mind as to whether there was a meeting of the minds agreeing to it or not?

A No, it doesn't change my mind.

Q The part about the money being in your's and Billie's account, could you cut a check for that money to Bob today if he would take it?

A Yes, I could.

Q Okay. Would you if he would give you a 7.5 percent interest in NARP?

A Yes, absolutely.

Q The government money from taxes that Mr. Ellis talked about, is that the same government that buys the military gear from NARP?

A Yes.

Q When Mr. Ellis asked you about investing in NARP in the spring of '05?

A Yes.

Q In connection with the Dobson deal, at that point, did you -- do you believe that you already had the right

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2007-CP-23-3206

|                                             |                           |
|---------------------------------------------|---------------------------|
| North American Rescue Products, Inc., ..... | Appellant/<br>Respondent, |
| v.                                          |                           |
| P.J. Richardson, .....                      | Respondent/<br>Appellant. |

PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent/Appellant P.J. Richardson, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Respondent/Appellant P.J. Richardson's Return to North  
American Rescue Product's Motion to Dismiss

Counsel Served:

Robert L. Widener, Esquire  
McNair Law Firm, PA  
Post Office Box 11390  
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
In the Court of Common Pleas  
Steven H. John, Circuit Court Judge

---

Case No. 07-CP-23-3206

---

North American Rescue Products, Inc.,.....Appellant-Respondent,

v.

P.J. Richardson,.....Respondent-Appellant.

---

APPELLANT-RESPONDENT'S REPLY TO  
RESPONDENT-APPELLANT'S RETURN TO  
APPELLANT-RESPONDENT'S MOTION TO DISMISS  
APPEAL OF RESPONDENT-APPELLANT

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In its Motion to Dismiss, Appellant-Respondent (NARP) sets forth the controlling statute, rule, and case law on the requirement that a would-be appellant must be "aggrieved" by the appealed order. (Motion at 1, 3; see also n.7, *infra*). Respondent-Appellant (PJ) never mentions nor discusses these controlling authorities. (Return, *passim*). Rather, PJ asserts he is "aggrieved" by *NARP's interpretation* of the appealed order and, therefore, he is entitled to appeal NARP's interpretation of the order. (Return, *passim*). Research reveals no authority supporting this theory, and PJ cites none. Moreover, South Carolina's statute, rule, and case law clearly establish that appeals lie only from orders and decisions by a trial court that aggrieve the would-be appellant. (See n.7, *infra*).



The motion to dismiss presents a narrow question: Can PJ appeal when he claims he is not aggrieved by the appealed order? PJ argues in his Brief of Appellant and in his Return to Motion to Dismiss that he is not aggrieved by the appealed order; he asks this Court to affirm that order. Having taken this position, he has no right to appeal the order and his appeal must be dismissed. *Cisson v. McWhorter*, 177 S.E.2d 603, 605 (S.C. 1970) (Appellate courts have a “duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court.”) (emphasis added); accord *Carson v. Adgar*, 486 S.E.2d 3, 6-7 (S.C. 1997); see also *Bivens v. Knight*, 173 S.E.2d 150, 153 (S.C. 1970) (dismissing appeal because appellant took position on appeal that rendered him not aggrieved by the appealed order).

This Reply reviews the numerous assertions and arguments made in the Return. This review demonstrates that the PJ’s appeal must be dismissed because he claims he is not aggrieved by the appealed order.

**I. The Opening Paragraph of the Return (p. 1).**

PJ asserts he will dismiss his appeal if this Court resolves the “order interpretation” dispute between the parties, *i.e.*, if this Court gives him the ruling sought in his appeal. (Return at 1). He repeats this “offer” throughout his Return. (Return at 4, 5, 5-6, 8, 10, 13). This is a meaningless offer from a party who has no right to appeal in the first place, because he does not claim to be aggrieved by the appealed order. (Return at 1). Moreover, any ruling on the parties’ dispute must first come from the trial court; an issue cannot be raised on appeal if it was not first presented to and ruled upon by the trial court. *Simpson v. World Fin. Corp. of S.C.*, 623 S.E.2d 877, 879 (S.C. App. 2006). Here, the trial court has never been presented with or ruled upon the parties’ dispute and, therefore, PJ cannot raise this issue for the first time on appeal.

After the jury's verdict, PJ moved the Court for a JNOV on the stock price set by the jury, and the trial court denied the motion:

[PJ]: Your Honor, I guess the only thing I can think of looking at this [the verdict form] is we'd ask for a JNOV based on the 13<sup>th</sup> jury doctrine for the Court *to reform the verdict in that the basis for the number* [\$2.9 Million] is something that I can't see already in evidence.

[Court]: In the amount?

[PJ]: Yes, sir, Your Honor.

[Court]: I do find there is *sufficient evidence* in the record which would *support the jury's verdict in the amount set forth* based upon the evidence presented. The different dates as far as the evaluation over a period of years that the jury could have used in this particular matter to arrive at that verdict. And I find it's well *within their discretion and the facts and evidence* in this case. And would respectfully decline to so grant your motion.

(Tab A, Trial Transcript at 915-916) (emphasis added). Rather than appeal (or even mention) the denial of this motion, PJ acts as if the motion was granted and "appeals" to ask this Court to affirm this imaginary granting of his post-verdict motion.

In an appended footnote, PJ asserts that granting the motion to dismiss will result in the parties' respective appeals moving forward on a different time line, and "[s]uch a division in the appeal would not serve judicial efficiency or economy." (Return at 1, n.1). This is not a valid reason for denying the motion to dismiss. Were it valid, there could never be a dismissal of a cross-appeal. In any event, the "division in the appeal" is easily remedied: (1) this Court could order that the time for PJ to seek rehearing of a dismissal order is held in abeyance until this

Court rules on NARP's appeal; or (2) PJ could request such an abeyance, to which NARP would and hereby does consent. This approach makes sense because, if NARP prevails in its appeal, the meaning of the judgment becomes a moot issue (NARP appeals the denial of its directed verdict motions and, if granted, the judgment would be changed to an outright "no contract" judgment for NARP).

**II. The "Background" Section of the Return (pp. 1-3).**

The opening paragraph of this section, and the appended footnote 2, summarizes PJ's interpretation of the judgment. The second paragraph attacks NARP's motion to dismiss as an attempt to change the "contract" between the parties. (Return at 2-3). NARP's motion to dismiss has nothing to do with any contract issues. It is based solely on PJ's attempt to appeal an order when he does not claim to be aggrieved by that order. The underlying issue revolves around the meaning of the judgment (not the meaning or terms of any contract). This underlying issue (meaning of the order) must first be presented to and decided by the trial court before there can be any appeal on that issue.

**III. The "Law/Analysis" Section of the Return (pp. 3-13).**

- A. NARP's prior motion for a limited remand did not seek any ruling from this Court on the meaning of the appealed order, nor does its motion to dismiss PJ's appeal.

In his Argument I(A) (Return at 3-8), PJ describes NARP's prior remand motion and its current motion to dismiss as an attempt "to have this Court give approval to NARP's far-fetched interpretation of the unambiguous judgment in this case" and "to have this Court condone NARP's unilateral alteration of the judgment in this case." (Return at 4). He thus argues the motion to dismiss is an impermissible request for a rehearing on this Court's denial of the prior remand motion. This argument is without merit.

NARP's remand motion never asked this Court to "approve" or "accept" NARP's reading of the appealed order. It simply asked that this Court to remand the case so that NARP could make a Rule 60(b) motion. NARP explained the parties' differing views of the judgment to explain the basis for the Rule 60(b) motion. (See Remand Motion, Exhibit C to Return).

NARP's current motion to dismiss also does not ask this Court to "approve" or "accept" NARP's reading of the appealed order. Rather, it simply asks this Court to apply the well-established statute, rule, and case law that a party cannot appeal unless he is "aggrieved" *by the appealed order*. PJ argues he is not aggrieved *by the appealed order*. Therefore, his appeal must be dismissed. *Bivens*, 173 S.E.2d at 153 (dismissing appeal because appellant took position on appeal that rendered him not aggrieved by the appealed order).

In short, NARP's remand motion did not seek any ruling from this Court on the meaning of the judgment, nor does its current motion to dismiss. Thus, NARP's current motion to dismiss is not a request for a rehearing on the remand motion. It presents an entirely different issue that did not exist at the time of the remand motion, because PJ had not yet filed his Appellant's Brief and taken the position that he is not aggrieved by the appealed order.

In his Argument I(B), PJ reviews the jury's verdict and the evidence to construct and support his interpretation of the judgment. He returns to this task in his Argument III. NARP addresses this issue later in connection with its reply to PJ's Argument III. Also in his Argument I(B), PJ makes two assertions that warrant a brief response here.

First, PJ argues that NARP's motion to dismiss "leaves out the critical detail that the parties differ as what the judgment means." (Return at 5). This is simply wrong. NARP notes the disagreement between the parties on the meaning of the judgment in its motion to dismiss. (Motion to Dismiss at 2, 4). In any event, the meaning of the judgment is irrelevant to the

motion to dismiss. Second, PJ argues he is aggrieved by NARP's interpretation because: "The contract cannot be rewritten now; not by the Court or the opposing party." (Return at 5). The motion to dismiss is not an attempt to rewrite anything, much less the "contract." The underlying issue is the meaning of the judgment, not the contract. The judgment defines the contract in actions over the questions of whether a contract exists and, if so, the terms of that contract. If there is any "rewriting" here, it is PJ's attempt to rewrite South Carolina's law that only a party aggrieved *by the order* can appeal, which is the basis of the motion to dismiss.

B. PJ is not an "aggrieved" party as required by South Carolina's law, and his cited authorities do not support his argument that he is an aggrieved party.

In his Argument II (Return at 8-11), PJ cites several authorities in support of his argument that: (1) he is aggrieved by NARP's reading of the order; and (2) he therefore can appeal to this Court and challenge NARP's reading of the order. This argument fails for two reasons. First, PJ ignores the statute, rule, and firmly established Supreme Court precedent upon which the motion to dismiss rests. Second, PJ's authorities do not support his argument.

Rather than address South Carolina's statute, rule, and case law on being "aggrieved" by the appealed order, PJ relies upon Black's Law Dictionary and American Jurisprudence. (Return at 10). Both are fine treatises but neither establishes South Carolina law and neither supports PJ's arguments.

PJ correctly quotes the seventh edition of Black's Law Dictionary as defining an aggrieved party as: "[a] party whose personal, pecuniary, or property rights have been adversely affected by *another person's actions* or by a court's decree or judgment." (Return at 10, *citing* BLACK'S LAW DICTIONARY 1144 (7<sup>th</sup> ed. 1999)) (emphasis added). PJ apparently believes the emphasized language establishes South Carolina law. It does not and cannot; that law is set forth in the statute, rule, and South Carolina cases decided under the statute and rule. See n.7, *infra*.

Moreover, Black's gives a general definition of the term; it does not attempt to define "aggrieved" for appellate purposes. Under South Carolina appellate law, an appellant must be aggrieved by the appealed order. *Id.* Black's reference to "another person's actions" simply recognizes the general rule that if one person aggrieves (harms) another, the injured person may have a claim against the other person, but this does not translate into a party being able to appeal without claiming to be aggrieved by the appealed order.

PJ also cites and partially quotes 5 AM. JUR. 2D *Appellate Review* § 243 (2007) for the proposition that "prevailing parties are permitted to appeal 'where the order of judgment in question is apparently favorable but is *actually adverse*.'" (Return at 10) (emphasis added). PJ does not claim the appealed order is "actually adverse," so the cited authority does not support his position here. Moreover, a fuller quotation of Am. Jur. supports the motion to dismiss:

As a general rule, the *prevailing party may not appeal* a decision in its favor.

One who has received in the trial court *all the relief that he or she sought* therein is *not aggrieved by the judgment and thus has no standing to appeal*. . . . However, a party who prevails at trial, but receives a judgment *only partly in his or her favor*, or a judgment which he or she believes is less favorable than it *should be*, may appeal. Thus, a plaintiff who has not received all the damages he or she sought may appeal as to the adequacy of damages, or the exclusion of testimony whose inclusion could affect the amount of damages awarded. . . .

The prevailing party in the lower court may also appeal where the order or judgment in question is apparently favorable but is *actually adverse*.

5 AM. JUR. 2D *Appellate Review* § 243 (2007) (emphasis added). Here, PJ claims he was the "prevailing party" and that he received "all the relief that he ... sought." Thus, he is "not aggrieved" by the order and "has no standing to appeal." PJ does not claim the appealed order ruled "only partly in his ... favor"; he does not claim the appealed order is "less favorable than it should be"; and he does not claim the appealed order "is actually adverse." In short, the rule in Am. Jur. supports dismissal of this appeal.

PJ also argues that a party who won in the trial court "can be aggrieved by a judgment or order in light of the effect or position or interpretation given to the judgment or order by the court or opposing party." (Return at 8). There is no doubt that a party can be aggrieved by a court's interpretation of an order, but that is not the situation here. PJ does not claim the trial court misinterpreted the appealed order, nor can he, *because the trial court has never been asked to interpret the order*. Moreover, PJ's cited authorities (two cases) do not support the argument that a party can be aggrieved by an opposing party's interpretation of an order such that he can appeal that interpretation directly without first presenting the issue to a trial court.

In *State v. Gregorie*, 528 S.E.2d 77 (S.C. 2000) (cited in Return at 8 and 10), the defendant was convicted of speeding in magistrate's court. The defendant appealed to the circuit court, which reversed the conviction because the state did not introduce any evidence of the applicable speed limit. Rather than dismiss the charges, the circuit remanded the case to the magistrate for a new trial. The defendant appealed the new trial order. He was aggrieved by the new trial order, because a new trial would be in violation of the constitutional prohibition against double jeopardy. The Supreme Court agreed and reversed the new trial order. *Gregorie* was nothing more than a straightforward appeal by a party who was aggrieved by the appealed order. It had nothing to do with any interpretation of any order by any party.

In *Cobb v. Benjamin*, 482 S.E.2d 589 (S.C. 1997) (cited in Return at 8 and 10), this Court addressed whether a covenant not to execute relieved the underinsured (UIM) carrier from any obligation to pay UIM benefits under the following facts:

1. The plaintiff was injured in an accident while driving her car, for which she had UIM coverage. 482 S.E.2d at 590.

2. The at-fault driver was a permissive user of a car belonging to another, resulting in liability coverage from the insurance on the borrowed car. This “borrowed car policy” had liability limits of \$15,000. *Id.*
  3. The plaintiff’s medical bills exceeded \$16,000, so she entered a covenant not to execute with the “borrowed car” liability carrier, whereby she released the at-fault driver but reserved the right to pursue her UIM coverage. *Id.* at 590-591.
  4. After this settlement, plaintiff discovered that the at-fault driver had his own liability coverage with his own insurer (the “at-fault driver liability policy”). *Id.* at 591.
  5. Plaintiff made claims against her UIM Carrier and the “at-fault driver liability policy,” and both denied coverage. *Id.*
  6. The UIM Carrier defended on two alternative grounds: (a) a “no coverage” defense based on the plaintiff’s failure to exhaust all liability coverage, including the “at-fault driver liability policy”; and (b) an alternative “limited coverage” defense based on any coverage being limited to the plaintiff having damages that exceeded the combined coverage under the “borrowed car policy” and the “at-fault driver policy.” *Id.* at 591, 592.
  7. The trial court held that the release of the at-fault driver also released his “at-fault driver policy.” *Id.* at 591. The plaintiff appealed and this Court affirmed. *Id.* at 591-592.
  8. The trial court also held that UIM coverage was available but only to the extent that plaintiff’s damages exceeded the combined coverage under the “borrowed car” and “at-fault driver” policies. In other words, the trial court rejected the UIM Carrier’s “no coverage” defense but accepted its alternative “limited coverage” defense. *Id.* at 591, 592.
- The UIM Carrier appealed the denial of its “no coverage” defense. The plaintiff argued the UIM Carrier was not “aggrieved” by the order, because the court had granted the UIM Carrier its



alternative “limited coverage” defense. *Id.* at 592. This Court summarily rejected the plaintiff’s “not aggrieved” argument, because the UIM Carrier had pled in the alternative and the trial court’s rejection of the primary “no coverage” defense aggrieved the UIM Carrier. *Id.* at 592-593. Thus, contrary to PJ’s description of *Cobb*, this Court did not hold the judgment “essentially provided the [UIM Carrier’s] requested relief.” (Return at 8-9, parenthetical description of holding in *Cobb*). Rather, this Court specifically rejected the argument that the UIM Carrier “was granted the relief [it] requested and is therefore not ‘aggrieved.’” *Cobb*, 482 S.E.2d at 592. This Court held the UIM Carrier was aggrieved, because the trial court rejected the primary and more complete “no coverage” defense. In short, *Cobb* was nothing more than a straightforward appeal by a party who was aggrieved by the appealed order, and it had nothing to do with any interpretation of any order by any party.

PJ also argues his “appeal is proper as it arises in a context that requires this Court to interpret the trial court’s judgment ordering specific performance, and it is proper for this Court to interpret the trial court’s order.” (Return at 9). PJ correctly cites three cases for the general proposition that an appellate court has the power to interpret a trial court’s order on appeal, but this proposition is irrelevant here. PJ does not claim to be aggrieved by the appealed order, and his cited cases do not support the argument that a party can appeal when aggrieved by the interpretation of an opposing party.

In *Wayburn v. Smith*, 211 S.E.2d 560 (S.C. 1975) (cited in Return at 9), the Supreme Court interpreted the appealed order to reject the *respondent’s* argument for *affirmance*.<sup>1</sup> In

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<sup>1</sup> In *Wayburn*, the circuit court refused a reference of all issues for trial by the master-in-equity, finding that some issues were at law and required a jury trial. The parties that moved for the reference were aggrieved by this refusal, appealed, and argued for reversal. The Supreme Court found that all issues were in equity, reversed the trial court, and remanded for a non-jury trial of all issues.

*Management Recruiters of Greenville v. R.J.R. Mech., Inc.*, 404 S.E.2d 908 (S.C. App. 1991)<sup>2</sup> (cited in Return at 9), this Court interpreted the appealed order to reject the *appellant's* argument for reversal. In *Petition of White*, 385 S.E.2d 211 (S.C. App. 1989) (cited in Return at 9), the parties disagreed over the meaning of a prior court order on child support. The parties presented their disagreement to the trial court, which construed the order in favor of the father. The mother was aggrieved by the trial court's construction of the prior order and appealed. This Court construed the prior order (not the appealed order) in accepting the *appellant's* argument for reversal of the appealed order. In each of these cases, the appellant argued for reversal not affirmance. In short, these cases do not support PJ's contention that he can appeal without being aggrieved by the appealed order.

C. PJ's interpretation of the appealed order is irrelevant to the issue presented in the motion to dismiss and is not a basis for resisting the motion to dismiss.

In his Argument III (Return at 11-13), PJ focuses on a recurring theme throughout his Return: his argument that his reading of the appealed order is correct. This issue is not properly before this Court, because it was not raised to or ruled upon by the trial court, and because PJ argues he is not aggrieved by the appealed order.

PJ relies on four cases in asserting his view of the appealed judgment. These cases do not support PJ's position that he can appeal from NARP's interpretation of the appealed judgment, which is the only and controlling issue under NARP's motion to dismiss PJ's appeal.

In *Fesmire v. Digh*, 683 S.E.2d 803 (S.C. App. 2009) (cited in Return at 11), the trial court ordered specific performance of an oral land sale contract under alternative theories that sufficient writings and/or sufficient part performance took the oral contract out of the statute of

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<sup>2</sup> In *Management Recruiters*, the trial court awarded treble damages and attorney's fees to the respondent and against the appellant under the South Carolina Personnel Placement Services Act. The appellant was aggrieved by this award, appealed, and argued for reversal. This Court affirmed.

frauds. The *appellant* (seller) in *Fesmire*, unlike PJ here, appealed and *sought reversal* of the trial court's ruling. This Court reversed, finding the trial court erred in admitting the writings to prove the contract, and finding there was insufficient evidence of part performance.

In *Campbell v. Carr*, 603 S.E.2d 625 (S.C. App. 2004) (cited in Return at 11-12), the trial court ordered specific performance of a written land sale contract. The *appellant* (seller) in *Campbell*, unlike PJ here, appealed and *sought reversal* of the appealed order. This Court reversed because the price was inadequate and the seller suffered from mental illness at the time of the contract, thereby making it inequitable to order specific performance.

In *McMaster v. Strickland*, 472 S.E.2d 623 (cited in Return at 12), the trial court awarded attorney's fees to the prevailing party in an action for specific performance of a written land sales contract. The *appellant* (losing party), unlike PJ here, appealed and *sought reversal* of the fee award. This Court reviewed the evidence and affirmed the award of fees.

The appellants in *Fesmire*, *Campbell*, and *McMaster*, unlike PJ here, appealed, claimed to be aggrieved by the appealed orders, and sought reversal of the appealed orders. *Fesmire*, *Campbell*, and *McMaster* teach that when an appellant seeks reversal of the appealed order, the appellate court will review the sufficiency of the evidence that supports the appealed order. Here, PJ does not seek reversal of the appealed order, so there is no basis for reviewing the evidence underlying the appealed order.

In *Reese v. Holmes*, 26 S.C. Eq. (5 Rich. Eq.) 531 (S.C. App. Eq. 1852) (cited in Return at 12), the Court affirmed the trial court in a one-sentence per curiam opinion: "We concur in the [trial court's] decree; and it is ordered, that the same be affirmed, and that the appeal be dismissed." 5 Rich. Eq. at 579. The report of this opinion includes a copy of the trial court's

very long and detailed order. The issue was who owned the property (slaves) of a decedent. The trial court ruled in favor of the decedent's daughter under the following legal analysis:

1. The decedent's estate was settled by a prior order of a Virginia court, and this order was *res judicata* as to all parties to the current litigation.<sup>3</sup>
2. The Virginia order was ambiguous.<sup>4</sup>
3. Therefore, the South Carolina court looked to the Virginia record to determine the holding of the Virginia order and the scope of its *res judicata* effect.
4. The South Carolina court determined that the Virginia court's prior and binding order required an award of the property to the decedent's daughter:

Here, PJ relies upon the evidence presented at trial to construe the appealed judgment in his favor. PJ, however, never claims the appealed judgment is ambiguous. Rather, he claims the appealed order is unambiguous. (Return at 4). Thus, PJ has specifically disavowed the predicate for reviewing the trial evidence, an ambiguous order. *Reading v. Ball*, 354 S.E.2d 397, 399 (S.C. App. 1987) (if order is ambiguous, may resort to record to construe it); *Drawdy v. Drawdy*, 328 S.E.2d 133, 135 (S.C. App. 1985) (same). Moreover, PJ cannot claim the appealed judgment is ambiguous, because he did not first seek clarification from the trial court. See *Revis v. Barrett*, 467 S.E.2d 460, 462-463 (S.C. App. 1996) (absent motion to clarify discrepancy in order, issue cannot be addressed on appeal); *Nellums v. Cousins*, 403 S.E.2d 681, 681-682 (S.C. App. 1991) (if order unclear, must move to clarify or issue is not preserved for appeal).

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<sup>3</sup> The trial court did not use the term "res judicata." Rather, it relied on a statement of law describing that doctrine: "The principle of *Muse vs. Edgerton* is, that the parties to the record are concluded by the record, from averring that any other right existed in them, or any of them, at the time of the proceeding, that the record itself imports." 5 Rich. Eq. at 541.

<sup>4</sup> The trial court did not use the term "ambiguous." Rather, it posed the issue: "This is the [Virginia] decree. If there is any thing equivocal in it, are we to stop there, and give it no effect beyond those things that are explicit, and clearly expressed? or are we at liberty to go into the record for its construction?" 5 Rich. Eq. at 549. The trial court found the Virginia decree was equivocal (ambiguous) and concluded it could review the record to determine the intent and scope of the Virginia court's ruling.

D. PJ's interpretation of the appealed order is manifestly without merit.

The meaning of the appealed order is irrelevant to the instant motion to dismiss. Accordingly, NARP will not burden this Court with a point-by-point refutation of PJ's arguments on the meaning of the appealed order unless requested by this Court. Two matters warrant a brief observation: (1) PJ does not argue the appealed order is ambiguous; and (2) a simple reading of the appealed order shows there is no ambiguity.

A trial court's judgment is to be construed like any other written instrument. *Petition of White*, 385 S.E.2d 211, 215 (S.C. App. 1989); *Weil v. Weil*, 382 S.E.2d 471, 474 (S.C. App. 1989). The controlling inquiry is the intent of the authoring judge. *O'Banner v. Westinghouse Elec. Corp.*, 459 S.E.2d 324, 327 (S.C. App. 1995). That intent must first be gleaned from the judgment itself, read as a whole and giving effect to every word in the judgment, not just isolated parts. *Eddins v. Eddins*, 403 S.E.2d 164, 166 (S.C. App. 1991); *Management Recruiters, Inc. v. R.J.R. Mechanical, Inc.*, 404 S.E.2d 908, 909 (S.C. App. 1991). If the judgment is not ambiguous, there is no room for construction and the judgment must be enforced as written. *Petition of White*, 385 S.E.2d at 215; *Weil*, 382 S.E.2d at 474. If the judgment is ambiguous, then the court may go beyond the four corners of the judgment to determine the authoring judge's intent. *Id.* PJ never argues the appealed order is ambiguous. Therefore, his attempt to go outside the judgment to show its meaning is manifestly without merit. (It is noteworthy and telling that PJ argues the appealed order is not ambiguous but finds it necessary to go outside the judgment and review the disputed evidence at trial to support his "reading" of the order).<sup>5</sup>

<sup>5</sup> Under PJ's theory and argument, the trial judge intended the following enforcement procedure for the appealed order: (a) ignore the jury's expressly stated stock price in Question 8; (b) order the trial transcript; (c) review the disputed testimony; (d) resolve that dispute; and (e) determine the terms of the contract, including the price. Nothing in the judgment hints at any such intent by the trial judge. To the contrary, the judgment plainly grants specific performance of the attached special verdict form, which plainly states PJ is entitled to buy the stock for \$2.9 Million. (See n.6, *infra*).

The judgment is the Form 4 and the verdict form. The trial judge attached the verdict form to the Form 4 and wrote thereon: "Judgment for [PJ] under specific performance doctrine." (Exhibits A and B to Return). The judge then entered the judgment. It is thus clear that the trial court based its judgment on the verdict form. When read as whole, the judgment unambiguously orders specific performance at a price of \$2,936,300 under the plain language of the judgment. This ends the inquiry and precludes PJ's attempt to rely on his interpretation of the disputed evidence presented at trial. *Petition of White*, 385 S.E.2d at 215; *Weil*, 382 S.E.2d at 474; see also *Reading v. Ball*, 354 S.E.2d 397, 399 (S.C. App. 1987) (if order is ambiguous, may resort to record to construe it); *Drawdy v. Drawdy*, 328 S.E.2d 133, 135 (S.C. App. 1985) (same).<sup>6</sup>

### CONCLUSION

Only a party aggrieved by an order may appeal that order. PJ does not claim to be aggrieved by the appealed order in his Brief of Appellant or in his Return to the Motion to Dismiss. To the contrary, PJ argues he is not aggrieved by the appealed order and requests this Court to affirm the appealed order. As a result, this Court has a "duty to reject" PJ's appeal under the controlling statute and rule, as well as under firmly established Supreme Court

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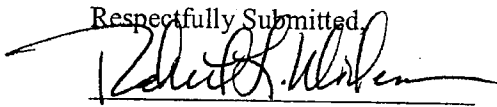
<sup>6</sup> PJ ignores Question 8 and the jury's answers:

- 8. Is [PJ] entitled to receive 7.5% of the outstanding capital stock of [NARP]?  
[ YES ]
- a. If you answer YES, what should [PJ] pay to [NARP] for 7.5% of the common capital stock?  
\$2,936,300.00

(Exhibit B to Return at 4). PJ asserts his interpretation of the appealed order, which is contrary to the above-quoted explicit finding by the jury, is based on undisputed evidence. This is simply wrong. There were substantial factual disputes at trial on the key matters, including whether NARP agreed in Charleston to accept cash from PJ for its stock. PJ argues that Question 8 (above) "was relevant only if the jury found that the termination provision ended the parties' rights under the 2000 agreement as modified in Charleston." (Return at 2, n.1). Nothing supports this assertion. Neither party objected to Question 8; neither party requested that it be answered only under the conditions now imagined by PJ; nothing in the Verdict Form supports this imaginary instruction; and the trial court never instructed the jury to approach Question 8 in this imaginary manner. Importantly, the Verdict Form demonstrates the trial court knew how to impose conditions on whether or not to answer a particular question, and further demonstrates it did not impose the conditions now imagined by PJ on Question 8. See Verdict Form Questions 5(a), 6(a), 7(a), 7(b)(i), and instructions for answering Questions 8 and 9 (Exh. B to Return at pp. 2-4).

precedent.<sup>7</sup> For this reason, and for the reasons set forth above and in Appellant-Respondent's Motion to Dismiss, it is respectfully submitted that the appeal of Respondent-Appellant should be dismissed.

Respectfully Submitted,

  
Robert L. Widener  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

Bernie W. Ellis  
McNair Law Firm, P.A.  
Post Office Box 447  
Greenville, South Carolina 29602  
(864) 271-4940

Attorneys for Appellant-Respondent

Columbia, SC  
February 4, 2010

<sup>7</sup> Appellate courts have a "duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court." *Cisson v. McWhorter*, 177 S.E.2d 603, 605 (S.C. 1970) (emphasis added); accord *Carson v. Adgar*, 486 S.E.2d 3, 6-7 (S.C. 1997). "Only a person aggrieved by a ruling may appeal." *Burns v. Gardner*, 493 S.E.2d 356, 361 (S.C. App. 1997) (emphasis added), applying Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.") and S.C. Code Ann. § 18-1-30 (1976) ("Any party aggrieved may appeal in the cases prescribed in this Title."). The right to appellate review "is restricted to persons or parties aggrieved by the decision below." *Bivens v. Knight*, 173 S.E.2d 150, 152 (S.C. 1970) (emphasis added); accord *First Union Nat'l Bank of S.C. v. Soden*, 511 S.E.2d 372, 378 (S.C. App. 1998) and *Burns v. Gardner*, 493 S.E.2d 356, 361 (S.C. App. 1997). A party is "aggrieved in a legal sense" if the order causes injury to his person or property by denying some personal or property right or by imposing a burden or obligation upon the party. *Bivens v. Knight*, 173 S.E.2d 150, 152 (S.C. 1970), citing *Parker v. Brown*, 10 S.E.2d 625 (S.C. 1940) and *Bowles v. Dannin*, 2 A.2d 892 (R.I. 1938); accord *Powell v. Bank of America*, 665 S.E.2d 237 (S.C. App. 2008).

A



1 would be sufficient for the jury and obviously was  
2 sufficient in their mind to find that though  
3 Mr. Richardson owed a fiduciary duty, he did not breach  
4 any duty to North American Rescue Products, Inc. And  
5 therefore, respectfully decline to grant your motion in  
6 that regard.

7 MR. ELLIS: Thank you, Your Honor.

8 THE COURT: Thank you, very much.

9 From the defense, gentlemen, I'll be glad to hear any  
10 motions on behalf of the defense at the time.

11 MR. STILLWELL: Your Honor, frankly, if I could, I  
12 need five minutes to discuss it with my client. The  
13 import of what the jury has told us in order for us to  
14 digest.

15 THE COURT: Okay. And I appreciate that. And I tell  
16 you what why don't you just do the best that you can do  
17 right now. I'm not going to give y'all additional time  
18 but if you would like to, while you're making motions and  
19 you have your co-counsel, Mr. Davis, to communicate with  
20 the clients, I'll be glad for him to do so.

21 MR. STILLWELL: Your Honor, I guess the only thing I  
22 can think of looking at this is we'd ask for a JNOV based  
23 on the 13th jury doctrine for the Court to reform the  
24 verdict in that the basis for the number is something that  
25 I can't see already in evidence.

1 THE COURT: In the amount?

2 MR. STILLWELL: Yes, sir, Your Honor.

3 THE COURT: All right, I would respectfully decline  
4 to do so. I do find that there is sufficient evidence in  
5 the record which would support the jury's verdicts in the  
6 amount set forth based upon the evidence presented. The  
7 different dates as far as the evaluation over a period of  
8 years that the jury could have used in this particular  
9 matter to arrive at that verdict. And I find it's well  
10 within their discretion and the facts and evidence in this  
11 case. And would respectfully decline to so grant your  
12 motion.

13 And if you wanted to, Mr. Stillwell, I'll be glad for  
14 you to, as Mr. Ellis did, to reaffirm all of the motions  
15 that you made earlier in the case as a basis for a  
16 directed verdict motion or judgment NOV if you wish to do  
17 so.

18 MR. STILLWELL: I would like to reaffirm my directed  
19 verdict motion, although the Court saw the one regarding  
20 the fiduciary duty is now mute.

21 THE COURT: I understand that but as to ones  
22 applicable to the verdict form and verdict as rendered by  
23 the jury, I would respectfully decline to sub-grant those  
24 motions, finding again, as I indicated to Mr. Ellis, that  
25 there was certainly conflicting testimony in this case

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

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Case No.: 07-CP-23-3206

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North American Rescue Products, Inc., .....Appellant-Respondent,

v.

P. J. Richardson, .....Respondent-Appellant.

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CERTIFICATE OF SERVICE

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I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the APPELLANT-RESPONDENT'S REPLY TO RESPONDENT-APPELLANT'S RETURN TO APPELLANT-RESPONDENT'S MOTION TO DISMISS APPEAL OF RESPONDENT-APPELLANT by depositing a copy in the United States Mail, postage prepaid, on February 4<sup>th</sup>, 2010 addressed to the attorneys of record, as follows:

Lane W. Davis, Esq.  
Rivers S. Stilwell, Esq.  
A. Marvin Quattlebaum, Jr., Esq.  
NELSON MULLINS RILEY &  
SCARBOROUGH, LLP  
Post Office Box 10084  
Greenville, South Carolina 29603

C. Mitchell Brown, Esq.  
William C. Wood, Jr., Esq.  
A. Mattison Bogan, Esq.  
NELSON MULLINS RILEY &  
SCARBOROUGH, LLP  
Post Office Box 11070  
Columbia, South Carolina 29211-1070



Ann Shuler

30528/01500  
rec'd 2/23/10



## The South Carolina Court of Appeals

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COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
www.sccourts.org

February 22, 2010

Bernie Wellington Ellis, Esquire  
McNair Law Firm, PA  
P.O. Box 447  
Greenville, SC 29602

Robert L. Widener, Esquire  
McNair Law Firm, PA  
P.O. Box 11390  
Columbia, SC 29211

Re: North American Rescue v. Richardson  
2008105026

Dear Counsel:

The following Order has been endorsed on your Motion to Dismiss in the above entitled case on appeal.

"Denied.

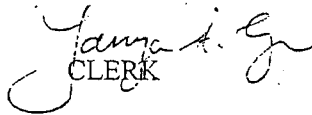
s/ Jasper M. Cureton A. J.

February 19, 2010."

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

  
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TAG/mpm

cc: C. Mitchell Brown, Esquire  
William C. Wood, Jr., Esquire  
A. Mattison Bogan, Esquire  
Lane W. Davis, Esquire  
Rivers S. Stilwell, Esquire  
A. Marvin Quattlebaum, Jr., Esquire